Nos. 24-1911 & 24-1919

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SOPHIA WILANSKY,
Plaintiff/Appellant,

vs.

MORTON COUNTY, NORTH DAKOTA, *et al.*,
Defendants/Appellees,

THOMAS IVERSON,
Defendant.

SOPHIA WILANSKY,
Plaintiff/Appellant,

vs.

PAUL D. BAKKE, in his personal capacity, *et al.*,
Defendants/Appellees.

On Appeal from the U.S. District Court for the District of North Dakota,
No. 1:18-cv-236 and No. 3:23-cv-00142,
Honorable Daniel M. Traynor, U.S. District Judge

AMENDED REPLY BRIEF OF APPELLANT SOPHIA WILANSKY

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Defendants' response briefs unabashedly repeat the district court's mistakes: they "ignore[] reasonable inferences supported by the facts alleged" and instead "dr[a]w inferences in [their own] favor." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). This fundamental error infects their Fourth Amendment analysis, leading Defendants to focus on whether using force *to disperse* a crowd is a seizure. But that is not relevant to this appeal. Sophia does not allege that the Defendants used physical force in order to disperse her or drive her away from the barricade. Instead, drawing all reasonable inferences in her favor as the Court must, Sophia alleges that Defendants intended to and actually did restrain her and terminate her freedom of movement. The relevant questions are whether *that* force is constitutionally unreasonable and whether it was clearly established as such in November 2016.

Defendants' responses to the Fourteenth Amendment arguments are only slightly more responsive to what Sophia argues—and no more correct. This circuit and two others already recognize that *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), made objective reasonableness the standard for Fourteenth Amendment excessive-force claims. *See Davis v. White*, 794

F.3d 1008, 1011 (8th Cir. 2015); *Ryan v. Armstrong*, 850 F.3d 419, 417 (8th Cir. 2017); *Edrei v. Maguire*, 892 F.3d 525, 534 (2d Cir. 2018); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016). And even if Sophia needed to show that the officers' conduct shocked the judicial conscience, she has done so. Defendants' conclusion that "the alleged conduct of the individual Defendants does not otherwise shock the conscience in a constitutional sense," City & Cnty. Br. at 50, is as callous as it is incorrect.

To this day, Defendants "deny responsibility for the explosion which injured [Sophia's] arm." City & Cnty. Br. at iii. But Sophia's arm did not spontaneously combust, and she has pleaded plausible allegations establishing Defendants' liability for her grievous injury. For the reasons set out below and in Sophia's principal brief, the Court should reject Defendants' efforts to avoid accountability for their wrongs, reverse the district court's dismissals, and remand for full discovery.

I. Sophia plausibly alleged Fourth Amendment violations to which qualified immunity does not apply.

A. Both a seizure by force and a seizure by control occurred.

As Sophia's brief showed (Br. at 17–21), she plausibly alleged both seizure by force and by control. Seizure by force "requires the use of force

with intent to restrain," *Torres v. Madrid*, 592 U.S. 306, 317 (2021). One way to show seizure by control, meanwhile, is to show "the termination of freedom of movement" by means "set in motion or put in place in order to achieve that result." *Id.* at 322.

Sophia's allegations objectively indicate Defendants meant to restrain, rather than repel or disperse, her when they hit her with rubber bullets and then "nearly severed her left hand from her arm" "with an explosive munition." (App. 359, R. Doc. ¶¶ 148, 150–51.) Taken in the light most favorable to Sophia, as these allegations must be, at least six aspects of the attack support this inference, including that Defendants had no valid reason to repel her from the barricade and continued attacking her even after she started moving away from the barricade.[1] *See* Br. at 18–19. Sophia was therefore seized for Fourth Amendment purposes at two separate

[1] Defendants' accusations that Sophia's allegations contradicted her deposition testimony on this point are inaccurate. Sophia stands by her deposition testimony. She did not testify that Defendants ceased firing at her when she began to run. Rather, she testified: (1) that she was not struck by anything between the rubber bullet and the explosive munition; and (2) that she did not see or hear anything fired at her as she ran. (App. 185, R. Doc. 120-10, at 134–35.) Given that night's trauma, it is understandable that Sophia may not remember every detail. And a pleading need not be based exclusively on the plaintiff's personal recollection; she can rely on her later investigation.

points: first, when Defendants trapped her against the metal sheet with less-lethal munitions, temporarily preventing her from moving away; and second, when Defendant Moll intentionally hit her with an explosive munition.

