No. 21-1958

In the
United States Court of Appeals
for the Seventh Circuit

DEISY JAIMES, ENRIQUE JAIMES and GLORIA JAIMES,

Plaintiffs-Appellants,

v.

COOK COUNTY, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division, No. 1:17-cv-08291.
The Honorable **Jorge L. Alonso**, Judge Presiding.

**BRIEF OF DEFENDANTS-APPELLEES
COOK COUNTY, ILLINOIS, THOMAS J. DART, GEORGE TURNER,
JEFF K. JOHNSEN, JAIME PHILLIPS and JUANITA PETERSON**

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Attorney's Signature: /s/ Elizabeth A. Ekl Date: 06/08/2021

Attorney's Printed Name: Elizabeth A. Ekl

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Daniel J. Burns Date: 06/08/2021

Attorney's Printed Name: Daniel J. Burns

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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JURISDICTIONAL STATEMENT[1]

Plaintiffs' jurisdictional statement is not complete and correct. A complete and correct statement is as follows.

On November 14, 2016, Plaintiffs Deisy Jaimes, Enrique Jaimes, and Gloria Jaimes filed suit in the Circuit Court of Cook County, in case number 2016-L-011167, against Cook County, the Cook County Department of Corrections, and the Sheriff of Cook County, Thomas J. Dart, in his official capacity, ("Sheriff" or "Sheriff Dart") alleging claims arising from Erika Aguirre's November 15, 2015 shooting of Plaintiffs. Plaintiffs moved to voluntarily dismiss that action, and the Circuit Court of Cook County granted Plaintiffs' motion on November 29, 2016.

On November 15, 2017, Plaintiffs refiled the lawsuit in the United States District Court for the Northern District of Illinois, Case No. 2017-CV-8291 against Defendants Cook County, Sheriff Dart, in his official capacity, and various Cook County Sheriff's Office ("CCSO") supervisors.[2] Plaintiffs asserted various federal constitutional claims actionable under 42 U.S.C. § 1983, and Illinois law, arising out of the same November 15, 2015 incident alleged in Plaintiffs' state court complaint. The district court had federal-question jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331 but declined to exercise supplemental jurisdiction over

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[1] The Defendants-Appellees ("County Defendants") will cite to the district court record as "R.__," this Court's docket as "Doc.__," and to Plaintiffs' Supplemental Appendix as "S.A.__."
[2] On appeal, Plaintiffs only bring claims against Defendants Cook County and Sheriff Dart, in his official capacity.

the state-law claims under 28 U.S.C. § 1367(c)(3), when it dismissed all federal claims.

On May 3, 2021, the district court entered a final order granting the County Defendants' motion for summary judgment on all federal claims and dismissing without prejudice Plaintiffs' remaining state-law claims against the Sheriff, in his official capacity. R. 237. A timely notice of appeal was filed on May 20, 2021. R. 238.

This Court has jurisdiction to review the district court's May 3, 2021 final order granting the County Defendants' motion for summary judgment on all federal claims and dismissing Plaintiffs' state-law claims based upon 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure 3 and 4.

STATEMENT OF ISSUES

I.

Whether Plaintiffs set forth competent evidence showing there is a genuine issue of material fact that they suffered a due process violation based upon the state-created danger exception to *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.,* 489 U.S. 189 (1989)?

II.

Whether Plaintiffs presented sufficient evidence showing there is a genuine issue of material fact to hold the County Defendants liable under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978)?

III.

Whether the district court abused its discretion in relinquishing before trial jurisdiction over Plaintiffs' state-law claims where Plaintiffs failed to raise or argue

in the district court that they would be barred from refiling those claims in state court due to their prior decision to voluntary dismiss their initial complaint filed in the Circuit Court of Cook County?

STATEMENT OF THE CASE

The Parties and Allegations in Plaintiffs' Second-Amended Complaint

On November 15, 2015, a masked intruder entered the Jaimes home through a basement window and began shooting at family members. R. 190, ¶¶12, 13, 14. After shooting at one of the young daughters in the home, who came to investigate the sound of breaking glass, the intruder went directly to the bedroom of Deisy Jaimes ("Deisy") and fired approximately six shots at her, striking her arm, face, and legs. *Id.* ¶¶15, 16. As Deisy's father, Enrique, started down the stairs to investigate, the intruder turned her weapon at him and fired, striking Enrique twice. *Id.* ¶17. The rest of the family, including Deisy's mother, Gloria, successfully fled the home to a neighbor's house where the police were contacted shortly after 11:00 p.m. *Id.* ¶18. Officers entered the home and discovered the intruder, Erika Aguirre ("Aguirre"), on the floor of the kitchen with a fatal self-inflicted bullet wound to her head. *Id.* ¶23. Prior to a recent breakup, Aguirre had been Deisy's girlfriend. *Id.* ¶¶1, 8, 19.

At the time of the shooting, Aguirre was a Cook County correctional officer ("CO"). *Id.* ¶8. She was assigned to the Receiving, Classification, Diagnostic Center ("RCDC") of the Cook County Department of Corrections ("CCDOC"). *Id.* ¶¶8, 27. According to co-workers, Aguirre walked out of the facility with them at the end of her shift on November 15, 2015 at approximately 10:00 p.m. *Id.* ¶¶27, 28. She was

not acting out of the ordinary at that time. *Id.* ¶29. Around 11:00 p.m., Aguirre exchanged messages over her phone with her sister, Alicia. *Id.* ¶20. During the exchange, Alicia told Aguirre she saw Deisy at a club with another woman. *Id.* Aguirre asked Alicia for the password to Alicia's SnapChat account so that Aguirre could look at a video of Deisy with the other woman who appeared to be hugging Deisy from behind and kissing her neck. *Id.* ¶21.

After leaving work, Aguirre changed from her CCSO uniform into head-to-toe black clothing. *Id.* ¶14. Her presence became known in the Jaimes' home only by the sound of the breaking glass as she entered a basement window. *Id.* ¶15. Having entered the home, she moved through the house carrying out her attack on Deisy and shooting at everyone else in the family she encountered. *Id.* ¶¶15-17, 23. Aguirre then took her own life. *Id.* ¶23.

Aguirre was found on the floor of the Jaimes' kitchen – a semi-automatic handgun near her body. *Id.* ¶¶23, 25. Officers located a wallet inside her front jacket pocket that contained her driver's license, FOID card, and CCSO badge. *Id.* ¶24. There is no evidence she used any of her CCSO credentials to thwart neighbors from calling the police or to assist her in gaining entry into the home. Aguirre used her personal weapon, which also served as her duty weapon, to shoot the Jaimes family. *Id.* ¶¶25, 44.

Aguirre was hired by the CCSO as a correctional officer on December 27, 2010. *Id.* ¶26. As part of the hiring process, an investigation was conducted into Aguirre's criminal history and job history; family members, neighbors, and previous employers

were interviewed about Aguirre's character; and she was given a polygraph and a psychiatric examination. *Id.* ¶30. Upon hiring, all recruits, including Aguirre, attend 16 weeks of pre-service training that covers topics such as suicide prevention, advanced mental health topics, peer support, proper usage and handling of firearms, coping skills, and domestic violence. *Id.* ¶33. CCSO correctional officers are required to maintain a valid FOID card; register a personal service weapon with the Department; train on the use, care, and storage of that firearm; qualify yearly in the use of that firearm; and carry the firearm if called upon to perform duties outside of the CCDOC, including the transporting of prisoners outside of CCDOC. *Id.* ¶¶34, 38, 40. Correctional officers with a valid FOID card, who have qualified within the last 18 months, including completion of in-service training, are authorized through the CCSO to carry their weapon off-duty in a concealed manner on their person. *Id.* ¶¶34, 35, 38. Officers who, among other things: fail to attend yearly in-service training, qualify with their firearm, or maintain a valid FOID card, and those officers who are arrested, or found to be unfit for duty are stripped of their authorization to carry a firearm. *Id.* ¶41. At the time of the shooting, Erika had a valid FOID card that entitled her to own the 9mm Glock 19 found in her possession. *Id.* ¶44. As a recruit, she received training regarding storage, care and use of her firearm. *Id.* ¶33. Once she became a sworn peace officer, Aguirre received in-service firearms training each year that followed. *Id.* ¶46. There is no evidence Aguirre was arrested or convicted of any offenses while employed by the CCSO.

