No. 23-1084

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HOLLIS ANN WHITSON, as guardian ad litem for Peatinna Biggs,

Plaintiff-Appellant,

v.

THOMAS HANNA, et al.

Defendants-Appellees.

On Appeal from the U.S. District Court for the District of Colorado
The Honorable, Daniel D. Domenico, Judge Presiding
No. 1:18-cv-02076-DDD-SKC

APPELLANT'S OPENING BRIEF

ORAL ARGUMENT REQUESTED

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There are no prior or related appeals.

GLOSSARY

JA	Joint Appendix
County	Board of County Commissioners
Sheriff's Department	Sheriff Carlton Britton

INTRODUCTION

Ms. Peatinna Biggs, a woman with an intellectual disability, was incarcerated at Sedgwick County Jail when she was ordered out of her cell by the Sedgwick County Sheriff, Thomas Hanna. The Sheriff was to transport her to the Logan County Jail. But before bringing her there, he brought her to his home. He ordered her to take off all her clothes and then sexually molested her without her consent. He told Ms. Biggs that if she told anyone what he had done, she would spend the rest of her life in prison. He then handcuffed her and proceeded to transport her to the Logan County Jail.

Ms. Biggs, represented in this appeal by her Guardian ad litem, Plaintiff-Appellant Hollis Ann Whitson, filed suit against Sedgwick County, the Sedgwick County Sheriff's Department, and Sheriff Hanna in his individual and official capacity for violating her constitutional rights. Under § 1983, municipal entities, like the County and Sheriff's Department, are liable for the acts of a county official with final policymaking authority. Although the district court agreed that the Sheriff had final policymaking authority with respect to operating the jail and transporting detainees, the court dismissed the § 1983 claims against the municipal entity defendants on the grounds that the Sheriff did not have policymaking authority to falsely imprison and sexually assault Ms. Biggs.

But this reasoning turns the longstanding final policymaker doctrine inside out, conflating the question of whether someone acted in an area in which they have final policymaking authority with whether they acted within their lawful authority. It will always be true that when a plaintiff is alleging that a final policymaker did something unconstitutional in violation of § 1983, they are alleging that the policymaker acted *beyond* their legal authority. Indeed, the very purpose of § 1983 is to provide redress for *misuses* and *abuses* of state authority. The question is whether the unlawful conduct took place in an area—or context—in which the official has final policymaking authority.

Sheriff Hanna had final policymaking authority under state law to hold Ms. Biggs in his physical custody, to assert control over Ms. Biggs' person, and to transport her to another jail. And he used that authority to commit a cruel and egregious violation of her constitutional rights. There was no higher county official to regulate his conduct or hold him accountable; he was, for all intents and purposes, the County. This is precisely the case that the final policymaker doctrine was designed for. The doctrine ensures that the county itself is liable when it delegates final, unrestricted policymaking authority to an official in a particular area and that official abuses that power. The district court's decision to the contrary conflicts with binding Tenth Circuit precedent and undermines the very purpose of § 1983.

If counties are permitted to hide behind their municipal form, even when their final policymakers choose to commit egregious violations of peoples' constitutional rights, then victims like Ms. Biggs will be left without any meaningful recourse. Indeed, in this case, the jury proceeded to find that "Hanna abused the authority he had as Sedgwick County's sheriff in about as reprehensible a manner as could be imagined, and assessed the damage he caused at over $8,000,000." JA 235. But Ms. Biggs will never receive that money. The district court recognized that "[w]hile Mr. Hanna owes Ms. Biggs that amount, it is hard to imagine he will be able to pay her any more than a tiny fraction of it. Thus, in reality, the person who has to bear the bulk of the financial burdens of Mr. Hanna's actions is the same one who has to bear the emotional and personal burdens: Peatinna Biggs." *Id.*

But this injustice is not an unfortunate reality that Ms. Biggs must live with; it's a misapplication of the law. Section 1983, as interpreted by the Supreme Court, guards against this, ensuring that the county—not the victim—bears the financial burdens where a high-ranking county official acts in an area in which he has final policymaking authority. In other words, a sheriff's actions will be treated as the actions of the county. The buck stops there.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff's claims under 28 U.S.C. § 1331 because the claims raised a federal question pursuant to 42 U.S.C. § 1983.

On April 17, 2020, the district court granted the motions to dismiss filed by Defendant Sheriff Carlton Britton ("the Sheriff's Department") and Defendant Board of County Commissioners of Sedgwick County ("the County"). JA 140. On March 6, 2023, the District Court denied Plaintiff's motion to alter or amend the judgment under Rule 59(e) and entered a final Judgment dismissing all claims against the Sheriff's Department and the County. JA 224-236. Plaintiff timely appealed. JA 239. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Was Sheriff Hanna's misconduct in an area in which he had final policymaking authority such that his conduct is attributable to the County and Sheriff's Department under § 1983?

2. If the Court agrees that Sheriff Hanna was acting in an area in which he had final policymaking authority and that the municipal entities should therefore not have been dismissed from the case, does there need to be a new trial on remand?

3. Did the district court also err in dismissing the County as an improper defendant on the grounds that the County and Sheriff's Department are separate entities under Colorado law?

STATEMENT OF THE CASE

The Sheriff's Sexual Assault of a Sedgwick County Jail Detainee

This case arises from Ms. Peatinna Biggs' incarceration at the Sedgwick County Jail. While she was detained there, she was removed from her cell by former Sheriff Thomas Hanna. JA 25, ¶ 24. Sheriff Hanna was the highest-ranking law enforcement officer in Sedgwick County and in charge of operating the jail and supervising its detainees. JA 25, ¶ 19. Sheriff Hanna was going to transfer Ms. Biggs to the Logan County Jail. JA 25, ¶ 21. He ordered her to change into street clothes, handcuffed her, and then placed her into his truck. JA 25, ¶¶ 24, 26.