None of Defendants' arguments to the contrary changes this analysis. Over and over, Defendants incorrectly invite the Court to draw inferences in their favor rather than in Sophia's. For example, they point out that in the months leading up to Sophia's injury, "other protests occurred in Morton County involving confrontations between protesters and law enforcement, including a large confrontation … at this same location only a few hours prior." City & Cnty. Br. at 29. "These admitted facts," Defendants contend, "establish continuing chaos and tension between protesters and law enforcement." City & Cnty. Br. at 30. They also point to other protesters' actions the day before, "using a semi-truck" to tow a burned-out truck away from the barricade, to assert that "the continuing risk to the barricade would be in the forefront of any reasonable office's [sic] mind." State Br. at 36–37.

But this is all *Defendants'* version of the events. Sophia alleged a different version: when she approached the bridge, there was no

"continuing chaos and tension." Rather, the scene had been calm and peaceful for hours. Br. at 5. Officers behind the barricade were no longer deploying munitions or ordering anyone to disperse, and the handful of protesters remaining near the bridge were mostly huddled around small campfires, talking quietly, and trying to keep warm. *Id.* That is the version of the facts the Court must consider in assessing whether dismissal was proper. Deciding between Sophia's and Defendants' versions of the events is a task reserved solely to the jury, not the district court. And it is certainly not part of the dismissal analysis.

Next, Defendants say that Sophia "was trespassing at all locations where force was allegedly applied against her." City & Cnty. Br. at 32. That conclusion, however, does not appear in Sophia's pleadings; it comes from *Dundon v. Kirchmeier*'s discussion of the summary judgment evidence in *that* case. *See* City & Cnty. Br. at 31–32 (quoting 85 F.4th 1250, 1254 (8th Cir. 2023)). Defendants seem to believe that the Court can properly consider this because a court "may take judicial notice of, and give effect to, its own records in another, but interrelated proceeding." City & Cnty. Br. at 18.

But the so-called judicial notice that Defendants propose would stretch the doctrine far beyond its bounds. The Court may take judicial

notice of the existence of the other case or that certain arguments or filings were made in another case. It may *not*, however, transplant substantive evidence and legal conclusions from another case to this one and then treat the evidence and conclusions as factual allegations for dismissal purposes. *See United States v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011) ("Pursuant to Federal Rule of Evidence 201, we may also take judicial notice of 'matters of public record,' but not of facts that may be 'subject to reasonable dispute.' More specifically, we may not, on the basis of evidence outside of the Complaint, take judicial notice of facts favorable to Defendants that could reasonably be disputed." (citations omitted)); *Lustgraaf v. Behrens*, 619 F.3d 867, 885 (8th Cir. 2010) ("Judicial notice of a fact is only to be taken when that fact is not subject to reasonable dispute.").

Even if Defendants' contention that Sophia was trespassing on the bridge were properly before the Court, that would still be another impermissible inference in Defendants' favor. Sophia alleged that she had walked around and conversed with protesters for about an hour in clear view of the officers. Br. at 6. No officer objected to her presence or directed her to leave during that time. *Id.* Around 3:30 a.m., when Sophia moved

closer to the barricade, she talked for some time, in plain view, with protesters already there. *Id.* Again, no officer objected to her presence or ordered her to move. *Id.* These facts support an inference that the officers had no objection to Sophia's presence on the bridge, did not believe her to be dangerous, and were not treating her as a trespasser.[2] On a motion to dismiss, the Court must adopt that inference, not Defendants'.