The CCSO takes numerous steps to ensure the safety of its employees, the detainees housed in its facility, and the public at large. In addition to providing mandatory yearly in-service training regarding the care, use, and storage of correctional officers' firearms, the CCSO promulgates rules regarding correctional officers' conduct both on- and off-duty. *Id.* ¶¶33, 48-51. Officers who do not abide by the Conduct Policy can be subject to discipline. *Id.* ¶50. The CCSO conducts routine criminal history, FOID card, and driver's license checks of its officers. *Id.* ¶47. Additionally, correctional officers are required to notify Human Resources of any law enforcement contact while off-duty. *Id.* ¶51. The CCSO and the County offer services to assist employees in dealing with employment and non-employment stressors and mental health; these services include peer support and the employee assistance program ("EAP"). *Id.* ¶¶ 61-67. Both services are made known to correctional officers at their yearly in-service training and are confidential to encourage officers to seek assistance for a myriad of issues they may face in both their personal and professional lives. *Id.* ¶61-67. Officers who are believed to be unfit for duty can be sent by Human Resources for a fitness for duty evaluation. *Id.* ¶55. Officers can be stripped of their authorization to carry (or "de-deputized") for a number of reasons, including arrests for certain crimes, being unfit for duty, failing to attend in-service annual firearms training, failing to possess a valid FOID card, or failing to qualify at the gun range. *Id.* ¶41.

During the five years Aguirre was employed as a correctional officer for the CCSO, she was written up for discipline twice. *Id.* ¶¶72, 82. The first, in 2014 for

insubordination, occurred while she was assigned to Division 3, and resulted in two days without pay. *Id.* ¶68-73. The second incident involved a verbal altercation with a co-worker/correctional officer in RCDC that occurred in front of detainees. *Id.* ¶78-82. The incident was investigated, and both Aguirre and the other correctional officer were issued verbal reprimands. *Id.* ¶¶81-82.

There is no evidence anyone in Aguirre's life, at work or at home, thought, suspected, or knew that she was capable of the terrible acts she committed in the Jaimes home. By all accounts, when Aguirre left work at 10:00 p.m. on November 15, 2015, she appeared to be acting normally. *Id.* ¶29

Relevant Procedural History and the Parties and Claims in Plaintiffs' Second-Amended Complaint

Plaintiffs filed their original complaint on November 14, 2016 in the Circuit Court of Cook County, Illinois. R. 82-1. Plaintiffs then moved pursuant to 735 ILCS 5/2-1009(a) to voluntarily dismiss their complaint, which the Circuit Court of Cook County granted on December 2, 2016. R. 82-2. On November 15, 2017, Plaintiffs refiled their complaint in the United States District Court for the Northern District of Illinois. R. 1. Plaintiffs later filed the operative, second-amended complaint (SAC). R. 32-1.

According to the SAC, Deisy and Enrique are shooting victims of Aguirre. R. 32-1, ¶1, 7, 8. Plaintiff Gloria Jaimes is Deisy's mother and Enrique's wife. *Id.* ¶9. Aguirre was a CCSO correctional officer. *Id.* ¶1. She committed suicide after breaking into the Jaimes home while off-duty and shooting Deisy and Enrique. *Id.* ¶¶26-38.

Plaintiffs brought claims against Defendants George Turner, Jeff Johnsen, Jaime Phillips, Juanita Peterson[3] in their individual and official capacities, and Cook County, and Sheriff Dart, in his official capacity, pursuant to 42 U.S.C. § 1983, alleging Defendants violated Plaintiffs' rights under the Fourth Amendment. *Id.* ¶¶4, 11-25. Plaintiffs also brought claims under Illinois state law against Sheriff Dart, in his official capacity. *Id.* ¶11. Cook County is sued for indemnity purposes. *Id.* ¶10.

Specifically, Plaintiffs asserted the following claims under 42 U.S.C. § 1983: Excessive Force (Count I); Unlawful/Unreasonable Seizure under the Fourth Amendment (Count II); Failure to Intervene (Count III); a *Monell* claim for failure to investigate and/or discipline officer misconduct (Count IV); a *Monell* claim for failure to maintain a proper early warning system (Count V); and a *Monell* claim alleging the Sheriff maintained a code of silence (Count VI). In addition, Plaintiffs' SAC asserted various state law claims (Counts VII through XI).

The County Defendants moved to dismiss the SAC, which the district court granted in part, dismissing claims against certain Defendants. R. 74; 147. Following the close of discovery, the County Defendants moved for summary judgment as to all claims in Plaintiffs' SAC. R. 187; 189. In addition, the County Defendants moved to bar the opinions of Plaintiffs' experts, Roger Cowan and Richard Bard. R. 208. After the County Defendants' motion for summary judgment was fully briefed, this Court

[3] On July 31, 2020, Plaintiffs filed a Notice of Voluntary Dismissal, voluntarily dismissing with prejudice Defendants Sheriff Dart, Cara Smith, and Nneka Jones in their individual capacities and all claims against Defendant Angelique Monroe. R. 182.

issued its opinion in *First Midwest Bank Guardian of Est. of LaPorta v. City of Chicago*, 988 F.3d 978 (7th Cir. 2021) ("*LaPorta*") on February 23, 2021. The parties were then given the opportunity to address *LaPorta*'s application to the facts of this case. R. 230; 236.

The District Court Grants Summary Judgment in Favor of the County Defendants

On May 3, 2021, the district court granted the County Defendants' motion for summary judgment. R. 237; S.A. 1. The court first addressed whether summary judgment was proper as to Plaintiffs' individual-capacity claims brought under § 1983. The court held no jury could find Aguirre was acting under color of law when she forcibly broke into the Jaimes' home and opened fire on anyone she encountered. *Id.* at 10; S.A. 10. The court reasoned that there was no evidence these actions were related to her official duties and no evidence that Aguirre possessed any authority greater than an ordinary citizen, as she was merely a correctional officer and not a police officer. *Id.* at 11; S.A. 11.

The court found that Aguirre purchased her firearm with her own FOID card and, although her employment at the CCSO required her to have a firearm, it was not by virtue of her position that she was able to obtain it. *Id.* at 11-12; S.A. 11-12. The use of a service weapon to injure a plaintiff is not by itself enough to render Aguirre's acts under the color of law. Nor could Aguirre's concealed carry privileges, allowed because she was a correctional officer, blanket Aguirre's conduct under the color of law because Aguirre's criminal actions at the Jaimes' home were in no way related to her official duties. *Id.* at 12; S.A. 12. Finally, the court held that Aguirre's

possession of her CCSO badge on her person when she killed herself and her comments made in 2014, over a year before the shooting, were insufficient because there was no evidence her position of authority allowed her to enter a private home and commit criminal acts. *Id.* at 13-14; S.A. 13-14.

Next, the district court rejected Plaintiffs' supervisory and failure-to-intervene claims because Plaintiffs failed to point to sufficient evidence that Aguirre acted under color of law. *Id.* at 14-15; S.A. 14-15. The court reasoned that Aguirre was a private individual when she shot Plaintiffs, and Plaintiffs failed to put forth evidence that CCSO supervisors participated in or had knowledge of the shooting such that the shooting could amount to a constitutional violation. *Id.* at 15-16; S.A. 15-16.