Once in his car, the Sheriff removed Ms. Biggs' handcuffs but locked the door so she would not be free to leave. Ms. Biggs, who has an intellectual disability, was confused and terrified about what was happening. JA 26, ¶¶ 27-28. Instead of transporting Ms. Biggs directly to the Logan County Jail, Sheriff Hanna drove to his home and ordered Ms. Biggs inside. JA 26, ¶¶ 29-31. She was afraid to run from his house because she was afraid of being physically harmed by the Sheriff or arrested on new charges. JA 26, ¶ 35. Once inside, the Sheriff offered to pay Ms. Biggs $60 to have sex with her, but she refused. JA 26, ¶ 36.

Sheriff Hanna then ordered Ms. Biggs to take off all her clothes. JA 26, ¶ 37. His gun was visible in his holster. JA 26, ¶¶ 36-37. Afraid for her life, Ms. Biggs complied. JA 26, ¶ 38. She stood naked before him, embarrassed and afraid. JA 27,

¶ 39. The Sheriff then took off his department-issued uniform pants and proceeded to sexually molest Ms. Biggs by digitally penetrating her vagina without her consent. JA 27, ¶ 41. The touching was forceful and unwanted. *Id.* His gun remained visible on the table throughout the assault. JA 27, ¶ 42.

Afterwards, the Sheriff threatened Ms. Biggs, telling her that if she told anyone about what he had done she would spend the rest of her life in prison. JA 27, ¶ 43. Ms. Biggs believed that the Sheriff could follow through on this threat given that he was the highest-ranking law enforcement office in Sedgwick County. JA 27, ¶ 44. The Sheriff then handcuffed Ms. Biggs and placed her back in his vehicle. JA 28, ¶ 50. He then proceeded to bring her to the Logan County jail. JA 28, ¶ 52.

Ms. Biggs did not immediately report the assault for fear that she would spend the rest of her life in prison. JA 28, ¶ 55. But a deputy that worked at Sedgwick County Jail, Deputy Neugebauer, had witnessed the Sheriff placing Ms. Biggs, who was in street clothes, into the Sheriff's vehicle, and later that day had seen the vehicle parked outside of the Sheriff's home. JA 25, ¶¶ 26, 30, 46, 48. He knew or reasonably suspected that Sheriff Hanna had violated Ms. Biggs' constitutional rights, but initially failed to report the incident. JA 28, ¶ 56. It wasn't until twelve days later that Deputy Neugebauer reported the incident to the Logan County District Attorney's Office—when it was too late for a rape kit or other DNA evidence to be collected. JA 31, ¶¶ 80-81.

Sheriff Hanna was eventually arrested and criminally charged, while Ms. Biggs was released on bail. JA 32, ¶¶ 81-82. Ms. Biggs completed her term of probation and is no longer in custody. JA 32, ¶ 87. She has been clinically diagnosed with Post-Traumatic Stress Disorder caused by the assault and suffers from embarrassment, humiliation, insomnia, night terrors, and anxiety. JA 32, ¶ 89. She lives in constant fear of being sexually assaulted again as the Sheriff is on probation and she continues to reside in Sedgwick County. JA 32, ¶ 87.

Neither the County of Sedgwick nor its Sheriff's Department oversaw or internally monitored the Sheriff's actions. JA 33, ¶ 90. He was undisciplined and unsupervised throughout his term as Sheriff. JA 33, ¶ 93. Indeed, Deputy Neugebauer eventually reported former Sheriff Hanna's actions to the Logan County District Attorney's Office because there was no other supervisor, bureau, or department at the Sedgwick County Sheriff's Department that could review the actions of the Sherriff. *Id.* The Sheriff's Department, an agency of Sedgwick County, had a policy committed to zero-tolerance of any form of sexual abuse of inmates and a policy against bringing an inmate, especially an inmate of the opposite sex, into an officer's home. JA 26, ¶¶ 23, 30; JA 28, ¶ 54. But Sheriff Hanna, as the highest-ranking law enforcement officer, made the decision to cast those policies aside and approved of the constitutional violations he committed against Ms. Biggs. JA 33, ¶ 94.

The Lawsuit

In the wake of the assault, Ms. Biggs filed a civil rights lawsuit under § 1983 naming a number of defendants, including the former Sheriff Hanna in his individual and official capacity, the Deputy Larry Neugebauer, the Sedgwick County Sheriff's Department, and the County of Sedgwick. JA 21. Early in the litigation, the caption was amended replacing the "County of Sedgwick" with the "the Board of County Commissioners for the County of Sedgwick" and replacing the "Sedgwick County Sheriff's Department" with "Sheriff Carlton Britton in his official capacity" as the proper way of identifying those municipal entities. JA 7, Dkt. # 41. For ease of reference and clarity, this brief uses the shorthand of the "County" to refer to the County Board of Commissioners and the "Sheriff's Department" to refer to Sheriff Carlton Britton in his official capacity.

Ms. Biggs' complaint alleged claims of excessive force, cruel and unusual punishment, false imprisonment, sexual assault and battery, equal protection, due process, right to privacy, failure to intervene, conspiracy to interfere with civil rights, as well as municipal liability for Sheriff's Hanna's constitutional violations. JA 34-45, ¶¶ 95-168.

The County and Sheriff's Department moved to dismiss the claims against them, arguing that that they were not liable for Sheriff Hanna's conduct because the complaint fails to allege a custom or policy attributable to the County or Department.

See JA 50-52; 96-100. The County also argued that it was not liable because, under Colorado law, the Sheriff's Department is separate from the Board of County Commissioners. *See* JA 54-55.

Plaintiff opposed the motions to dismiss and explained that establishing an unconstitutional custom or policy is only one way of establishing municipal liability. There is a second way: the County and Sheriff's Department are liable for the Sheriff's conduct because he was the final policymaking official for the County for matters concerning operations of the county jail. JA 77-78; 119-120. Plaintiff also argued that the County, or more specifically the Board of County Commissioners, is a proper defendant. JA 76.

The district court granted the County and Sheriff's Department's motions to dismiss, reasoning that Sheriff Hanna was not acting within his policymaking authority when he falsely imprisoned and sexually assaulted Ms. Biggs because his "actions were not 'pursuant to' Department policies, but in direct contravention of them." JA 148. The claims against Deputy Neugebauer were also dismissed. JA 159.

