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For The Eighth Circuit
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RE: 24-1285 Matthew Locke v. County of Hubbard, et al

Dear Counsel:

The amici curiae brief of the amici Farhang Heydari and Jessica Pishko in support of the appellant has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

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District Court/Agency Case Number(s): 0:23-cv-00571-WMW

No. 24-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Matthew Locke,

Plaintiff-Appellant,

v.

County of Hubbard, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of
Minnesota, Hon. Wilhelmina M. Wright

No. 0:23-cv-00571-WMW

**Brief of *Amici Curiae* Jessica Pishko and Farhang Heydari
In Support of Appellant Locke**

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INTEREST OF *AMICUS CURIAE*¹

Jessica Pishko is a lawyer and journalist focusing on the role of the power of sheriffs in America. Previously, she was a Fellow in Sheriff Accountability at the Rule of Law Collaborative at the University of South Carolina School of Law, a staff attorney for The Justice Collaborative, a nonprofit organization focused on criminal justice reform, and the author of numerous whitepapers and policy guidance for nonprofits on the issue of sheriff accountability.

Farhang Heydari is an Assistant Professor of Law at Vanderbilt Law School, where his research and teaching focus on policing and criminal law. Professor Heydari's research appears in leading law journals, including the *Stanford Law Review*, *University of Virginia Law Review*, and *George Washington Law Review*. His work in progress, tentatively titled *The Sheriff's Constitution*, explores the law and politics of a sheriff's enforcement discretion. Prior to joining the faculty

¹ Pursuant to Rule 37, counsel for *amici* affirms that no counsel for any party authored this brief in whole or part, and no person or entity, other than *amici* and counsel, made any monetary contribution to its preparation or submission. All parties timely consented to *amici* filing this brief.

at Vanderbilt Law, Professor Heydari served as the Executive Director of the Policing Project at the New York University School of Law, a non-profit organization that promotes just and effective policing through democratic accountability, equity, and community engagement.

Amici rarely file amicus briefs generally, and have never done so together prior to this case. Both are experts on a variety of historical, political, and legal issues regarding the office of the sheriff in America. Although this brief is filed on behalf of Plaintiff-Appellant, *amici's* interest are not in the outcome of any particular case or claim and do not write to support either affirmance or reversal. Rather, *amici* write in the interest of ensuring that the court has fuller context regarding the county sheriff's unique policymaking role. *Amici* therefore write only to address the limited question of the role of sheriffs as final policymakers in a *Monell* analysis.

SUMMARY OF ARGUMENT

The argument in this brief relates only to the district court's dismissal of Appellant's *Monell* claim. This brief argues that sheriffs, by virtue of the history and tradition of the office as well as their statutory authority, are final, elected policymakers for their counties on matters of law enforcement. The district court erred to find a county sheriff simply held the role of employee of a county and that *Monell's* prohibition on liability based merely on employment barred in part Appellant's claims.

The argument proceeds in two parts: Part I describes why, on matters of law enforcement policy, elected sheriffs generally are considered policymakers for their county, and those policies are imputed to the county for *Monell* purposes. In addition to controlling legal precedent, this Part focuses on providing the court with additional context regarding the history and traditions of the office of the sheriff.

Part II explains why, given the unique authority of the county sheriff, private remedies such as those sought by Appellant, are so essential.

ARGUMENT

I. The Sheriff Acts As Final Policymaker For the County On Issues Related To His Criminal Enforcement Authority.

County sheriffs have a robust and unique history in the United States as independent, elected officials. This independence allows them to establish and implement criminal enforcement policies beyond the review of other county officials, and with unparalleled discretion compared to top law enforcement officials such as chiefs of police. This aspect of the office is celebrated and cherished by sheriffs and emphasized by sheriff professional associations as the core of the sheriff's importance in American law enforcement. It also means that under a *Monell* analysis a sheriff is a final policymaker when it comes to county actions related to law enforcement.