The district court next rejected Plaintiffs' *Monell* claims. *Id.* at 19-20; S.A. 19-20. The court first recognized that Plaintiffs' *Monell* claims predicated on a failure to maintain a proper early warning system and the failure to order Aguirre to undergo a fitness exam depend entirely on whether Aguirre was acting under color of law. *Id.* at 20-21; S.A. 20-21. Because Aguirre was not acting under color of law, and the Sheriff's failure to prevent private acts of violence cannot amount to a constitutional violation, these *Monell* theories necessarily failed. *Id.*

Leaving only Plaintiffs' *Monell* claim predicated upon the CCSO policy of requiring every correctional officer to maintain a firearm, the district court analyzed whether such a policy can satisfy the state-created danger exception to the Supreme Court's holding that a government entity cannot be liable for preventing private acts of violence. *Id.* at 21-22; S.A. 21-22. The district court first noted that "Plaintiffs do

not substantively address whether there is evidence to satisfy *Monell's* requirements . . . nor do they address whether there is evidence to satisfy the state-created danger causation requirement, and there is reason to doubt whether Plaintiffs can prove some of these elements." *Id.* at 23; S.A. 23. The district court pointed out that a plaintiff must show an injury was limited in time and scope, and Plaintiffs' argument regarding the CCSO policy "appears impermissibly indefinite." *Id.* Nevertheless, the court declined to "base its decision on these unaddressed issues" because the CCSO policy could not be said to "shock the conscience." *Id.* at 24-25; S.A. 24-25.

Regarding the element that the policy must "shock the conscience," the court noted "Plaintiffs fail to discuss substantively how the evidence in the record supports a finding that the CCSO acted with the requisite culpability." *Id.* at 25; S.A. 25. The court then analyzed evidence in the record, including from Plaintiffs' experts, and held that "no reasonable jury could find that the CCSO was deliberately indifferent to the danger that its correctional officers would misuse their weapons to commit acts of domestic violence." *Id.* at 25-26, 28; S.A. 25-26, 28. Specifically, the court reasoned that "[i]n light of the measures the CCSO takes in its hiring process, firearms training, and programs aimed at addressing mental health of its correctional officers" it precludes a finding that the policy was deliberatively indifferent, and therefore, that it shocks the conscience. *Id.* at 28; S.A. 28. The court concluded by rejecting Plaintiffs' assertions that the rationales behind the CCSO policy could be justified by a "less dangerous policy" as the standard for liability requires deliberate indifference or recklessness. *Id.* at 29-30; S.A. 29-30.

As to Plaintiffs' state-law claims, the district court declined to exercise jurisdiction over them because all federal claims were dismissed prior to trial and the court had not yet expended significant efforts on the merits of the state-law claims. *Id.* at 30; S.A. 30. The court dismissed the state-law claims without prejudice. *Id.*

In light of its order granting summary judgment in favor of the County Defendants, the district court denied as moot the County Defendants' motion to bar Plaintiffs' experts. *Id.* at 1; S.A. 1. On May 20, 2021, Plaintiffs filed a timely notice of appeal. R. 238.

SUMMARY OF ARGUMENT

Even overlooking Plaintiffs' numerous instances of waiver—which alone defeat any claim against the County Defendants—Plaintiffs fail to establish the threshold requirement of setting forth evidence that they suffered a constitutional injury based on Aguirre's acts of private violence. Indeed, absent a constitutional injury, Plaintiffs cannot satisfy the requirements under *Monell* to hold the Sheriff liable. The district court properly granted summary judgment in favor of the County Defendants.

Recognizing that the Sheriff cannot be found liable for Aguirre's acts of private violence, Plaintiffs attempt to argue the "state-created danger" exception applies. But, among other deficiencies, Plaintiffs have failed to put forth sufficient evidence that the CCSO policy requiring correctional officers to maintain firearms "shocks the conscience" as required for the state-created danger exception to apply. Plaintiffs' claim separately fails as they have failed to set forth sufficient evidence supportive of holding a governmental entity liable under *Monell*.

Finally, Plaintiffs cannot show the district court abused its discretion in relinquishing jurisdiction over Plaintiffs' state-law claims. Crucially, Plaintiffs failed to argue in the district court that they would be barred from refiling their state law claims in state court. They have therefore waived any argument the district court abused its discretion. Nevertheless, Plaintiffs have failed to show the district court erred by adhering to the "well-established law" of this Circuit that courts should dismiss without prejudice state-law supplemental claims whenever all federal claims have been dismissed prior to trial. The district court properly exercised its discretion.

The district court properly analyzed the evidence in the record, which showed that no reasonably jury could find that the Sheriff is liable for Aguirre's act of private violence. Absent a constitutional injury, the County Defendants cannot be held liable, and summary judgment in favor of the County Defendants was therefore proper. This Court should affirm the judgment of the district court.

ARGUMENT

Plaintiffs have abandoned on appeal their claims for supervisory liability, failure to intervene, and claims under *Monell* based upon the CCSO's early warning system and deliberate indifference by a policymaker. Instead, on appeal, Plaintiffs contend they have put forth sufficient evidence of a due process violation based on a state-created danger theory in order to hold the Sheriff liable under *Monell*. In support, Plaintiffs point to the CCSO policy requiring correctional officers to obtain firearms as a condition of their employment with the CCSO. But the district court properly rejected Plaintiffs' state-created danger arguments because the CCSO policy cannot be said to have "shocked the conscience" in order to avoid the Supreme Court's

holding in *DeShaney*. R. 237, at 25-30; S.A. 25-30. The district court, therefore, correctly granted summary judgment in favor of the County Defendants. This Court should affirm the district court's reasoned judgment.

I. Standard of Review

The Court of Appeals reviews a district court's final decision granting summary judgment *de novo*. *Starzenski v. City of Elkhart*, 87 F.3d 872, 879 (7th Cir. 1996). In doing so, this Court construes the record in the light most favorable to the nonmoving party. *Estate of Simpson v. Gorbett*, 863 F.3d 740, 745 (7th Cir. 2017). "In a § 1983 case, the plaintiff bears the burden of proof regarding the claimed constitutional violation and must present sufficient evidence to create genuine issues of material fact to avoid summary judgment." *Jackson v. Indian Prairie School Dist. 204*, 653 F.3d 647, 654 (7th Cir. 2011).

The Court of Appeals reviews the district court's decision to decline to exercise supplemental jurisdiction over state-law claims for an abuse of discretion. *RWJ Mgmt. Co., Inc. v. BP Prods. N. Am., Inc.*, 672 F.3d 476, 479 (7th Cir. 2012). A district court's decision to relinquish jurisdiction over state-law claims will only be reversed in "extraordinary circumstances." *Coleman v. City of Peoria, Ill.*, 925 F.3d 336, 352 (7th Cir. 2019) (citing *Capeheart v. Terrell,* 695 F.3d 681, 686 (7th Cir. 2012)).

II. Plaintiffs Have Failed to Raise a Genuine Issue of Material Fact To Allow a Jury To Find the Sheriff Liable Under *Monell*.

To prevail on a claim under 42 U.S.C. § 1983, a plaintiff must establish that he or she was deprived of a right secured by the Constitution or the laws of the United States, and that this deprivation occurred at the hands of a person or persons acting

under the color of state law. *Buchanan–Moore v. Cty. of Milwaukee,* 570 F.3d 824, 827 (7th Cir. 2009). "Municipalities do not face *respondeat superior* liability under section 1983 for the misdeeds of employees or other agents. Only actions of the entity will suffice." *Flores v. City of South Bend*, 997 F.3d 725, 731 (7th Cir. 2021); see also *Monell*, 436 U.S. at 691-94.

As Plaintiffs seek to hold the Sheriff directly liable, in order to succeed on a Section 1983 claim under *Monell*, "a plaintiff must challenge conduct that is properly attributable to the municipality itself." *LaPorta*, 988 F.3d at 986. Therefore, Plaintiffs must provide evidence as to the following: "(1) [they] suffered a deprivation of a federal right; (2) as a result of either an express municipal policy, widespread custom, or deliberate act of a decision-maker with final policy-making authority for the [CCSO]; which (3) was the proximate cause of [their] injury." *Ovadal v. City of Madison*, 416 F.3d 531, 535 (7th Cir. 2005).