Post-Trial Motions

The case against Sheriff Hanna proceeded to trial. The jury found Sheriff Hanna liable for excessive force, cruel and unusual punishment, and false imprisonment in the total amount of $3,250,000.00 in compensatory damages and

$5,000,000.00 in punitive damages. JA 169. The court's initial order entering judgment in the case sparked confusion because it entered the judgment against Sheriff Hanna in his individual *and his official capacity*, while also entering a final judgment dismissing all claims against the County and Sheriff's Department. *Id.* Because an official capacity claim against a Sheriff is another way of alleging a municipal liability claim against the Sheriff's Department and County, the judgment was self-contradictory.

Plaintiff moved to alter or amend the final judgment, explaining that an official capacity claim *is* a claim against the municipal entities, and that therefore the Sheriff's Department and County should be on the hook for the damages awarded by the jury. Plaintiff argued that no one ever moved to dismiss the "official capacity" claim, the Court never dismissed it, and the jury instructions even included a stipulation that Sheriff Hanna was acting in his "official capacity." JA 175-178. Plaintiff also argued, as a substantive matter, that the district court erred in dismissing claims against the County and Sheriff's Department prior to trial because Sheriff Hanna was acting within the realm of his final policymaking authority when he violated Ms. Biggs' constitutional rights. Therefore, his conduct was attributable to the County and Sheriff's Department. JA 178-185. At the same time, the County and Sheriff's Department also moved to amend the judgment, arguing that it erroneously states Sheriff Hanna is liable in his official capacity. JA 191-194.

The district court entered an order amending the final judgment to clarify that the County and Sheriff's Department are not liable. In doing so, the court concluded that the official capacity claims did not survive the County and Sheriff Department's motions to dismiss, and that the Sheriff was not acting within his final policymaking authority when he sexually assaulted Ms. Biggs because while he had policymaking authority to operate the jail and transport Ms. Biggs, he did not have policymaking authority to sexually assault her. JA 224-235

Plaintiff timely appealed the district court's pretrial order granting the County and Sheriff Department's motions to dismiss as well as its post-trial order refusing to alter or amend the final judgment. JA 239.

SUMMARY OF ARGUMENT

This Court should reverse the district court's dismissal of claims against the County and Sheriff's Department because Plaintiff sufficiently alleged municipal liability. Under the Supreme Court's decision in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986), a plaintiff may establish municipal liability under § 1983 by alleging that a county official with final policymaking authority acted in violation of a plaintiff's constitutional rights.

Here, there is no dispute that Sheriff Hanna had final policymaking authority with respect to operating Sedgwick County's jail, including the care and supervision of its detainees and the transportation of those detainees to other jails. There is also

no dispute that Sheriff Hanna, while transporting Ms. Biggs, a Sedgwick County jail detainee, violated Ms. Biggs' constitutional rights.

I.A. The question in this appeal is whether Sheriff Hanna acted in an area of his final policymaking authority when he violated Ms. Bigg's constitutional rights. He clearly did. Sheriff Hanna had final policymaking authority with respect to controlling, supervising, and transporting detainees and he used that very authority to falsely imprison and inflict cruel and unusual punishment against Ms. Biggs while transporting her. He even expressly invoked his policymaking authority, telling Ms. Biggs that if she told anyone what he had done that she would spend the rest of her life in prison. The fact that the Sheriff did something unlawful (beyond his legal authority) or that some of his unconstitutional conduct was in the form of a sexual assault does not alter the legal analysis.

I.B. The district court decision below, dismissing claims against the municipal entity defendants on the grounds that the Sheriff was acting outside his policymaking authority, is inconsistent with Tenth Circuit precedent. This Court has repeatedly held that an official's actions in an area in which he has final policymaking authority are attributable to the county even if those actions are unlawful, in direct contravention of county policy, or particularly nefarious and intentional. Nor does an official have to be motivated by legitimate policy goals for his conduct to fall

within his final policymaking authority. Tenth Circuit case law and the central purpose of § 1983 preclude such limited interpretations of municipal liability.

II. Because the municipal entity defendants are liable for Sheriff Hanna's constitutional violations and should never have been dismissed from this case, this Court should reverse and remand. But on remand, a new trial is not necessary because the County and Sheriff's Department are liable for Sheriff Hanna's official acts as a matter of law. A jury already found that the Sheriff violated Ms. Bigg's constitutional rights and calculated the compensatory damages she is owed. In fact, the law of the case doctrine prohibits any retrial on such factual questions.

III. The district court also erred in dismissing claims against the County on the grounds that the Sheriff's Department and County are separate entities under Colorado law. However, this issue is of little consequence because regardless of whether the Sheriff's Department or the County is held liable in name, the damages are paid out of the County fund.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). *Khalik v. United Airlines*, 671 F.3d 1188, 1190 (10th Cir. 2012). In doing so, this Court must accept all factual allegations in the Amended Complaint as true and view these allegations in the light most favorable to the Plaintiff. *Kerber v. Qwest Group Life Ins. Plan*, 647 F.3d 950, 959 (10th Cir. 2011).

With that said, the question at the heart of this appeal is a pure question of law. "[T]he Supreme Court has made plain that the question of whether [an official] is a final policymaker is a legal question for the court, not the jury." *Morro v. City of Birmingham*, 117 F.3d 508, 518 (11th Cir. 1997) (citing *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)); *see also Milligan-Hitt v. Bd. of Trustees of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219, 1227 (10th Cir. 2008) (holding "final policymaking authority must be determined by a judicial examination of state and local law, not turned over to the jury").

ARGUMENT

I. Plaintiff Adequately Alleged Municipal Liability Claims Against Sedgwick County and the Sedgwick County Sheriff's Office.

A. Former Sheriff Hanna's Unconstitutional Conduct Was in the Realm of His Final Policymaking Authority.

Contrary to the district court's analysis, the County Sheriff was acting within the area of his policymaking authority as required to establish municipal liability under § 1983. It is undisputed that Sheriff Hanna was the final policymaker with respect to law enforcement, including jail operations, supervising detainees in the county's custody, and transporting detainees between jails. JA 231. The Sheriff was acting in those specific areas of final policymaking authority when he falsely imprisoned and then sexually assaulted a female detainee in his custody while transporting her to another jail.