A. The History, Traditions, and Structure of the Office of Sheriff Reflect Independence from County Control.

The office of the sheriff has deep historical roots. Sheriffs are the oldest form of law enforcement in the country and the only ones that existed at the time of the American Revolution. The office of sheriff predates modern democracy, with roots tracing back to medieval England. *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 793 (1997). In the U.S., most states enshrined

the office of the sheriff in their state constitutions, though others did so in early statutes. See *Minnesota Sheriffs' Association, History*, available at <https://www.mnsheriffs.org/association-history> (last accessed June 8, 2024) (dating the formation of the Minnesota Sheriffs' Association to 1885); Cameron DeHart, *The Rise and Fall of Elected Sheriffs* (July 2020), available at <https://rb.gy/w4ikoq> (dating the establishment of Minnesota sheriffs as elected officials to 1851); see also 1 W. Anderson, *A TREATISE ON THE LAW OF SHERIFFS, CORONERS AND CONSTABLES* 2 (1941) ("A sheriff is an officer of great antiquity, dignity, trust and authority"); Anthony O'Rourke, Rick Su & Guyora Binder, *Disbanding Police Agencies*, 121 Colum. L. Rev. 1327, 1372 (2021) ("As a historical matter, the office of the sheriff in many states preceded the creation of county governments as we now know them").

The sheriff is our nation's only elected law enforcement officer. Most sheriffs are elected to four-year terms on a county level by popular vote and may serve unlimited consecutive terms so long as voters choose to keep them in office; sheriffs view this direct relationship with their communities

as a source of authority. See National Sheriffs' Association, *Preserving the Office of Sheriff By Continuing the Election of Our Nation's Sheriffs*, available at https://www.sheriffs.org/sites/default/files/tb/Preserving_the_Office_of_Sheriff_Through_Election.pdf (last accessed June 6, 2024) ("The Office of Sheriff provides a 'check and balance' as an 'elected' law enforcement officer who is 'directly responsible' to the citizens and the Office of Sheriff protects the populace from undue political influence by members of the county board/supervisors, etc. on local law enforcement and public safety issues").

These two pillars – the office's historic origins and its direct electability – are touted by sheriffs as the bedrock of the office's independence from other county officials. For example, the National Sheriff's Association (NSA),² after noting the office's "historical roots," explains that "[t]he Office

² The National Sheriffs' Association (NSA) is "a professional association dedicated to serving the Office of Sheriff and its affiliates through law enforcement education and training, and through the provision of general law enforcement informational resources." National Sheriffs' Association, *About NSA*, available at <https://www.sheriffs.org/about-nsa> (last accessed June 8, 2024). The NSA is the largest nonprofit organization that represents

of Sheriff is not a department of county government, it is the independent office through which the Sheriff exercises the powers of the public trust. No individual or small group hires or fires the Sheriff, or has the authority to interfere with the operations of the office. Elected sheriffs are accountable directly to the constitution of their state, the United States Constitution, statutes, and the citizens of their county.” Sheriff Roger Scott, *Roots: A Historical Perspective on the Office of Sheriff*, National Sheriffs’ Association, available at <https://www.sheriffs.org/about-nsa/history/roots> (last accessed June 6, 2024). The NSA is explicit that the office of sheriff “is not directly controlled by local county board/commissioners, supervisors, mayor, etc.” National Sheriffs’ Association, *Preserve the Office of Sheriff By Continuing the Election of Our Nation’s Sheriffs*.

The NSA’s position, although perhaps self-serving, also has ample support in scholarship, which widely recognizes the sheriff’s independence

the interests of sheriffs across the country and produces materials about the office of sheriff for educational purposes.

from county officials. *See, e.g.,* Aaron Littman, *Jails, Sheriffs, and Carceral Policymaking*, 74 Vand. L. Rev. 861, 903 (2021) (“[Sheriffs] can effectively override the decisions of other actors in the local criminal legal system, including the decision of a municipal police officer to make a custodial arrest, the decision of a prosecutor to request and a judge to impose bail, and the decision of a court to order a particular sentence following conviction.”); *Disbanding Police Agencies*, 121 Colum. L. Rev. at 1372 (2021) (“[S]heriffs operate independently of county governments and are generally insulated from county control”); Mirya Holman & Emily Farris, *Sheriffs in the United States: Authority and Autonomy in Local Criminal Justice*, Comparative Politics Newsletter 28(1): 38-45, 39 (2018) (“Sheriffs also have an impressive level of autonomy in the United States, stemming from the political development of the office and the direct election of sheriffs. The autonomy means that sheriffs can work as independent leaders, which produces opportunities for policy innovation”); David Kopel, *The Posse Comitatus And The Office Of Sheriff: Armed Citizens Summoned To The Aid Of Law Enforcement*, 104 Journal

of Criminal Law and Criminology 761, 781 (2015) (“[I]n the United States, the sheriff’s oath is also to the supreme ruler, the law itself”).