Plaintiffs assert they have raised a genuine issue of material fact to hold the Sheriff liable under *Monell* based on the CCSO policy of requiring all correctional officers to purchase and own a firearm. However, Plaintiffs failed to argue in the district court that there was sufficient evidence to satisfy the requirements of *Monell*. R. 237, at 23. Indeed, the district court explicitly concluded, "Plaintiffs do not substantively address whether there is evidence to satisfy *Monell*'s requirements…." *Id.* "[A] party opposing a summary judgment motion must inform the district court of the reasons why summary judgment should not be entered." *Riley v. City of Kokomo*, 909 F.3d 182, 190 (7th Cir. 2018). "If it does not do so, and loses the motion, it cannot

raise such reasons on appeal." *Id.* (cleaned up). Accordingly, Plaintiffs waived on appeal any argument that they have put forth sufficient evidence for a reasonable jury to find in their favor on a *Monell* claim. See *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012) ("arguments not raised to the district court are waived on appeal"). Plaintiffs presented arguments in the district court regarding the state-created danger exception under *DeShaney*, but "*Monell* and *DeShaney* are not competing frameworks for liability." *LaPorta*, 988 F.3d at 990. Here, as Plaintiffs advance only a claim against the Sheriff, in his official capacity—they must present evidence to satisfy the requirements to hold a municipality liable as set forth in *Monell*. Their failure to present evidence as to *Monell*'s requirements in the district court dooms the entirety of their arguments made on appeal. This Court can and should affirm the district court's judgment on this basis alone.

Waiver aside, Plaintiffs have failed to establish the threshold requirement that they suffered constitutional injury. Absent a constitutional injury, there can be no liability under *Monell*. *Swanigan v. City of Chicago*, 775 F.3d 953, 962 (7th Cir. 2015); *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 (7th Cir. 2007) ("It is well established that there can be no municipal liability based on an official policy under *Monell* if the policy did not result in a violation of [the plaintiff's] constitutional rights").

A. Plaintiffs Fail to Set Forth A Genuine Issue of Material Fact that They Suffered a Deprivation of a Federal Right.

The "first step in every § 1983 claim, including a claim against a municipality under *Monell*," requires a plaintiff to prove he was deprived of a federal right.

LaPorta, 988 F.3d at 987. Although the Due Process Clause of the Fourteenth Amendment prevents the state from infringing on an individual's right to life, liberty, or property, it does not "impose an affirmative obligation on the [s]tate to ensure that those interests do not come to harm through other means." *DeShaney,* 489 U.S. at 195.

In cursory fashion, Plaintiffs assert (at 13) they have satisfied the deprivation of a federal right requirement under *Monell* "because [they] are suing for the deprivation of their due process right to bodily integrity." But Plaintiffs misunderstand the relationship between *Monell* and *DeShaney*. See *LaPorta*, 988 F.3d at 990. *DeShaney* addressed the constitutional right to due process, "strictly limiting the circumstances under which privately inflicted injury is cognizable as a due-process violation." *Id.* at 990-91. It is undisputed, and Plaintiffs concede, Aguirre was not acting under color of law—but was instead a private person—when she shot Plaintiffs. It is therefore not enough for Plaintiffs to simply contend they are suing for a due process right to bodily integrity. Indeed, "a State's failure to protect an individual against private violence … does not constitute a violation of the Due Process Clause." *DeShaney*, 489 U.S. at 197; see also *LaPorta*, 988 F.3d at 991 ("Simply put, LaPorta suffered a common-law injury not a constitutional one").

Rather, to the extent Plaintiffs seek to show a deprivation of their constitutional rights, they must rely on an exception to *DeShaney*'s holding that there is no due process duty to prevent harm from private actors. *LaPorta*, 988 F.3d at 989. One exception is the "state-created danger exception," which applies when a state

actor's conduct "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger that they otherwise would have been." *Reed v. Gardner,* 986 F.2d 1122, 1126 (7th Cir. 1993). Although Plaintiffs cite the "state-created danger" exception and argue its familiar three-part test, Plaintiffs fail to connect the exception to their sole claim brought under *Monell*. Nevertheless, Plaintiffs cannot show the "state-created danger" exception applies, and therefore, cannot show any deprivation of a constitutional right under the due-process clause.

1. Plaintiffs Cannot Succeed on a State-Created Danger Theory.

The state-created danger exception is "narrow" and reserved for situations that are "rare" and "egregious." *Doe v. Village of Arlington Heights*, 782 F.3d 911, 917 (7th Cir. 2015) (quoting *Estate of Allen v. City of Rockford*, 349 F.3d 1015, 1022 (7th Cir. 2003)). In order to succeed on a due-process claim under the state-created danger exception, a plaintiff must show proof of the following elements: "(1) the government, by its affirmative acts, created or increased a danger to the plaintiff; (2) the government's failure to protect against the danger caused the plaintiff's injury; and (3) the conduct in question 'shocks the conscience.'" *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019); *but see Weiland v. Loomis*, 938 F.3d 917, 920-21 (7th Cir. 2019) (noting "[n]one of these elements has its provenance in *DeShaney*").

Plaintiffs fail to set forth sufficient evidence as to each of these elements for a reasonable jury to find that Defendant's policy satisfies the state-created danger exception. See *Buchanan-Moore,* 570 F.3d at 828 (noting that when a case may be resolved on one of the elements of the state-created danger exception, there is no need

to consider the remaining elements). Therefore, Plaintiffs are unable to establish any deprivation of their constitutional rights.

a. Plaintiffs Cannot Show the Sheriff Created or Increased a Danger To Plaintiffs.

This Court has cautioned that the state-created danger exception's requirement that an affirmative action "create or increase" danger "must not be interpreted so broadly as to erase the essential distinction between endangering and failing to protect." *Doe,* 782 F.3d at 917 (citation omitted). For this exception to apply, the victim must be "safe before the state intervenes and unsafe afterward." *Sandage v. Bd. of Comm'rs of Vanderburgh Cnty.*, 548 F.3d 595, 598 (7th Cir. 2008). "When courts speak of the state's 'increasing' the danger of private violence, they mean the state did something that turned a potential danger into an actual one." *Id.* at 600.

Plaintiffs' state-created danger argument fails at the first step, as they cannot establish that the CCSO policy created or increased the danger to them. Plaintiffs argue that COs are at increased risk for mental health issues and that the risk of domestic violence is heightened." Finally, despite their argument the Sheriff has a policy of "flooding COs' homes with firearms," they point to two instances over a five-year period of time. Even considering Plaintiffs' arguments, Plaintiffs cannot show that they "were safe before the state intervenes and unsafe afterwards" as necessary to satisfy the first element of the state-created danger exception, *i.e.* that the Sheriff created or increased the danger to them. *See id.* at 598. Indeed, Aguirre was subject to the CCSO policy for nearly five years before she inflicted the injury on Plaintiffs. R. 237, at 23; S.A. 23. No evidence was presented that Plaintiffs' particularly, as

opposed to any other individuals, were placed in a position of danger they would not have otherwise faced. *Monfils v. Taylor*, 165 F.3d 511, 516 (7th Cir. 1998) ("liability exists when the state affirmatively places a particular individual in a position of danger the individual would not have otherwise faced").