Later, Defendants argue that "[a]s a practical matter, the stinger ball grenades and other less-lethal munitions allegedly deployed did not, as a matter of common sense, create any barrier to [Sophia's] retreat." City & Cnty. Br. at 33. This is a factual dispute disguised as legal argument. Sophia alleged that the sudden hail of less-lethal munitions made her and Stephen duck behind a metal sheet propped up against the truck. Br. at 7. Defendants were firing the munitions so rapidly that the two were stuck behind the sheet, unable to leave without sustaining injuries. *Id.*

When a rubber bullet hit Sophia's arm, she panicked and fled south despite Defendants continuing to fire munitions at her. *Id.* at 8. In other

[2] The State Defendants complain that Sophia "does not explain why she or the other protestors were standing 'vigil' on a closed bridge in the middle of the night." State Br. at 11. Sophia's subjective motivations for standing peacefully in a certain spot are not relevant; what matters is that the officers had no objective reason to fear her.

words, she decided to risk further injury and run. That does not mean, however, that the munitions never "create[d] any barrier to [Sophia's] retreat." City & Cnty. Br. at 33. They actually created such a barrier until Sophia, in desperation, believed she had to risk further injury to move away. *Cf. Pollreis v. Marzolf*, 66 F.4th 726, 731 (8th Cir. 2023) ("Pollreis was neither arrested nor detained. Neither was she told she was 'not free to leave[.]' Nonetheless, we conclude Pollreis was seized, even if for only a moment. For a brief time, Pollreis stood, with a taser pointed at her." (citation omitted)).

Defendants next say that Sophia's bending down "to pick up a piece of plywood to use as a shield" implies "intent to defy [the] admitted command to proceed south." City & Cnty. Br. at 29. But that allegation amply supports the inference that Sophia intended to continue complying with the direction to move away from the barricade—and was simply a terrified young woman searching for something to protect her as she did so. (Given what ultimately happened, this is understandable.) And, regardless, Sophia alleged that Defendant Moll hit her with the explosive munition at the same moment she reached for the plywood, meaning (in the light most favorable to Sophia) that it was aimed and fired *before* she tried to pick up

the shield. Br. at 8. The notion that "[t]he only plausible inference is that Deputy Moll deployed this munition because [Sophia] stopped," State Br. at 36, directly contradicts Sophia's allegations and should be discarded.

Likewise, arguing Sophia was not seized because she "proceeded with the assistance of other protesters south off the Bridge" after her injury, City & Cnty. Br. at 32, incorrectly views the factual allegations in a pro-Defendant light. Sophia did not "proceed[]" anywhere. After being incapacitated by Defendant Moll's explosive munition, Sophia was literally carried to a car by concerned bystanders (a group that conspicuously did *not* include Defendants). *See* Br. at 9. That indicates, at most, that Defendants decided to let Sophia be carried away for medical attention; it does not show anything about whether Defendants intended to stop her when they attacked her. *See Marks v. Bauer*, 107 F.4th 840, 846 (8th Cir. 2024) ("That Marks was not arrested does not change the analysis."); *Pollreis*, 66 F.4th at 731 (plaintiff seized even though not arrested).

Finally, Defendants try to distinguish this Court's recent holding in *Marks*, 107 F.4th at 845–46, that shooting a protester in the eye with a less-lethal munition was a seizure. It makes sense that they go to such efforts to distinguish it—because it directly supports Sophia's arguments. There,

as here, the officer argued that he was trying to disperse a crowd rather than detain the protester he hit. But the Court rejected that argument, reasoning that the officer "was not dispersing a crowd *the moment* he aimed and shot" the protester. *Id.* at 845 (emphasis added). Likewise, regardless of what else happened in the days or weeks before Sophia was injured, Defendant Moll "was not dispersing a crowd *the moment* he aimed and shot" the explosive munition at Sophia. *Id.*

The Court should hold that Sophia adequately alleged both seizure by force and seizure by control.