The Supreme Court has carved out multiple, independent pathways for holding municipalities liable under § 1983. Plaintiffs often establish municipal liability by showing that county employees' unconstitutional conduct was taken in "compliance with a preexisting policy or longstanding custom" in accordance with the Supreme Court's decision in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Simmons v. Uintah Health Care Special Dist.*, 506 F.3d 1281, 1285 (10th Cir. 2007). But that is not "the only way to demonstrate that an action is properly viewed as the municipality's own." *Id.* "While *Monell* found [municipal] liability on the basis of an 'official policy as the moving force of the constitutional violation,'" the Supreme Court in *Pembaur* "establish[ed] that actions taken by a municipality's final policymakers *also* represent acts of 'official policy' giving rise to municipal liability." *Id.* (citing *Pembaur*, 475 U.S. at 481) (emphasis added). "Accordingly, a municipality is responsible for both actions taken by subordinate employees in conformance with preexisting official policies or customs and actions taken by final policymakers." *Id.* at 1284.

Under *Pembaur*, "if a county official has been delegated the power to make final policy in an area of the county's business, then the official's acts in that area are the acts of the county." *Starrett v. Wadley*, 876 F.2d 808, 818 (10th Cir. 1989) (citing *Pembaur*, 475 U.S. at 482-83; *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123, (1988)). "Whether an official has final policymaking authority in a particular

area is a question of state law." *Id.* Importantly, the final policymaker's acts need not amount to formal rules or customs—"municipal liability may be imposed for a single decision . . . tailored to a particular situation and not intended to control decisions in later situations." *Pembaur*, 475 U.S. at 480-481. In fact, municipalities are liable for "actions by final policymakers taken in *defiance* of a policy or custom that they themselves adopted." *Simmons*, 506 F.3d 1281 at 1285 (emphasis added).

In this case, Plaintiff adequately alleged that the municipal entity defendants, including Sedgwick County and the Sedgwick County Sheriff's Office, were liable under § 1983 for the unconstitutional acts of Sheriff Hanna because Sheriff Hanna was acting in an area in which he was a final policymaker. The complaint alleges that Sheriff Hanna, the highest-ranking law enforcement official in Sedgwick County who operated the Sedgwick County Jail, falsely imprisoned, used excessive force against, and sexually assaulted Ms. Biggs, inflicting cruel and unusual punishment, while she was a detainee in his custody. JA 25-27, 34-42. Specifically, in transporting Ms. Biggs from his county jail to another county jail, Sheriff Hanna brought Ms. Biggs to his private home where he held her against her will, ordered her to undress, humiliated her, and sexually assaulted her. JA 25-28. He used his authority to threaten Ms. Biggs, telling her that if she told anyone what he had done, he would ensure she would spend the rest of her life in prison. JA 27, ¶ 43. All of Hanna's unconstitutional conduct took place while Ms. Biggs was a detainee under

Hanna's direct control and supervision during a routine jail transport. The conduct clearly took place in the realm of supervising and transporting detainees.

It is well settled—and undisputed—that Hanna was the final policymaker with respect to supervising and transporting detainees. Under Colorado law, the sheriff has "charge and custody of the jails of the county, and of the prisoners in the jails, and shall supervise them." Colo. Rev. Stat. Ann. § 30-10-511. Colorado law also assigns to the sheriff the authority to transport prisoners to other places of confinement. Colo. Rev. Stat. Ann. § 30-10-514. Colorado's elected sheriff is the final policymaker with respect to law enforcement activities generally, including jail operations. *See Cortese v. Black*, 838 F. Supp. 485, 496 (D. Colo. 1993); *see also Rustgi v. Reams*, 536 F. Supp. 3d 802, 824 (D. Colo. 2021). Facing this wall of authority, the County conceded that, in Colorado, the sheriff is the final policymaker for matters concerning the operation of the county jail. JA 54-55. And the district court recognized "[i]t is undisputed that transportation of prisoners is within the realm of the county sheriff's policymaking authority." JA 231.

Because Colorado's sheriff is the final policymaker with respect to law enforcement activities, including the supervision and transportation of detainees, and Sheriff Hanna's unconstitutional acts took place in the context of supervising and transporting a detainee, Plaintiff adequately alleged that the municipal entities are liable under § 1983 for Hanna's unconstitutional acts. *See Simmons*, 506 F.3d at

1286 (county liable for Board's wrongful termination of employee because "the Board was the final policymaker on personnel matters"); *Seifert v. Unified Gov't of Wyandotte Cnty./Kansas City*, 779 F.3d 1141, 1159 (10th Cir. 2015) (county liable for Sheriff's retaliation against deputy because Sheriff was the final policymaker for the Sheriff's Department and responsible for its deputies).

The fact that Hanna's unconstitutional conduct was intentionally harmful and clearly beyond his legal authority is irrelevant. In *McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984), the plaintiff alleged false imprisonment—just as Ms. Whitson does here—and "that the [county] sheriff … was involved knowingly in [a deputy's] deprivation of [plaintiff's] liberty without due process." *Id.* at 1374. This Court concluded that because the sheriff "was the official responsible for the policies and procedures of the [ ] County Sheriff's Office," "the Sheriff's Office will be liable . . . for implementing an unconstitutional act if [the sheriff] knowingly was involved in an intentional constitutional deprivation." *Id.* Here, as in *McKay*, Sheriff Hanna is the final policymaker with respect to law enforcement and jail operations and his "personal participation is alleged" in intentionally depriving a detainee under his custody and control of her constitutional rights. *Id.* Thus, Sedgwick County and the Sedgwick County Sheriff's Department should be liable for Sheriff Hanna's unconstitutional acts.

Nor does the fact that Sheriff Hanna sexually assaulted the Plaintiff alter the legal analysis. There is no authority to suggest that unconstitutional conduct of a sexual nature is exempt from the unlawful acts of a final policymaker that may trigger municipal liability under *Pembaur.* Sexual assault of a detainee, just like excessive use of force or an intentional false arrest, is just another unlawful act that a sheriff may engage in (or knowingly permit), which will in turn trigger municipal liability.