Nor do the cases Plaintiffs rely upon warrant a different result here. In *Monfils*, Monfils alerted the police, via a recorded phone call, that a thief was at his workplace. *Id.* at 513. Monfils begged the police not to release the recorded phone call because the thief was a violent individual and would recognize his voice. *Id.* at 514. Nevertheless, the police released the phone call and the thief killed Monfils. *Id.* at 515. This Court held the state-created danger exception applied where the police created the danger by releasing the recorded phone call making Monfils a target of violence. *Id.* at 517. In *Paine v. Cason*, the police arrested a young, mentally unstable woman in an area where she was safe and released her from custody just before nightfall in a dangerous neighborhood. 678 F.3d 500, 509 (7th Cir. 2012). The court found the police not only created the extra risk by moving the woman to a known high crime area but did not nothing to mitigate the risk that she was mentally unstable and unable to protect herself. *Id.* at 510. In *Reed*, the court found that the police violated the due process clause by arresting the driver of a car and leaving his keys in the hands of an intoxicated adult, who then endangered third parties when he crossed the center line while speeding and plowed into another car. 986 F.2d at 1127. In *Ross v. United States*, the court found that Lake County's policy of preventing unauthorized persons from attempting rescue of another person in danger of

drowning in Lake Michigan without providing a meaningful alternative violated a 12-year-old drowning victim's right to life. 910 F.2d 1422, 1431 (7th Cir. 1990). The court found the policy "not only tolerated a risk that someone might drown but actually contemplated that some persons would die for the sake of preventing harm to private rescuers. *Id.*

Unlike the cited cases, Plaintiffs failed to establish facts from which a reasonable jury could find that the CCSO policy of requiring COs to purchase a duty weapon creates or increases a danger to Plaintiffs that they would not have otherwise faced. Plaintiffs' experts identify five incidents between 2010 and 2019, in which officers either took or tried to take their own lives and/or that of another person. R. 198, ¶83. However, the cited expert report does not attribute any of those incidents to the CCSO policy of requiring COs to purchase weapons and notes only one of those five cases as involving use of the officer's "service weapon." R. 195-35, ¶11. Contrary to Plaintiffs' assertion (at 16) that correctional officers Rojo and Acevedo killed their wives with "their CCSO-mandated gun[s]," Plaintiffs' own expert does not connect the use of Rojo's and Acevedo's weapons to the CCSO policy, or otherwise establish that these weapons were even acquired in order to be in compliance with the CCSO policy. See *id.* Simply put, the CCSO Policy falls well short of the egregious official conduct necessary to find deliberate indifference, and therefore, cannot be said to shock the conscience. Plaintiffs cannot establish the "narrow" exception to *DeShaney*'s holding that the state's failure to protect an individual against private violence does not constitute a due process violation. See *Doe*, 782 F.3d at 916-17.

b. Plaintiffs Fail To Show Causation.

In order to establish causation, Plaintiffs must have been foreseeable victims of the Sheriff's acts. *King,* 496 F.3d at 818. To this end, the danger to Plaintiffs must be "limited in time in scope;" it cannot be "indefinite." See *Buchanan-Moore*, 570 F.3d at 828-29. Once again, Plaintiffs' argument is waived, as they failed to argue causation in the district court. *Riley*, 909 F.3d at 190; *Puffer*, 675 F.3d at 718. The district court properly recognized, "nor do [Plaintiffs] address whether there is evidence to satisfy the state-created danger causation requirement…." R. 237, at 23; S.A. 23. As Plaintiffs waived this argument, they cannot establish the state-created danger exception applies. This Court may affirm the judgment of the district court based on Plaintiffs' failure to put forth evidence as to causation. *Buchanan-Moore*, 570 F.3d at 828 (declining to address the first component of the state-created danger exception where this Court could "resolve [the plaintiffs'] case" on the causation element).

To the extent this Court addresses Plaintiffs' waived argument, *Buchanan-Moore* is instructive. In that case, Gray, a mentally-ill man who had been arrested at least 35 times over a ten-year period, had been in and out of mental health facilities. *Id.* at 826. After one arrest, Gray was released by the county despite a signed criminal trespass complaint. *Id.* After Gray was released, he broke into the next-door home of Moore. When Moore approached the home, Gray shot and killed Moore. *Id.* Moore's family sued the county and other city actors alleging a Section 1983 due process violation based on a state created danger. *Id.* The plaintiffs asserted that Moore was a foreseeable victim because he was released on Milwaukee's north side, which is the

same location in which Gray was released. *Id.* at 828. This Court noted that the north side represents a large, heavily populated area the danger of which Moore shared with thousands of others. *Id.* Therefore, "[s]uch a generalized, amorphous zone of danger is insufficient to trigger a state duty to protect." *Id.* In rejecting the plaintiffs' state-created danger argument, this Court held "the facts as alleged amount to only a 'but-for' causal link, they do not state a claim that Moore's death was proximately caused by the County's acts. Moore's death was simply too remote a consequence of the County's actions to hold the County responsible under the federal civil rights law." *Id.* at 829.

Similarly, here, the "generalized, amorphous zone of danger is insufficient to trigger a state duty to protect" Plaintiffs. As the district court correctly reasoned, "Plaintiffs present their claim, the danger of arming CCSO correctional officers appears impermissibly indefinite; indeed, Aguirre had a firearm for nearly five years before she injured Plaintiffs." R. 237, at 23; S.A. 23. Plaintiffs seemingly acknowledge this evidence but contend the district court erred by deciding this issue (as opposed to a jury) and by relying on *Buchanan-Moore*. But *Buchanan-Moore* properly resolved the issue of causation and affirmed the district court's judgment because "Moore's death was simply too remote a consequence of the County's actions to hold the County responsible under the federal civil rights law." *Buchanan-Moore*, 570 F.3d at 829. Moreover, it is unclear the significance of Plaintiffs' assertion (at 18) that the "firearms mandate was in effect every day Aguirre worked at the Jail." Such a statement, in light of the nearly five-year passage of time the policy was in effect as

to Aguirre and when she injured Plaintiffs, shows the "generalized, amorphous zone of danger" that is impermissibly "indefinite" under this Court's holding in *Buchanan-Moore*.

Finally, Plaintiffs' argument (at 18) that the danger to Plaintiffs was "obvious" is undercut by their argument that "the government pointlessly arms thousands of employees in their homes, places those employees in a stressful and violent workplace day after day" makes the incident "more than foreseeable." Plaintiffs' experts identify five incidents between 2010 and 2019, in which officers either took or tried to take their own lives and/or that of another person. R. 198, ¶83. However, the cited expert report does not attribute any of those incidents to the CCSO policy of requiring COs to purchase weapons and notes only *one* of those five cases as involving use of the officer's "service weapon." R. 195-35, at 11. Moreover, the CCSO policy is justified because (1) correctional officers may be assigned to a post that requires a firearm, and (2) under Illinois law, correctional officers must meet certain firearm qualification and training requirements, including 40 hours of firearms training each year. Plaintiffs therefore fail to set forth sufficient evidence as to causation to satisfy the state-created danger exception. R. 237, at 4; S.A. 4; R. 197, ¶¶34-35, 38, 40.

c. Plaintiffs Cannot Show the CCSO Policy "Shocks the Conscience."

Nor can Plaintiffs show that the CCSO policy "shocks the conscience." Although the specific level of culpability necessary for conduct to shock the conscience "lacks precise measurement," the Supreme Court has noted that it "fall[s] toward the more culpable end of the [tort law's] spectrum." *King*, 496 F.3d at 818-19 (citing *Cty.*

of Sacramento v. Lewis, 523 U.S. 833, 847-49 (1998)). This Court has explained conduct that shocks the conscience requires a mental state of deliberate indifference or criminal recklessness. *Estate of Her,* 939 F.3d at 876. Relevant here, where "the circumstances permit public officials the opportunity for reasoned deliberation in their decisions," courts shall only find the conduct to be conscience shocking when it "evinces a deliberate indifference to the rights of the individual." *Id.* at 819.