B. Defendants used excessive force.

Sophia's allegations also plausibly showed that Defendants used objectively unreasonable force against her when they seized her. The bridge was peaceful; Sophia and the other protestors were unarmed, non-threatening, and not resisting arrest. They were, in fact, attempting to comply with the officers' commands. Under these circumstances, it was constitutionally excessive for Defendants to attack Sophia with less-lethal munitions, particularly explosive ones. Br. at 21–23.

Defendants' arguments yet again ask the Court to draw inferences in their own favor. They write that "a reasonable officer would conclude

[Sophia] was disobeying lawful commands to extricate herself from the restricted area[] and was resisting and fleeing any alleged attempts to restrain her." City & Cnty. Br. at 45. But Sophia was neither resisting nor "fleeing"; she was complying with the order to move away despite the officers' continued efforts to restrain her. *Cf. Poemoceah v. Morton Cnty.*, 117 F.4th 1049, 1055 (8th Cir. 2024) ("According to the complaint, Poemoceah also was not resisting arrest or attempting to evade arrest when he 'instinctively' ran from the officers."). Firing less-lethal munitions and explosives at Sophia was therefore unreasonable, because this Court has "held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022).

Defendants say that "active resistance … does not require physical altercation with officers" and "failure to comply with commands incident to an arrest constitutes active resistance." City & Cnty. Br. at 46. But Sophia was overtly attempting to comply with Defendants' command to move, so this is beside the point. Likewise irrelevant the notion that "officers may apply force to regain control of a situation incident to an arrest, even where

the suspect is a nonviolent misdemeanant." City & Cnty. Br. at 46. Taking Sophia's factual allegations as true, there was no "situation" the officers needed to "regain control of." *Cf. Poemoceah*, 117 F.4th at 1055 ("The district court found that when Poemoceah 'advanced *toward* the officers,' a reasonable officer could feel threatened. But Poemoceah alleged that he was unarmed and peacefully attempting to negotiate … when he 'advanced slightly (a couple of feet).' He also 'remained at a respectful distance and did not make any sudden movements.' Based on these allegations, we have difficulty concluding that it was objectively reasonable for an officer to believe that Poemoceah posed a threat." (citation omitted)).

Defendants' briefs also entirely ignore an important point. Intentionally firing an explosive munition *at* Sophia constitutes deadly force. Regardless of Defendants' factual disputes about what Sophia was doing, they never argue that they had probable cause "to believe that [Sophia] pose[d] an immediate threat of death or serious bodily injury to others." *Torres v. City of St. Louis*, 39 F.4th 494, 503 (8th Cir. 2022). Using deadly force as alleged was therefore objectively unreasonable, Br. at 26–27, and Defendants make no effort to argue otherwise.

Plainly, Defendants dispute the factual circumstances of what happened the night Sophia was injured. But a motion to dismiss is not the time to litigate that dispute. Taking Sophia's allegations as true, she was not suspected of a serious crime, was not threatening anyone, and was neither fleeing nor resisting arrest. Therefore, the officers used excessive force when they seized her.

The Court should hold that Sophia adequately alleged use of force that was objectively unreasonable and therefore constitutionally excessive.

C. Any reasonable officer would have known in 2016 that the force Defendants used was excessive.

Defendants' factual disputes lead their qualified-immunity arguments astray as well. Defendants' briefs argue that the Court must assess whether the "use of force for some purpose other than to restrain, such as to disperse or repel," is "a seizure under the Fourth Amendment." City & Cnty. Br. at 22. But that is not the relevant question. Sophia's allegations objectively show Defendants' intent to restrain or harm Sophia, not to repel her. Thus, the relevant question for qualified-immunity purposes is whether a reasonable officer would know that firing an explosive munition at Sophia when she was unarmed and running away would constitute excessive force. As Sophia explained, the answer to that

question *was* clearly established in 2016. Br. at 23–27. And because that is the relevant question, this Court's holding on dispersals in *Dundon*, 85 F.4th 1250, does not foreclose any of Sophia's arguments.