In *Bennett v. Pippen*, 74 F.3d 578 (5th Cir. 1996), for example, the Fifth Circuit held that where a sheriff raped a suspect during a homicide investigation, his actions were imputed to the county because the sheriff was the final policymaker for the county for matters of law enforcement. *Id.* at 581. The court found that "the Sheriff's actions were those of the County because his relationship with [the suspect] grew out of the attempted murder investigation and because . . . he used his authority over the investigation to coerce sex with her." *Id.* at 586. The same is true here. Sheriff Hanna's actions grew out of his supervision and transportation of a detainee. And just as the Sheriff in *Bennett* used his authority as Sheriff to violate the suspect's constitutional rights, threatening to put her in jail for the rest of her life if she did not comply with his demands, so too did Sheriff Hanna. *See* JA 27, ¶ 43.

In fact, the final policymaker analysis is even more straight forward in this case than in *Bennett*. In *Bennett* the sheriff's sexual assault "grew out of" his law

enforcement work, while Sheriff Hanna's sexual assault took place in the course of performing specific law enforcement duties. Further, Sheriff Hanna's use and abuse of his authority as sheriff is more apparent because he sexually assaulted a detainee under his complete custody and control while transporting her to another jail. Such conduct is squarely within—not outside of—the Sheriff's area of final policymaking authority. *See Hernandez v. Theriot*, 38 F. Supp. 3d 745, 748 (M.D. La. 2014) (holding municipality liable where Chief of Police, a final policymaker, sexually assaulted inebriated woman in his custody while transporting her); *Doe #1 v. Cravens*, No. 2:17-CV-00049, 2018 WL 1522401, at *4 (M.D. Tenn. Mar. 28, 2018) (holding municipality liable where sheriff, a final policymaker, raped several detainees).

Because the complaint alleges that Sheriff Hanna falsely imprisoned, used excessive force, and inflicted cruel and unusual punishment on a detainee during a transport, and it is undisputed that Hanna was a final policymaker with respect to jail operations and supervising and transporting detainees, the complaint sufficiently alleges municipal liability under § 1983.

B. The District Court's Analysis is Inconsistent with Tenth Circuit Precedent.

The district court's decision that Sheriff Hanna was acting outside the area of his policymaking authority conflicts with binding Tenth Circuit precedent and would create a legal loophole undermining the very purpose of § 1983.

i. An Official's Actions in his Area of Policymaking Authority are Imputed to the County Even if they Violate Policies or the Law.

Contrary to Tenth Circuit precedent, the district court's decisions below conflate the final policymaking inquiry with a requirement that the official's conduct be consistent with departmental policies or their *lawful* authority. In its April 2020 Order, the district court dismissed the municipal entities from this case on the ground that "Mr. Hanna's actions were not 'pursuant to' Department policies, but in direct contravention of them." JA 148. But that reasoning directly contradicts then-Judge Gorsuch's binding decision in *Simmons* holding that municipalities are liable for "actions by final policymakers taken in *defiance* of a policy or custom that they themselves adopted." *Simmons*, 506 F.3d at 1285 (emphasis added).

Simmons explained why the county must be liable for discrete acts in defiance of county policy committed by a final policymaker:

> Were the rule of law different, we would invite irrational results. Holding municipalities immune from liability whenever their final policymakers disregard their own written policies would serve to encourage city leaders to flout such rules. Policymakers . . . have little reason to abide by their own mandates . . . and indeed an incentive to adopt and then proceed deliberately to ignore them. Such a rule of law would thus serve to undermine rather than enhance Section 1983's purposes.

Id. at 1285. The district court's holding that the County and Sheriff's Department could not be liable for a final policymaker's acts in defiance of departmental policies is directly precluded by *Simmons*.[1]

In response to Plaintiff's post-trial motion for reconsideration of this issue, the district court still failed to reconcile its decision with *Simmons*. In the March 2023 Order, the district court recognized the holding in *Simmons*, noting that "a county can be liable for the actions of its policymakers, even when those actions violate a previously established policy," and that "transportation of prisoners is within the realm of the county sheriff's policymaking authority." JA 231. But the court still held that the County and Sheriff's Department were not liable, reasoning that "the Entity Defendants are not being sued because Mr. Hanna transported Ms. Biggs; they are being sued because he sexually assaulted her. That is not within the policymaking authority a county sheriff has." *Id.*

The district court's post-trial decision confuses the question of whether a sheriff was acting in the area or context in which he has final policymaking authority

[1] If anything, the fact that the Sheriff's Department had policies in place to address this very circumstance of an officer sexually assaulting a detainee during a transport or in his home is evidence that Sheriff Hanna's misconduct *was* within an area of his policymaking authority. *See* JA 26, ¶ 30; JA 28, ¶ 54. The Sheriff's Department would not have a policy directly governing this factual situation if the situation was beyond the Sheriff's policymaking authority.

with whether the sheriff was exceeding his *legal* or *lawful* authority. If courts define the area of policymaking authority as the alleged unconstitutional conduct—be it sexual assault, excessive use of force, false imprisonment, cruel and unusual punishment, or even medical neglect—it will *always* be true that there is no state law giving the sheriff final policymaking authority with respect to that particular unlawful conduct. It would make municipalities immune from liability whenever their final policymakers deliberately abuse their authority to violate a person's constitutional rights because abuse of authority will, by definition, exceed one's legal authority. Such an approach would not just create a loophole to the final policymaking inquiry, it would eviscerate it, undermining the "central aim" of § 1983 which is "to provide protection to those persons wronged by the *misuse* of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Owen v. City of Indep., Mo.*, 445 U.S. 622, 650 (1980) (emphasis added) (internal quotations and brackets omitted).

Nor is this how the Tenth Circuit has ever sought to define "policymaking authority" for purposes of assessing municipal liability under *Pembaur*. In *Simmons*, for example, this Court determined that the Board was the final policymaker on "personnel matters" and then held the municipality liable for the Board's wrongful termination of an employee. *Id*. at 1286. The Court did not ask whether the Board

had authority to *wrongfully* terminate an employee. Similarly, in *Seifert*, the Court did not ask if the sheriff had authority to retaliate against an employee for testifying in a civil rights suit; the Court asked if the sheriff had policymaking authority with respect to managing deputies within the sheriff's department. *Seifert*, 779 F.3d at 1159. Accordingly, here, the proper question is whether the Sheriff had final policymaking authority with respect to supervising and transporting detainees—not whether he had authority to sexually assault or falsely imprison a detainee while transporting them.