Plaintiffs' argument that the CCSO policy constitutes deliberate indifference or "shocks the conscience" merely boils down to their disagreement with the policy at issue, rather than any egregiousness. As the district court recognized, the CCSO took numerous steps to address or minimize the risk that correctional officers would misuse their firearms. R. 237, at 26; S.A. 26. The CCSO employs measures in its hiring process, firearms training, and use of programs to address the mental health of its correctional officers such that the policy cannot be considered an act of deliberate indifference. *Id.* Specifically, the CCSO requires correctional officers to attend 16 weeks of pre-service training that covers topics such as proper use of firearms and mental health topics, including coping skills and domestic violence. R. 237, at 26; S.A. 26; R. 197, ¶33. Correctional officers must train on the use, care, and storage of their firearm and requalify annually in the use of their firearm. *Id.*; S.A. 26; R. 197, ¶38. As to hiring, the CCSO conducts a personality exam, a polygraph exam, background checks of applicant's criminal history and job history, including interviews with previous employers. *Id.* at 26-27; S.A. 26-27; R. 197, ¶30. In addition, the CCSO conducts routine background checks of correctional officers' criminal

history, their driving abstract, and their FOID records. *Id.* at 27; S.A. 27; R. 197, ¶47. Finally, as a matter of policy, the CCSO requires compliance with all laws, ordinances, and regulations, and correctional officers must notify the CCSO if they are arrested, indicted, or convicted of a felony or misdemeanor. *Id.*; S.A. 27; R. 197, ¶¶49-50.

Regarding correctional officers' mental health, the CCSO operates a "Peer Support Program," as well as an "Employee Assistance Program." *Id.*; S.A. 27; R. 197, ¶¶61-67. The Peer Support program comprises a network of volunteer CCSO members, who provide confidential assistance and support to CCSO employees experiencing crises in both their personal and professional lives. *Id.*; S.A. 27; R. 197, ¶62. Participation in the Peer Support Program is voluntary, but a coworker or family member can refer a correctional officer to the program, who will then contact the correctional officer. *Id.*; S.A. 27; R. 190-16, at 2-3. Although this program is confidential, a member of the program must disclose information regarding an employee when threats of harm to another person are made or the employee is in imminent danger of committing suicide. *Id.*; S.A. 27; R. 197, ¶64. The Employee Assistance Program provides confidential counseling by staff who are professionally certified in psychology, social work, or other human services fields. *Id.*; S.A. 27; R. 197, ¶65. Correctional officers can refer themselves to this program of they can be referred by a supervisor in certain circumstances. *Id.* at 26; S.A. 26; R. 197, ¶66. Information regarding both the Peer Support Program and the Employee Assistance

Program are periodically provided to correctional officers. *Id.*; S.A. 26; R. 197, ¶¶61, 67.

As the CCSO adequately took steps to prevent or minimize the danger posed by its policy, Plaintiffs cannot show the CCSO policy "shocks the conscience." Plaintiffs may disagree, but "[m]aking a bad decision, or even acting negligently, does not suffice to establish the type of conscience-shocking behavior that results in a constitutional violation." *Jackson*, 653 F.3d at 654-55.

Plaintiffs assert (at 20) that the district court usurped the role of the jury by "weighing evidence" in holding that the Sheriff's conduct was not deliberately indifferent. Rather, the district court evaluated whether the evidence presented was sufficient for a reasonable jury to find the CCSO policy was deliberatively indifferent. Indeed, as conduct that "shocks the conduct" requires a mental state of deliberate indifference, the district court necessarily looked to the actions undertaken by the Sheriff contained in the record. Such analysis is required in considering this element of the state-created danger exception. For example, in *Jackson*, this Court properly analyzed the evidence both "falling in favor of finding" of conduct that shocked the conscience and also factors tending to show the conduct did not shock the conscience. 653 F.3d at 654-56. Ultimately, this Court affirmed the district court's grant of summary judgment, holding that the defendants' conduct does not shock the conscience even though the conduct "may well have been short-sighted, flawed negligent, and tortious…." *Id.* at 656. The same result is warranted here.

Indeed, this Court has affirmed district court decisions finding challenged conduct cannot be said to shock the conscience. *Jackson*, 653 F.3d at 656; *King*, 496 F.3d at 819; *Estate of Her*, 939 F.3d at 878; *D.S. vs. E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 799 (7th Cir. 2015). Such a result is warranted here. As set forth above, the CCSO policy is justified because (1) correctional officers may be assigned to a post that requires a firearm, and (2) under Illinois law, correctional officers must meet certain firearm qualification and training requirements, including 40 hours of firearms training each year. R. 237, at 4; S.A. 4; R. 197, ¶¶34-35, 38, 40. Such a policy, formulated to take into account the institutional needs of the jail as well as to comply with state law cannot be said to shock the conscience. Indeed, this policy is completely inapposite to the policy set forth in *Ross*, which prevented unauthorized persons from attempting rescue of another person in danger of drowning rescuers. In *Ross*, the policy at issue specifically contemplated that some individuals might drown in order to protect unauthorized rescuers. 910 F.2d at 1431. Plaintiffs assert (at 21) the CCSO policy is "more egregious than the policy in *Ross*" because it is "not designed to protect anyone at all." But designed "to protect anyone" is not the standard by which the constitutionality of a standard is measured. That Plaintiff believes such needs could be served differently, does not lead to a finding that the CCSO policy is so egregious or otherwise shocks the conscience. Plaintiffs have failed to establish the state-created danger exception applies.

Plaintiffs argue (at 21) that the Sheriff's institutional needs could be met without requiring correctional officers to purchase firearms by providing the firearms

to correctional officers when needed. They further contend (at 22), in a perfunctory manner, that a reasonable jury could find the Sheriff's mandate was unjustified by any legitimate purpose and that the Sheriff did not mitigate any dangers "he knew he created with his policy." But as the district court correctly reasoned, citing *Butera v. Cottey*, 285 F.3d 601, 608-09 (7th Cir. 2002), "'the existence or possibility of other better policies which might have been used does not necessarily mean that the [CCSO] was being deliberately indifferent' or reckless." R. 237, at 30; S.A. 30. Ultimately, such contentions only amount to Plaintiffs' general disagreement with the CCSO policy. Plaintiffs may not like the CCSO policy and may even point to better alternatives, but they have failed to show the policy "shocks the conscience." This is especially true where Plaintiffs must meet a higher standard in order for a finding of a constitutional violation. See *Jackson*, 653 F.3d at 656. (a policy "may well have been short-sighted, flawed negligent, and tortious," but that does not satisfy the standard for finding a constitutional violation). Plaintiffs have failed to show the CCSO policy is deliberatively indifferent to satisfy *DeShaney*'s state-created danger exception.

B. Plaintiffs Have Not Put Forth Evidence that the CCSO Policy was the "Moving Force" Behind Any Constitutional Injury For Purposes of *Monell*.

Plaintiffs' failure to establish that they suffered a constitutional violation likewise precludes a finding of liability against the Sheriff under *Monell*. *LaPorta*, 988 F.3d at 991 ("And because LaPorta was not deprived of his right to due process, the City cannot be held liable for his injuries under § 1983—and that is so *even if* the requirements of *Monell* are established"). Even overlooking the failure to establish a

due-process claim, Plaintiffs also cannot satisfy the requirements to state a claim under *Monell*.

Nor have Plaintiffs put forth evidence that the CCSO policy caused the constitutional violation, such that it was the moving force behind Plaintiffs' injuries. In their brief (at 13), Plaintiffs incorporate into their discussion of *Monell* "moving-force" causation the causation argument set forth under the second element of the state-created danger exception. But as set forth in section II.A.1.b., *supra*, Plaintiffs have failed to set forth sufficient evidence to establish causation, under the state-created danger exception or under *Monell*. To the extent "moving-force" causation may be equated with proximate causation under the state-created danger exception, Plaintiffs' argument nevertheless fails.

Under *Monell*, a plaintiff must show that the municipal action was "the 'moving force' behind the federal-rights violation." *LaPorta*, 988 F.3d 987 (quoting *Bd. of Cnty. Comm'rs v. Brown*, 520 U.S. 397, 407-08 (1997)). This "rigorous causation standard" requires "a 'direct causal link' between the challenged municipal action and the violation of [Plaintiffs'] constitutional rights." *Id.* (quoting *Brown*, 520 U.S. at 404).