Defendants argue that "no existing precedent … establishes beyond debate the unconstitutionality of Defendants' alleged conduct in this case." City & Cnty. Br. at 56. But Sophia "does not need to identify an identical case to show that [Defendant's] conduct was previously held to be unlawful." *Marks*, 107 F.4th at 849; *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."). "There is no requirement … that [plaintiffs] marshal a case in which 'the very action in question has previously been held unlawful,' so long as the unlawfulness of the action is apparent in light of preexisting law." *Glover v. Paul*, 78 F.4th 1019, 1024–25 (8th Cir. 2023). That was the case here. Firing an explosive munition directly at an unarmed, compliant, and peaceful protester violates the Fourth Amendment, and clearly so.

The Court should hold that Sophia has alleged constitutional violations not protected by qualified immunity.[3]

II. Sophia stated a Fourteenth Amendment claim.

A. The district court applied the wrong legal standard to the Fourteenth Amendment claim.

As Sophia explained, *Kingsley*, 576 U.S. 389, clarified that excessive-force claims under the Fourteenth Amendment need only allege the force was objectively unreasonable—*not* that the force "shocked the conscience." Br. at 34–35. Because the district court applied the wrong standard and dismissed Sophia's Fourteenth Amendment claims on that basis, this Court should reverse.

Defendants' arguments in opposition rely entirely on their view that *Kingsley*, as a matter of appellate precedent, did not alter existing law on this point with respect to individuals who are not pretrial detainees. But *Kingsley* did not restrict its holding solely to pretrial detainees. *See* Br. at 36–37. Both circuits that have examined whether *Kingley*'s "objective reasonableness" standard applies to excessive-force claims by free persons agree that it does. *Edrei*, 892 F.3d at 534; *Kedra v. Schroeter*, 876 F.3d 424,

[3] Further, the Court should categorically reject qualified immunity, which has no basis in the Constitution or the statutory text. *See* Br. at 45–48.

438–39 (3d Cir. 2017). That conclusion is correct, and this Court should reach it as well. Moreover, Defendants ignore an important underlying problem with their interpretation: it makes no sense to hold free citizens' claims to a higher, harder standard than pretrial detainees'. *See* Br. at 38. That is backwards. Nor does *Kingsley* anywhere suggest the Supreme Court's intent was to create multiple excessive-force standards under the same constitutional amendment. To the contrary, *Kingsley* was an attempt to reconcile the Fourteenth and Fourth Amendments' excessive-force standards. The goal was *fewer* tests, not more.

The Court should hold that *Kingsley* establishes the relevant standard for excessive-force claims under the Fourteenth Amendment and conclude that Sophia has plausibly pleaded such a claim.

B. The district court erred in concluding that Sophia had not plausibly alleged police conduct that shocks the conscience.

Even if Defendants were correct that the "shocks-the-conscience" standard governs Sophia's claim, she still satisfies it. As with their approach to Sophia's Fourth Amendment claims, Defendants muddy the waters by impermissibly drawing inferences in their favor and then arguing the law based on their own self-serving version of events. But the standard

approach for Rule 12 motions applies here as well: courts must "accept the factual allegations in the complaint as true and draw all reasonable inferences in the nonmovant's favor." *Ingram v. Ark. Dep't of Corr.*, 91 F.4th 924, 927 (8th Cir. 2024).

As Sophia explained, her allegations plausibly show that Defendants' conduct was "inspired by malice or sadism" and was "unrelated to the legitimate object" of their duties. *Truong v. Hasan*, 829 F.3d 627, 631–32 (8th Cir. 2016). Sophia was an unarmed, peaceful protester who was overtly complying with the direction to move away from the bridge. Firing an explosive munition at her as she ran away was malicious, unnecessary, and gratuitously cruel. *See* Br. at 41–42.