The sheriff also exerts near total control over internal office matters. As the NSA states: “[t]he internal operation of an Office of Sheriff is *the sole responsibility* of the elected Sheriff (emphasis added).” National Sheriffs’ Association, Definition of “Office of Sheriff,” available at <https://rebrand.ly/a1a46d> (last accessed June 6, 2024). The sheriff has sole control over the allocation of internal resources. *See, e.g., McCaffrey v. Chapman*, 921 F.3d 159, 168 (4th Cir. 2019) (“Sheriffs, by virtue of their executive roles, do not set policy in the same way as those performing legislative roles. But, in attempting to faithfully enforce the law, they must make policy-oriented decisions about the allocation of manpower and financial resources. A deputy sheriff necessarily carries out the sheriff’s policies, goals and priorities which were approved by the electorate in a political election”). This includes the hiring and firing of deputies who serve the sheriff himself. Minn. Stat. § 387.14 (“The sheriff shall appoint in writing the deputies and other employees, for whose acts the sheriff shall be

responsible and whom the sheriff may remove at pleasure.”); see *Jeffes v. Barnes*, 208 F.3d 49, 61 (2nd Cir. 2000) (holding as a matter of law that the elected sheriff was “the County's final policymaking official” with respect to personnel even when some aspects of employment were governed by civil service); *Terry v. Cook*, 866 F. 2d 373, 377 (11th Cir. 1989) (“The closeness and cooperation required between sheriffs and their deputies necessitates the sheriff's absolute authority over their appointment and/or retention”).

County officials exercise some control over the sheriff via the sheriff's budget, but budgetary control does not produce control over enforcement or personnel policies. In Georgia, for example, courts are explicit that a county authority to set a budget does not grant it authority to determine how that budget will be spent. Rick Su, et. al., *Defunding Police Agencies*, 71 Emory L.J. 1197, 1219–20 (2022). Other states follow similar principles. See Attorney General Daniel E. Lungren, Opinion No. 93-903 (Cal. May 3, 1994) (“A county board of supervisors is not authorized to govern the actions of a sheriff or district attorney concerning the manner in which their respective budget allotments are expended or the manner in which personnel are

assigned"). To prevent excessive county control, Minnesota law allows sheriffs to appeal to the district court if they feel the county board has reduced their budget or salary in a way that is "arbitrary, capricious, oppressive or without sufficiently taking into account the extent of the responsibilities and duties of said office, and the sheriff's experience, qualifications, and performance." Minn. Stat. § 387.20, subd. 7.

B. The Sheriff as Final Policymaker for *Monell* Purposes

The degree of independence with which the sheriff sets law enforcement policy for the county is central to the question of municipal liability under *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978). As the Court explained in *Monell*, "it is when execution of a government's policy or custom, whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy*, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694 (emphasis added).

The actions of the county sheriff, at least with respect to law enforcement policy, meet this standard. A sheriff is the county's elected representative and top law enforcement officer. When pursuing his law

enforcement duties, he sets county policy. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 481 (1986) (“If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government ‘policy’ as that term is commonly understood”). And although the sheriff sets policy on behalf of the county, he is unlike traditional county employees. *See Askew v. Sheriff of Cook Cnty.*, 568 F.3d 632, 636 (7th Cir. 2009) (“[T]he Sheriff is an ‘independently elected county officer and is not an employee of the county in which the sheriff serves.’” (quoting *Carver v. Sheriff of LaSalle Cnty.*, 787 N.E.2d 127, 136 (Ill. 2003))). The sheriff acts of his own accord and is “not subject to significant review.” *Granda v. City of St. Louis*, 472 F.3d 565, 568 (8th Cir. 2007) (internal citation omitted) (citing *McGautha v. Jackson County Collections Dep't*, 36 F.3d 53, 56 (8th Cir.1994)).

As such, it should come as no surprise that courts across the country agree that sheriffs are the final policymaking authority in the county on issues of law enforcement. *See, e.g., McMillan*, 520 U.S. at 785 (Parties agreed that the sheriff had “final policymaking authority” under Alabama law);

Beck v. Haik, 234 F.3d 1267, 2000 WL 1597942, at *4 (6th Cir. Oct. 17, 2000) (table) (“As a matter of well-settled Michigan law, [the sheriff’s] policies are those of the County.”); *Ryan v. County of Du Page*, 45 F.3d 1090, 1092 (7th Cir. 1995) (A rule forbidding mask-wearing inside the courthouse was “an act of the sheriff because he is the policymaker for the county sheriff's office.”); *Turner v. Upton County*, 915 F.2d 133, 136-137 (5th Cir. 1990) (“It has long been recognized that, in Texas, the county sheriff is the county's final policymaker in the area of law enforcement, not by virtue of delegation by the county's governing body but, rather, by virtue of the office to which the sheriff has been elected.”); *Crowder v. Sinyard*, 884 F.2d 804, 828 (5th Cir. 1989) (Arkansas sheriffs “solely responsible for the procedures and practices of the department.”); *Buchanan v. Williams*, 434 F. Supp. 2d 521, 531 (M.D. Tenn. 2006) (A “single act of a sheriff is sufficient to represent a decision of the County under federal law.”).³