Plaintiff's position is not an extension of municipal liability; it is precisely what Tenth Circuit law requires. The district court was concerned that Plaintiff's position "would effectively mean that any time a sheriff takes an action in the course of performing his official duties, the County and/or the Sheriff's Office would be liable for that action" and that this "would collapse the 'under color of state law' and municipal-liability analyses, which are separate questions." JA 231. Those fears are overstated, but the core insight—that municipalities will generally be liable for the actions of final policymakers—is a reflection of existing circuit law: *Simmons* makes clear that the county is liable for an official's actions when that official is operating in an area in which he has final policymaking authority. *See supra* pp. 14-15. That's because "[a]n act by a municipality's final policymaking authority is no less an act

of the institution than the act of a subordinate employee conforming to a preexisting policy or custom." *Simmons*, 506 F.3d at 1285.

While "final policymaking authority" is not synonymous with "under color of state law," there may be significant overlap as to conduct that is within one's "final policymaking authority" and conduct that is "taken under color of state law." This is especially true for certain actors, like sheriffs, who are often given final policymaking authority over law enforcement generally and who do little work in other contexts, like city budgeting or public education, in which the sheriff may not have final policymaking authority. If the sheriff had been operating in a non-law enforcement capacity in service of a different county department in which he did not have final policymaking authority, his actions may not be attributable to municipal entities.

ii. The Second Circuit's Decision in *Roe* Conflicts with Tenth Circuit Precedent and is also Inapposite.

The district court's reliance on the Second Circuit decision, *Roe v. City of Waterbury*, 542 F.3d 31, 40-41 (2d Cir. 2008), is misplaced. In that opinion, the Second Circuit held that an official is only acting with final policymaking authority if his decisions are "made for practical or legal reasons." *Id.* at 38. Relying on *Roe*, the district court argued that Sheriff Hanna's unlawful conduct was outside of his policymaking authority because it was advancing a purely personal agenda and not a "legitimate policy goal." JA 233.

But no Tenth Circuit case suggests that courts must assess the official's motivation or reasons for engaging in the unconstitutional conduct. In fact, such an approach would conflict with Tenth Circuit precedent in two ways. First, the Tenth Circuit has routinely found that officials acted within their final policymaking authority even when their conduct was *not* motivated by a legitimate or legal policy goal. For example, *Simmons* held that acts directly in defiance of the department's policies—and thus presumably in tension with "legitimate policy goals"—must be imputed to the county. *See Simmons*, 506 F.3d at 1285. In *Seifert*, the sheriff's unlawful conduct was motivated by a desire to retaliate against a deputy that had testified about federal law enforcement's mistreatment of a former criminal defendant. *Seifert*, 779 F.3d at 1145. Such retaliation is not a "legitimate policy goal," JA 233, yet this Court still found that the sheriff had acted within his final policymaking authority, *Seifert*, 779 F.3d at 1145. Similarly, in *McKay*, the complaint alleged that defendants, including the sheriff with final policymaking authority, *knew* that the plaintiff was out on a valid bond when they had him arrested. *See* 730 F.2d at 1374. Knowingly falsely imprisoning a person is not conduct in pursuit of a legitimate policy goal. Thus, *Roe* and the district court's "in pursuit of legitimate policy goals" test is inconsistent with Tenth Circuit case law.

Second, holding that an official acts only within his final policymaking authority if his conduct is motivated by legitimate policy goals conflicts with Tenth

Circuit precedent because assessing the reasons behind an official's unconstitutional activity would be a highly fact-dependent inquiry. The Tenth Circuit, relying on Supreme Court precedent, has held that whether an official was acting within his final policymaking authority is a pure question of law. *See Milligan-Hitt*, 523 F.3d at 1227 (holding "final policymaking authority must be determined by a judicial examination of state and local law, not turned over to the jury").

Even if this Court were to disregard Tenth Circuit precedent in favor of the Second Circuit's analysis in *Roe*, that case is distinguishable. *Roe* largely rested on the fact that "a finding of general policymaking power" on the part of the official in question was not sufficient because they must have policymaking authority "in a particular area, or on the particular issue involved in the actions." *Roe*, 542 F.3d at 38. The Court further reasoned there was not a sufficient "nexus" between the relevant official's "actions and his job functions" because he had sexually abused two children who had no relationship to his office or job duties. *Id.* at 40. This case is the opposite scenario: Sheriff Hanna has policymaking authority in the particular area of asserting custody over and supervising detainees, and his misconduct occurred while he was performing a core job function in that context. Thus, even *Roe* does not support municipal immunity in this case.

iii. Neither *Lankford* nor *Starrett* Support the District Court's Decision.

The two Tenth Circuit cases that the district court cited in a footnote do not support the district court's conclusion that sexual assault is necessarily "personal" and outside the scope of an official's policymaking authority. *See* JA 232 n.6 (citing *Lankford v. City of Hobart*, 73 F.3d 283, 286-87 (10th Cir. 1996) and *Starrett v. Wadley*, 876 F.2d 808, 819 (10th Cir. 1989)). In both cases, the Court held that the county was not liable for a county official's sexual harassment of their employees. But these cases are outdated, and neither is comparable to the facts here.

For starters, *Lankford* is inapplicable because, there, the police chief who had sexually harassed employees was not a final policymaker under state law. *Lankford*, 73 F.3d at 286-87. Accordingly, *Lankford* offers no insight into when a final policymaker's sexual abuse occurs within the ambit of his final policymaking authority. The district court partially quoted *Lankford*'s note that "[t]his case exemplifies a situation where the defendant was committing private, rather than public, acts of sexual harassment." JA 232 n.6 (citing *Lankford*, 73 F.3d at 286-87). But that was an explicitly fact-specific observation, not a categorical diagnosis of the nature of sexual abuse by public officials. Moreover, the point arose within this Court's analysis of whether there was a widespread and persistent practice of sexual harassment such that municipal liability could attach under *Monell* even though the police chief was not a final policymaker. *Id.* at 287. In context, "private" meant

something like "isolated," not "distinct from the harasser's final policymaking authority" (which, again, the *Lankford* police chief did not possess). Because Sheriff Hanna was a final policymaker, the issue of whether his harassment was part of a broader pattern is not present in this case.