Defendants' response to this is to argue (without any elaboration) that "[i]t cannot reasonably be disputed that the individual Defendants' alleged conduct at issue related to their employment responsibilities as law enforcement officers." City & Cnty. Br. at 50. Even if that were correct, maiming an unarmed, peaceful, and compliant protester without any objectively valid reason to do so is *not* related to Defendants' police duties. Defendants ask this Court to effectively insulate *all* officer violence against protesters—no matter how overzealous—from Fourteenth Amendment

scrutiny, so long as the violence is supposedly in service of peacekeeping. That is not the law, nor should it be.

Indeed, Defendants' alleged conduct has already shocked at least one judicial conscience: the district court acknowledged that Sophia's allegation that "the officers laughed at her and congratulated Moll for his 'marksmanship,'" "if true," was "appalling." (App. 402, R. Doc. 290, at 13 n.9). And Defendants thought their actions sufficiently shocking to ask the district court to seal Exhibit 1 to Sophia's original complaint, which "consists of a single gruesome photograph" of what remained of Sophia's forearm after Defendant Moll nearly blew it off. (R. Doc. 9, at 1.) Back then, they told the district court that "making the photograph publicly available" would "inflame … passions," "taint[] the potential jury pool," and place Defendants in danger of retaliation. (R. Doc. 9, at 2.)

In short, taking Sophia's allegations as true, as the Court must, she has alleged conduct that was so unjustified, so unrelated to legitimate police duties, and so beyond the pale that it shocks the conscience and violated the Fourteenth Amendment, regardless of the standard being applied.

III. The district court erred in dismissing the *Monell* claim.

As Sophia explained in her brief (Br. at 48–51), she adequately pleaded a *Monell* claim under this Court's holding in *Mitchell*. There, the court said that a plaintiff can state a *Monell* claim by plausibly pleading: (1) "a continuing widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees"; (2) "[d]eliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct"; and (3) "an injury by acts pursuant to the governmental entity's custom." *Mitchell*, 28 F.4th at 899–900. There is no daylight between Sophia's *Monell* claims and the ones that *Mitchell* let proceed.

Defendants' arguments otherwise are incorrect. First, Defendants argue that a *Monell* claim requires an underlying Fourth Amendment violation, and Sophia has not plausibly alleged one. City & Cnty. Br. at 58–59. As shown above and in Sophia's principal brief, that is incorrect.

Next, Defendants argue that Sophia's allegations are merely "formulaic recitations of the elements of the claim" and "numerous legal conclusions." City & Cnty. Br. at 60. The pleadings themselves refute this characterization:

- "[A]ll of the law enforcement officers and entities responding to DAPL protests in Morton County ultimately reported to a 'Unified Command'" chaired by Defendant Kirchmeier. (App. 340–41, R. Doc. 259, ¶¶ 35–41.)
- "The law enforcement presence at DAPL protests … became increasingly militarized over time" and officers "became increasingly hostile to and aggressive with the protesters." (App. 341–44, R. Doc. 259, ¶¶ 42–56.) "Numerous protesters suffered injuries caused by" Morton County's less-lethal weapons. (App. 342, R. Doc. 259, ¶ 46.)
- Defendant Kirchmeier and Morton County "regularly equipped the law enforcement officers under their direction, supervision, and authority with less-lethal weapons," which the officers "regularly deployed … at DAPL protests." (App. 343, R. Doc. 259, ¶¶ 48–49.) In fact, "[l]aw enforcement officers acting at the direction and under the supervision of Defendant Kirchmeier repeatedly and dangerously misused these explosive devices by deploying them directly at individuals and into crowds." (App. 352, R. Doc. 259, ¶ 92.)