³ Although *amici* focus on sheriffs in this brief, the actions of other law enforcement officers have also been held to establish municipal policy when the officer had autonomy similar to that of the county sheriff. *See, e.g., Angarita v. St. Louis Cnty.*, 981 F.2d 1537, 1547 (8th Cir. 1992) (actions of

C. Sheriff Aukes's actions were the final actions of a county policymaker

In Minnesota, the sheriff is “responsible both by common and statutory law to keep and preserve peace and good order within his county.”

In re Olson, 300 N.W. 398, 399 (Minn. 1941). In interpreting the duties of the sheriff in Minnesota, the Office of the Minnesota Attorney General has recognized that sheriffs have a duty imposed by law to preserve the peace everywhere in his county, even where there are independent policing agencies. Minnesota Attorney General Op. 2681 (October 14, 1997) available at <https://www.ag.state.mn.us/office/opinions/2681-19971014.pdf> (“[W]ithin its own county, the sheriff is the chief law enforcement officer

superintendent of St. Louis County police were sufficient to impose liability on the county because he “had final policymaking authority in the St. Louis County Police Department; was the highest ranking police official in St. Louis County; was responsible for the entire department; and was responsible for drafting and approving many of the department's general orders”); *Ware v. Jackson County*, 150 F.3d 873, 885 (8th Cir.1998) (prison director was final decision maker for those decisions municipal liability could be imposed because he “promulgated written policy, had the ability to impose and modify disciplinary actions, and was responsible for the operation of the jail and the implementation of the policies that he put in force”).

with a non-delegable duty to enforce the laws and ‘preserve the peace of his county’”). When performing these duties, the Sheriff of Hubbard County acts as a final policymaker for Hubbard County.

Sheriff Aukes’s decisions and conduct are policy for the county on matters of law enforcement. On his own website, Sheriff Aukes calls himself “the chief law enforcement authority in the county.” Office of the Sheriff, *Hubbard County, Minnesota*, available at <https://www.co.hubbard.mn.us/sheriff> (last accessed June 6, 2024). He has announced publicly that he would not enforce particular state laws in his county. *See, e.g.,* Robin Fish, *Town hall speakers warn of gun bills’ dire effects*, Parks Rapids Enterprise (Feb. 27, 2023), available at <https://rebrand.ly/t4ass6m>; MN Gun Owners’ Caucus, X (Feb. 9, 2023), available at <https://rebrand.ly/ilb9qxi>. In the early days of the COVID-19 pandemic, Sheriff Aukes, on his own authority, chose to halt inmate visitation in the jail, cease fingerprinting services, and continue gun permitting, all in the interest of maintaining the safety of his deputies and the public. *See* Cory Aukes, *Ask the Sheriff: The Sheriff’s Office is Still Working*

During the Pandemic, Parks Rapids Enterprise (April 16, 2020), available at <https://rebrand.ly/o7ne0ae>. In June of 2021, Sheriff Aukes closed access to tribal lands in order to prevent protestors from assembling, describing this action as “his decision.” See Alleen Brown, *Minnesota Sheriff Barricades Pipeline Resistance Camp’s Driveway*, The Intercept (June 28, 2021), available at <https://rebrand.ly/nm54g43>.⁴ In setting all of these policies, Sheriff Aukes was the policymaker for the county pursuant to his elected office.

Turning to this case, Appellant alleges unconstitutional conduct committed by the elected sheriff within the scope of his law enforcement duties. In particular, Appellant alleges that Sheriff Aukes was not only present at the scene of the incident, but was also personally involved in the application of so-called “pain compliance” techniques that resulted in Locke’s injuries and permanent disfigurement. (App. 6, R. Doc. 1 at ¶ 19)

⁴ In an undated letter on official letterhead, Sheriff Aukes describes his policy to arrest protestors as “[his] decision,” which was made without reference to any other authority, lawmaker, or court. Cory Aukes, *Updated Letter from Sheriff Cory Aukes*, available at <https://rebrand.ly/hjso28m> (last accessed June 8, 2024).