Starrett is also unhelpful to the County's cause. In that case, the Court held that a county assessor was the final policymaker with respect to the hiring and firing of employees and thus was liable for the retaliatory termination of female employees who complained of his sexual harassment. *Starrett*, 876 F.2d at 819. However, the Court held that the assessor's underlying harassment of the plaintiff did not constitute an "official policy" because "[t]hose acts did not concern any official terms of employment, such as job title or description, salary levels, or other conditions that [the assessor] could establish only because the County delegated final policy authority over those matters to him." *Id.* at 820. That is, the county assessor was a final policymaker when he misused his authority to engage in misconduct, but not when he engaged in misconduct disconnected from his authority.

Here, Sheriff Hanna's conduct is more akin to the *Starrett* assessor's retaliatory termination conduct than his sexual harassment conduct. Sheriff Hanna had final policymaking authority with respect to detaining Ms. Biggs, supervising and caring for her in custody, and transporting her to another jail. A sheriff's treatment of an individual held in the state's custody is the epitome of exercising

state power and is by its very nature a "public" act. Just as the assessor in *Starrett* misused his power to fire employees to retaliate against plaintiffs, Sheriff Hanna misused his power to assert control over the physical custody of Ms. Biggs to falsely imprison and then sexually assault her. *See Starrett*, 876 F.2d at 819. Both final policymakers acted for illegitimate, nefarious, and unlawful reasons. Those reasons were not a bar to municipal liability in *Starrett*, and should not be here, either. *See id.*

Plus, the cited analysis in *Starrett* rests on the outdated view that the final policymaker's conduct must amount to a formal announcement of a department-wide rule or guideline to trigger municipal liability. *See id.* at 820 (concluding that "acts of personal harassment of plaintiff did not rise to the level of official County 'policy'" because there were no "indicia of being 'officially sanctioned or ordered'"—they were not "official acts"). This reasoning is foreclosed by the later decided *Simmons*, which says a final policymaker's discrete acts in *defiance* of the official policy will also trigger municipal liability. *See Simmons*, 506 F.3d at 1286.[2]

[2] And this interpretation in *Simmons* must be true. If, per *Starrett*, the final policymaker had to take some particularly "official" action "sanctioning" a decision before it constituted an act attributable to the county, that would cause irrational results. For example, Sherriff Hanna's actions would have been considered "official policy" if he had "officially" directed or authorized a subordinate to sexually assault

There, this Court made clear that any action committed by an official in an area in which that official has final policymaking authority is "official" just by the nature of the actor. *See id.* Thus, even "a transient constitutional violation" by the sheriff "can be a basis for municipal liability because of the way the Supreme Court has defined 'policy' and 'custom' for purposes of Section 1983." *Wright v. Fentress Cnty., Tennessee*, 313 F. Supp. 3d 886, 890 (M.D. Tenn. 2018) (holding county liable for sheriff's assault of an inmate in his custody); *see also Congine v. Vill. of Crivitz*, 947 F. Supp. 2d 963, 975 (E.D. Wis. 2013) (holding police chief may have final policymaking authority with regard to individual decisions regarding enforcement and not just policies or rules).

* * *

Accordingly, Sheriff Hanna's false imprisonment and sexual assault of Ms. Biggs is attributable to the municipal defendants because it took place in a context in which Sheriff Hanna had final policymaking authority. The district court's decision to the contrary is inconsistent with Tenth Circuit precedent and the very purpose of § 1983.

Ms. Biggs but not if he sexually assaulted her himself. Such a loophole would make no sense given the purpose of § 1983 and of the final policymaker avenue for establishing municipal liability under *Pembaur*.

II. The District Court Need Not Retry This Case on Remand.

Because Sheriff Hanna's unconstitutional conduct was in an area in which he had final policymaking authority, this Court should reverse the dismissal of the municipal entity defendants and remand for further proceedings. In doing so, this Court should instruct the district court that it need not retry factual questions that were already resolved at trial.

The law of the case doctrine bars any retrial on liability. Under that doctrine, a "court should not reopen issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 236 (1997). It applies to all "issues previously decided, either explicitly or by necessary implication." *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1259 (10th Cir. 2004) (quoting *Octagon Res., Inc. v. Bonnett Res. Corp.*, 87 F.3d 406, 409 (10th Cir. 1996)). "As to issues of fact, given an unchanged record, 'law-of-the-case reluctance [to reconsider] approaches maximum force.'" *Teague v. Mayo*, 553 F.3d 1068, 1073 (7th Cir. 2009) (quoting 18B Wright, Miller & Cooper, 18B Fed. Prac. & Proc. Juris. § 4478.5 (2d ed. 2002)).

As explained in Part I, the County and Sheriff's Department are liable for Sheriff Hanna's official acts *as a matter of law* because he was acting in an area in which he had final policymaking authority. A jury already found that the Sheriff violated Ms. Bigg's constitutional rights on the job, the court entered judgment against the Sheriff on that basis, and no defendant appealed those decisions. *See* JA

236-238. So that judgment is now the law of the case. *See Mitchell v. State Farm Fire & Cas. Co.*, 15 F.3d 959, 960, 963 (10th Cir. 1994) (holding that un-appealed jury verdict was "the law of the case" and instructing the district court to treat it as such on remand). Finality thus bars a retrial on the only fact issue relevant to the County's liability, as it must "to prevent the attack on the integrity of the judicial process [that would occur] if a second jury's findings were inconsistent with the first." *Devilla v. Schriver*, 245 F.3d 192, 197 (2d Cir. 2001) (internal quotation marks omitted); *see Mitchell*, 15 F.3d at 963; *Teague*, 553 F.3d at 1073 (holding that verdict that resolved fact issue as to one claim barred retrial of same fact issue underlying another claim).