Plaintiffs cannot show a "direct causal link" to the CCSO policy requiring correctional officers to possess a firearm and the actions of Aguirre leading to a constitutional injury. Rather, the evidence shows Aguirre committed a common-law injury; it does not show that the Sheriff directly caused a constitutional violation. See *Dean v. Wexford Health Sources, Inc.*, Nos. 20-3058 and 20-3139, 2021 WL 5230855,

at *17 (7th Cir. Nov. 10, 2021) ("*Monell* requires more; Dean must show that Wexford itself directly caused the constitutional violation"). The CCSO policy requires correctional officers to possess a firearm; it does not require off-duty correctional officers to break into their former girlfriends' homes and shoot the occupants. The moving force behind Plaintiffs' injury was the actions of Aguirre following the break-up of her relationship with Deisy; it was not the CCSO policy.

Having failed to set forth evidence showing Plaintiffs suffered a deprivation of their constitutional rights, let alone having satisfied the requirements of *Monell*, Plaintiffs' claim against the Sheriff necessarily fails. This Court should affirm the district court's grant of summary judgment in favor of the County Defendants.

III. The District Court Properly Relinquished Jurisdiction Over Plaintiffs' State-Law Claims.

A. Plaintiffs Waived Any Argument That the District Court Abused Its Discretion in Relinquishing Jurisdiction Over the State-Law Claims.

As a final contention of error, Plaintiffs argue (at 22) the district court abused its discretion in relinquishing jurisdiction over the state-law claims after granting summary judgment on all federal claims in the SAC. Plaintiffs assert that, because they already filed suit in the Circuit Court of Cook County, voluntarily dismissed that suit, and refiled in federal court, they would be barred from again refiling the state-law claims in state court. However, Plaintiffs waived this argument by failing to raise it in the district court.

Crucially, Plaintiffs never argued in the district court that they would be barred from refiling their state-law claims in state court. Further, Plaintiffs never

urged the district court to address their state-law claims as an exception to the common rule that a district court should relinquish jurisdiction over state-law claims when all federal claims have been dismissed. Indeed, Plaintiffs' SAC and Rule 56.1 statement of material facts in opposition to summary judgment omits any reference to their decision to initially file their lawsuit in state court before voluntarily dismissing that suit and refiling in federal court. Plaintiffs never moved the district court to reconsider its decision to relinquish jurisdiction over the state-law claims. Plaintiffs have therefore waived this argument, and this Court need not consider Plaintiffs' argument raised for the first time on appeal. *See Houskins v. Sheahan*, 549 F.3d 480, 495 (7th Cir. 2008) ("the discretionary exercise of supplemental jurisdiction by the court under § 1367(c) … is waived if not raised in the district court"); *Int'l College of Surgeons v. City of Chicago*, 153 F.3d 356, 366 (7th Cir. 1998); *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 501 (7th Cir. 1999); see also *Perry v. Sullivan*, 207 F.3d 379, 383 (7th Cir. 2000) ("Arguments raised for the first time on appeal are routinely deemed waived").

B. The District Court Did Not Abuse Its Discretion in Relinquishing Jurisdiction over the State Law Claims.

Waiver aside, the district court properly exercised its discretion in declining to retain jurisdiction over Plaintiffs' state-law claims. Section 1367(c) sets forth when a court may decline to exercise supplemental jurisdiction over state law claims brought under Section 1367(a). Relevant and applicable here, a district court may decline to exercise supplemental jurisdiction when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. 1367(c)(3).

"When the federal claim in a case drops out before trial, the presumption is that the district judge will relinquish jurisdiction over any supplemental claim to the state courts." *Leister v. Dovetail, Inc.*, 546 F.3d 875, 882 (7th Cir. 2008). This procedure is "well-established" in this Circuit. *Groce*, 193 F.3d at 501 ("[I]t is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial"). This Court has recognized the following exceptions to the general rule that the state-law claims should be dismissed where all federal claims have been dismissed before trial: (1) "the statute of limitations has run on the pendent claim, precluding the filing of a separate suit in state court;" (2) "substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort;" or (3) "when it is absolutely clear how the pendent claims can be decided." *Sharp Elecs. Corp. v. Metro Life Ins. Co.*, 578 F.3d 505, 514-15 (7th Cir. 2009) (internal quotation marks omitted).

A district court's decision to relinquish jurisdiction over state-law claims is reviewed for an abuse of discretion and will only be reversed in "extraordinary circumstances." *Coleman*, 925 F.3d at 352 (citation omitted). This Court's review examines only whether the district court made "a considered determination of whether it should hear the claims." *Miller v. Herman,* 600 F.3d 726, 738 (7th Cir. 2010). Indeed, a district court's decision to relinquish jurisdiction is "almost unreviewable." *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 728 (7th Cir. 1998) (internal quotation marks and citations omitted); see also *Landstrom*

v. Ill. Dep't of Children and Family Servs., 892 F.2d 670, 679 (7th Cir. 1990) ("Pendent jurisdiction is a power which the district court, in the exercise of its sound discretion, may choose to grant; it is not a plaintiff's right").

Here, the district court properly exercised its discretion in declining to retain supplemental jurisdiction over the state-law claims. R.237, at 30; S.A. 30. Specifically, it held "Because the Court has resolved all federal claims before it and has not yet expended significant effort on the merits of the state law claims, the Court exercises its discretion and dismisses without prejudice [the state-law claims]." *Id.* It expressly considered—and applied—the "well-established" procedure of this Court to relinquish jurisdiction over state law claims when all federal claims have been dismissed. Indeed, this Court has routinely found no abuse of discretion in relinquishing jurisdiction over state-law claims when summary judgment has been granted as to all federal claims. *See*, e.g., *Coleman*, 925 F.3d at 352 (no abuse of discretion in relinquishing jurisdiction over state-law claims after the district court granted summary judgment as to all federal claims*); Lavite v. Dunstan*, 932 F.3d 1020, 1034-35 (7th Cir. 2019) (same); *Bishop v. Bosquez*, 782 Fed. App'x 482, 486 (7th Cir. 2019) (same); *Burritt v. Ditlefsen*, 807 F.3d 239, 252 (7th Cir. 2015) (same); *Kennedy*, 140 F.3d at 728 (same).

1. The Statute of Limitations Exception Does Not Apply.

Plaintiffs argue—for the first time on appeal—that the district court should have retained jurisdiction over the state-law claims because of statute of limitations concerns and the expenditure of resources having already been committed by the district court. See *Sharp Elecs. Corp.*, 578 F.3d at 514-15. However, even if these

concerns were raised before the district court (which they were not), they do not support a conclusion that the district court abused its discretion in relinquishing jurisdiction over the state-law claims.[4]

As to the statute of limitations exception, Plaintiffs contend that they would not be able to avail themselves of Section 13-217 of the Illinois Code of Civil Procedure (735 ILCS 5/13-217) to refile their state-law claims in state court because they previously filed in state court, voluntarily dismissed that suit, and refiled in federal court. Based on the Illinois Supreme Court's decision analyzing Section 13-217 in *Timberlake v. Illini Hosp.*, 676 N.E.2d 634 (Ill. 1997) which limits a plaintiff to one refiling, they would be barred from refiling the dismissed state-law claims in state court. Relatedly citing *Duckworth v. Franzen*, Plaintiffs suggest that should this Court affirm, it should nevertheless require the County Defendants to waive any statute limitations defenses that could be raised under Illinois law in opposition to Plaintiffs' refiled claims in state court.