(alleging that “[Sheriff] Aukes applied pressure to Plaintiff’s hypoglossal nerve, mandibular angle, and/or infra orbital as very painful pressure point control tactics”). The Sheriff also directed the actions of his deputies on scene as they engaged in enforcement actions against Plaintiff.⁵ As a result, Sheriff Aukes was clearly acting as the policymaker for the county.

II. The Public Interest Strongly Counsels Toward Providing Accountability For Sheriff Aukes' Decisions And Actions As Policymaker For The County.

Although often ignored relative to their municipal counterparts, sheriffs play an important role in our national system of law enforcement. America has over 3,000 sheriffs’ offices that employ about 25% of all sworn officers and make about 20% of all arrests.⁶ United States Department of

⁵ *Amici* cannot be certain, but the court below may have erred in part on a mistaken belief that Sheriff Aukes was not the elected sheriff of the county, but rather a deputy working for the county. (See App. 18, R. Doc. 23 at 1) (“Defendants Cory Aukes and Scott Parks are deputies for the Hubbard County Sheriff's Office”).

⁶ Notably, as relevant to the question of use of force and oversight, a recent news report found that sheriffs’ offices are involved in three times more fatalities than those in the custody of police departments. See E.D. Cauchi &

Justice, *Sheriffs' Officers Personnel*, 2020 1 (Nov. 2022), available at <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/sop20.pdf> (last accessed June 10, 2024). Sheriffs are particularly important policing figures in the 72 percent of America which is rural where “sheriffs act as the primary law enforcement.” Cauchi, *County sheriffs wield lethal power, face little accountability: A failure of democracy*. As small police departments are forced to close for lack of funding, sheriffs’ offices are “increasingly, they are taking on a larger role in policing American towns, since small police departments have been shutting down and ceding their responsibilities to county sheriffs.” *Id.*

And yet, as explained above, the office of the sheriff operates with a startling degree of independence. Sheriffs are largely beyond the control of their county peers. See James Tomberlin, *Don't Elect Me: Sheriffs and the Need*

Scott Pham, *County sheriffs wield lethal power, face little accountability: A failure of democracy*, CBS News (May 20, 2024), available at <https://www.cbsnews.com/news/county-sheriffs-deaths-accountability> (last accessed June 10, 2024).

for Reform in County Law Enforcement, 104 Va. L. Rev. 113, 129 (2018). Few sheriffs are subject to civilian oversight. See Sharon Fairley, *Survey Says: Powerful Sheriffs Successfully Limit The Rise Of Civilian Oversight*, 23 NYU J. Leg. & PP 807 (2022); see also <https://bjs.ojp.gov/document/soppt20st.pdf> (“In 2020, about 10% of all sheriffs’ offices had a civilian complaint review board or agency.”). Sheriffs also tend to be more resistant to pressure from insurers than appointed police. John Rappaport, *How Private Insurers Regulate Public Police*, 130 Harv. L. Rev. 1539, 1594 n.322 (2017). This leaves elections as the primary check of the sheriff’s decision-making, but are generally low-turnout and uncontested affairs. See Michael Zoorob, *There's (rarely) a new sheriff in town: The incumbency advantage for local law enforcement*, 80 Electoral Studies (Dec. 2022), 102550, available at <https://rb.gy/eqtd2v> (last accessed June 10, 2024).

The data shows that sheriffs’ offices are responsible for policing a vast majority of this country, and do so as elected officials largely without oversight. Unlike police officers (or even chiefs of police), who are employees hired, overseen, and, if necessary, terminated by a municipality,

sheriffs answer only to their electorate. It is therefore particularly important for courts to properly consider the unique role and policymaking abilities of sheriffs. They are accountable to their constituents, the courts, or no one.

CONCLUSION

In deciding whether the court below properly held that *Monell* barred in part Appellant's claims, this Court should take into particular consideration the unique role of sheriffs as elected law enforcement officers, as well as the limited review available in general when sheriffs exceed their constitutional and statutory authority. The history and tradition the office makes clear that sheriffs are policymakers for the county. The lower court erred to hold that sheriffs should be treated as "employees" of the county under *Monell* rather than top, elected policymakers in law enforcement policy.

Dated June 11, 2024

Respectfully submitted,

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Certificate of Compliance

The undersigned certifies that the brief of *Amici Curiae* complies with Fed. R. App. P. 32, in that it was prepared in Microsoft Word 365 in 14-point proportional font and contains 3,725 words.

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