Nor is a new trial necessary with respect to damages that the Sheriff—and therefore the County and Sheriff's Department—caused Ms. Biggs. Under § 1983, co-defendants are jointly and severally liable for indivisible injuries for which they are both responsible. *Northington v. Marin*, 102 F.3d 1564, 1569 (10th Cir. 1996). Since the County and Sheriff's Department are both responsible for the Sheriff's constitutional violation, they are also liable for the damages awarded against him. *See* Restatement (Third) of Torts: Apportionment Liab. § 13 (2000) ("A person whose liability is imputed based on the tortious acts of another is liable for the entire share of comparative responsibility assigned to the other."). "[J]ust as consistent verdict determinations are essential among joint tortfeasors, consistent damage

awards on the same claim are essential among joint and several tortfeasors." *Hunt v. Inter-Globe Energy, Inc.*, 770 F.2d 145, 148 (10th Cir. 1985). A new trial on damages, then, would be equally impermissible.

That the County and Sheriff's Department chose not to participate in the trial after the district court dismissed the claims against them does not change matters. When an issue "has been decided adversely to one or more codefendants, the law of the case doctrine precludes all other codefendants from relitigating" it. *Integra Realty*, 354 F.3d at 1259 (quoting *United States v. LaHue*, 261 F.3d 993, 1010 (10th Cir. 2001)); *see also Newsome v. McCabe*, 319 F.3d 301, 303 (7th Cir. 2003) (holding that law of the case barred city from litigating issues decided against its officers in a previous appeal under § 1983, even though city was not party to the first appeal); Wright & Miller, 18B Fed. Prac. & Proc. Juris. § 4478.5 (3d ed.) (explaining that the "law of the case may affect a party who did not participate in the argument that framed the first ruling").

Furthermore, despite the district court's interlocutory order dismissing the claims against the County and Sheriff's Department, these municipal entities remained a named party to the case in the form of "the Sheriff in his official capacity," had full notice of the trial, and could have sought to participate to protect their rights in the foreseeable event that this Court reversed the dismissal of the entity defendants on appeal. *Cf. Newsome*, 319 F.3d at 302-03 (city participated in § 1983

trial against its officers even though it was not a defendant). As the district court found, "[t]he Entity Defendants did not object to the dismissal order's failure to mention the official-capacity claims against Mr. Hanna, and . . . [t]hey made no objection when the Final Pretrial Order, jury instructions, and verdict form named Mr. Hanna in both his official and individual capacities, but were quick to reenter the case once final judgment was entered." JA 228. These defendants took a gamble and made the decision to leave Sheriff Hanna to his own devices in defending himself at trial. There is no reason to tax judicial resources—and require Ms. Biggs to rehash her sexual assault before a new jury—to allow the County and Sheriff's Department a second bite at an issue it already watched the jury decide against it.

III. Sedgwick County is a Proper Defendant.

Plaintiff properly alleged claims against Sheriff Carlton Britton (the Sheriff's Department), the Board of County Commissioners of Sedgwick County (the County), and Sheriff Hanna in his official capacity—all of which are, effectively, the County. Back in April of 2020, the County argued, and the district court agreed, that it was not a proper defendant in this case because under the Colorado Constitution, the County is a separate and distinct entity from the Sheriff's Department. *See* JA 149-150.

The County did not raise this argument again in the post-trial briefing and for good reason: "Colorado law forecloses any notion that a sheriff's office should be

held to account alone, independent from 'the county.'" *Chavez v. Bd. of Cnty. Commissioners of Lake Cnty.*, 426 F. Supp. 3d 802, 813 (D. Colo. 2019). By statute, any money judgment "against a county of this state in the name of its board of county commissioners or against any county officer in an action prosecuted by or against him in his official capacity or name of office" must be paid either out of "the ordinary county fund" or through a special property tax, which "shall be paid over, as fast as collected by the [treasurer], to the judgment creditor." Colo. Rev. Stat. § 30-25-104(1); *see also* Colo. Const. art. XIV, § 8 (recognizing Sheriff as "county officer"). "In other words, when a *Monell* claim is based on a sheriff-made policy, any distinction between suing the sheriff's office versus suing the county becomes purely theoretical, because the county will pay regardless." *Chavez*, 426 F. Supp. 3d at 813.

Practicalities aside, the district court was also wrong to state that the County (or, more precisely, the Board of County Commissioners) is not a proper defendant. JA 149-150. The district court relied on the fact that the County "does not have the legal authority to control or supervise the Sheriff." *Id.* But that's just a recognition of the fact that the Sheriff is a final policymaker for the County. That does not mean the County is an improper defendant. This Court has long held that a suit against a county sheriff in his official capacity is "equivalent" to a suit against the county itself. *See Cox v. Glanz*, 800 F.3d 1231, 1254 (10th Cir. 2015); *see also Porro v. Barnes*, 624 F.3d 1322, 1328 (10th Cir. 2010) ("Suing individual defendants in their

official capacities under § 1983 . . . is essentially another way of pleading an action against the county or municipality they represent."); *Grady v. Jefferson Cnty., Colo.*, No. CIVA07CV01191-WDMCBS, 2008 WL 178923, at *2 (D. Colo. Jan. 17, 2008) ("an action against the Sheriff in his official capacity is essentially an action against the entity that employs him-i.e., Jefferson County"); *Sanchez v. Hartley*, 65 F. Supp. 3d 1111, 1127 (D. Colo. 2014) (recognizing the county can be held liable when the sheriff is held to set "official policy" for the county and denying motion to dismiss against County Board of Commissioners). Thus, the district court also erred in dismissing the claims against the County Board of Commissioners on the ground that it was not an appropriate municipal defendant.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court's dismissal of claims against the County and Sheriff's Department and remand with instructions for the district court to enter judgment against the municipal entity defendants.

REASONS FOR ORAL ARGUMENT

Oral argument is requested because this case presents a novel question of law in the Tenth Circuit and raises an issue critical to ensuring that victims of horrific abuses of state power have meaningful recourse. Oral argument is also important

because there is a need to clarify existing Tenth Circuit precedent governing municipal liability under § 1983.

DATED: July 17, 2023

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Date: July 17, 2023

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I hereby certify that on July 17, 2023 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth 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.

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