However, Plaintiffs' contention that the statute of limitations exception applies and their suggestion that a procedure as set forth in *Duckworth* should be employed

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[4] In a footnote, Plaintiffs assert that the district court in ruling on a motion to dismiss, referenced that Plaintiffs availed themselves of the "one-refiling rule." To the extent Plaintiffs rely on this statement—made over 18 months prior to the court's final order—to avoid the application of waiver, any such statement does not relieve Plaintiffs from raising at summary judgment an argument that the court should retain jurisdiction over the state-law claims. Especially where Defendants argued for the district court to relinquish jurisdiction over the state-law claims. R. 189, at 20. Moreover, Plaintiffs' citation to, and the district court's reference of, 735 ILCS 5/13-217 was in the context of timeliness given the one-year period in which to refile; it was not to establish that Plaintiffs "had already availed themselves of the 'one-refiling rule.'" R. 82, at 12-15; R. 147, at 4-5.

must be rejected. In *Duckworth*, this Court was concerned that the plaintiffs would be unable to refile their claims in state court because the statute of limitations would have expired under the previous (and operative) version of the Illinois savings statute, as the recently amended savings statute would not be applied retroactively. 780 F.2d 645, 657 (7th Cir. 1985), *abrogated on other grounds by Farmer v. Brennan*, 511 U.S. 825 (1994). This Court remanded, explaining that the district court should not dismiss the pendant claim unless the defendants agree to waive their statute of limitations defenses. *Id.*

The problem here for Plaintiffs is not a recent change in the statute that would render their refiled claims untimely; rather, it was their decision to voluntarily dismiss their original complaint in state court and to refile in federal court. As the Illinois Supreme Court explained in *Timberlake*, "[Section 13-217] was not intended to permit multiple refilings of the same action. This court has interpreted section 13–217 as permitting only one refiling even in a case where the applicable statute of limitations has not yet expired." Contrary to *Duckworth*, Plaintiffs do not face a statute of limitations issue; they have a multiple refilings issue. Plaintiffs' choice, while represented by counsel, to initiate their lawsuit in state court, voluntarily dismiss that suit, and refile in federal court are now constrained by their own decision. Their choice to remain silent in the district court as to the application of Section 13-217 to their state-law claims is further reason to reject their assertion the district court abused its discretion or that the County Defendants waive any statute of limitations defenses in state court.

Nor do the cases Plaintiffs rely upon compel a different outcome. In *O'Brien v. Continental Illinois Nat'l Bank & Trust*, the parties briefed in the district court whether or not the court should retain jurisdiction over the state-law claims, including the plaintiffs' argument that the dismissed state law claims would be time-barred if refiled in state court. 593 F.2d 54, 63 (7th Cir. 1979); see also *O'Brien v. Continental Illinois Nat'l Bank & Trust*, 443 F. Supp. 1131, 1137 (N.D. Ill. 1977) ("The plaintiffs suggest that if this court were to dismiss the pendent state law claims, those claims may be barred by the statute of limitations"). This Court found the district court abused its discretion in dismissing the state law claims because the plaintiffs would not be able to refile in state court as the statute of limitations would have run on their claims. *O'Brien*, 593 F.2d at 64-65. Contrary to *O'Brien*, Plaintiffs, here, never raised the argument that the court should retain jurisdiction over the state-law claims, despite having ample opportunity before and after the district court granted summary judgment in favor of the County Defendants on all federal claims. In *O'Brien*, the plaintiffs specifically argued in the district court why they would be barred from refiling in state court. Here, Plaintiffs wait-and-see approach should not be the basis to conclude the district court abused its discretion, especially where the district court properly exercised its discretion in relinquishing jurisdiction, after consideration, pursuant to the "well-established law" of this Circuit. R. 237, at 30; S.A. 30.

In *Miller*, the district court erroneously believed that it had no duty to consider whether it should exercise supplemental jurisdiction over the state-law claims

because it reasoned "if there is no subject matter jurisdiction, there can be no supplemental jurisdiction." 600 F.3d at 738. Finding the district court possessed original jurisdiction over some of the federal claims, this Court vacated "the unconsidered dismissal of [the plaintiff's] state-law claims" and remanded to allow the district court to consider "in the first instance" whether the court "chooses to exercise its supplemental jurisdiction." *Id.* at 738. Notably, this Court explicitly declined to address whether Illinois' one-refiling rule under 735 ILCS 5/13-217 should factor in the district court's decision on remand as to whether supplemental jurisdiction over the state-law claims should be exercised. *Id.* ("We do not consider [whether the one-refiling rule prevents seeking relief in state court] or any other issue that may bear on the district court's ultimate decision"). Rather, because the court did not exercise its discretion in the first instance as to whether it should retain jurisdiction over the state-law claims due to an erroneous application of the law, this Court in *Miller* ordered a limited remand for that determination. Here, as discussed above, the district court properly exercised its discretion in declining to retain supplemental jurisdiction over the state law claims. R.237, at 30; S.A. 30. Contrary to *Miller*, there is no need here to remand for the court to consider whether to exercise supplemental jurisdiction "in the first instance."

2. The "Expenditure of Resources" Exception Does Not Apply.

Plaintiffs next argue that contrary to the district court's holding that it had not expended a significant effort on the merits, the district court oversaw discovery and ruled on various motions, including the motion for summary judgment from which they now appeal. But Plaintiffs have not presented any unique circumstances

reflecting *why* the district court expended significant resources uniquely in this case—as opposed to any other case where summary judgment was granted as to all federal claims—such that it abused its discretion in relinquishing discretion over the state-law claims. *Capeheart*, 695 F.3d at 686 ("nothing about the district court's investment or the nature of [the plaintiff's] state law claims is so extraordinary to make its decision not to retain those claims an abuse of discretion"); *Kennedy*, 140 F.3d at 728 ("While the parties claim the case should remain in federal court because the district judge was familiar with both the facts and the law of the case and the parties have undertaken discovery, these considerations are not adequate to make us second-guess the district court's decision to relinquish jurisdiction").

The cases Plaintiffs cite are not persuasive. In *Montano v. City of Chicago*, this Court determined the district court abused its discretion in relinquishing jurisdiction over state-law claims where it failed to explain its decision and nothing in the record suggested it was for one of the reasons outlined in Section 1367(c). 375 F.3d 593, 601 (7th Cir. 2004).

However, in *Montano*, the district court relinquished jurisdiction over the state-law claims when there were still federal claims pending for which it possessed federal-question jurisdiction. *Id.* at 596, 602. Noting that such an action compelled the "plaintiffs to bring a duplicative state-court action at the same time the federal claims were proceeding in the district court," this Court reasoned that the district court's decision would produce more litigation and a greater strain on comity and judicial resources. *Id.* at 602. Ultimately, in light of those concerns and the district

court's failure to explain its decision—"practically a fatal" problem for abuse-of-discretion review—this Court reversed and remanded to the district court for consideration of the state-law claims. *Id.* at 601-02. Here, contrary to *Montano*, the district court properly explained that it was relinquishing jurisdiction over the state-law claims because all federal claims had been dismissed and it had not expended a significant effort on the merits of the state-law claims. R.237, at 30; S.A. 30. Moreover, contrary to *Montano*, there were no surviving federal claims such that Plaintiffs would be required bring a "duplicative" state court action while the federal case proceeded.

Simply put, the district court properly exercised its discretion in following the "well established" procedure of relinquishing jurisdiction over any state-law claims when the federal claims have been dismissed. Plaintiffs failed to argue otherwise in the district court, and their belated attempt to present waived arguments for the first time on appeal to contend the district court abused its discretion should be rejected.

CONCLUSION

The County Defendants recognize the tragedy Plaintiffs have suffered. But such tragedy was inflicted by the off-duty Aguirre, not by any policy of the CCSO. The County Defendants cannot be liable in light of *DeShaney* for the privately inflicted injury Plaintiffs suffered, especially where Plaintiffs have failed to establish that the state-created danger exception applies. Nor can Plaintiffs show the district court abused its discretion in relinquishing jurisdiction over the state-law claims when

Plaintiffs waived the argument by not raising it in the district court. This Court should affirm the judgment of the district court.

Respectfully submitted,

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Dated: November 23, 2021

/s/ Elizabeth A. Ekl
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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2021, the Brief of Appellees was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Elizabeth A. Ekl
Elizabeth A. Ekl