- Many officers "lacked adequate training in the appropriate use of less-lethal weapons." (App. 343, R. Doc. 259, ¶ 53.) Defendant Kirchmeier again "knew that law enforcement officers he equipped with explosive less-lethal munitions lacked adequate experience and training in the appropriate use of these weapons." (App. 344, R. Doc. 259, ¶ 55.)
- Defendant Kirchmeier "was aware of and approved, ratified, or acquiesced to this policy or custom." (App. 343, R. Doc. 259, ¶ 51.) "To date, Defendants Kirchmeier and Morton County have never conducted any investigation at all into the cause of Sophia's injuries." (App. 362, R. Doc. 259, ¶ 165.) And "Defendant Kirchmeier also told the national media that no officer threw anything at Sophia on the night she was injured," which was false. (App. 362, R. Doc. ¶ 166.) At a press conference in December 2016 (and on multiple other occasions), "Defendant Kirchmeier accused Sophia of causing her own injury by participating in the attempted use of improved explosive devices against law enforcement officers." (App. 363, R. Doc. 259, ¶¶ 170–71.)

These allegations are specific, factual, and plausible. They contain "sufficient factual matter, accepted as true," *Braden*, 588 F.3d at 594, to adequately plead a *Monell* claim against Defendants Kirchmeier and Morton County. It does not matter at all that Sophia has not "point[ed] to an official policy either in writing or orally issued by Morton County or Sheriff Kirchmeier," City & Cnty. Br. at 60, because *Mitchell* does not require any such allegation.

The Court should hold that Sophia has alleged a *Monell* claim against Defendants Kirchmeier and Morton County.

IV. Reversing the final judgment in No. 24-1911 requires reversing in No. 24-1919 as well.

The Companion Lawsuit against additional named Defendants (now on appeal in No. 24-1919) pleaded the same excessive-force claims under the Fourth and Fourteenth Amendment as the Primary Lawsuit. Br. at 52–53. The district court recognized that the Companion Complaint involves "the exact same facts and circumstances" as the Primary Complaint and dismissed it using the "same reasoning." (App. 482–83, Companion R. Doc. 36, at 2–3.) Therefore, if the Court reverses the judgment in No. 24-1911, it should reverse the final judgment in No. 24-1919 as well. None of the Defendants disputes this logic. Their silence speaks volumes.

At one point, the Defendants point to Sophia's failure-to-intervene claims and observe that "Wilansky provides no argument in relation to the dismissal of her failure to intervene and conspiracy claims in her Companion Lawsuit." City & Cnty. Br. at 13; *see also* State Br. at 34 ("Wilansky does not even attempt to articulate the test for failure to intervene in her Appellant Brief."). These arguments are misguided; Sophia did not address her failure-to-intervene claims in her Brief because the district court did not address them in its dismissal order. (*See* App. 481–84, Companion R. Doc. 36, at 1–4.) Rather, the district court simply held that no seizure had occurred, meaning no failure-to-intervene could have occurred either. Sophia therefore did not need to address the failure-to-intervene analysis because "ordinarily" the Court "do[es] not decide issues that the district court did not adjudicate." *Al-Saadoon v. Barr*, 973 F.3d 794, 805 n.7 (8th Cir. 2020). The appropriate disposition is to reverse No. 24-1919 along with No. 24-1911, just as the district court dismissed them together.[4]

[4] If the Court wishes to address the failure-to-intervene arguments the State Defendants raise, Sophia's arguments in opposition are already in the record. (*See* Companion R. Doc. 28, at 19–22.) Sophia incorporates those arguments by reference, if necessary.

V. The district court erred in dismissing Sophia's claims with prejudice.

Finally, the district court should have permitted Sophia to amend her complaint before dismissing it with prejudice. Sophia acknowledges, of course, that usually a district court need not allow amendment where a plaintiff has not requested it. *See generally Hennessey v. Gap, Inc.*, 86 F.4th 823, 831 (8th Cir. 2023). But Sophia did request leave to amend when she filed her First Amended Complaint; that leave was effectively denied when the Court required Sophia to file a Second Amended Complaint whose allegations were dictated by the district court.

The procedural irregularity of this case justifies giving Sophia an opportunity to file a consolidated amended complaint. As Sophia's brief explained, she originally hired attorneys to identify who and what injured her; she served open-record requests and filed a lawsuit to obtain forensic evidence. Br. at 9. She filed the Primary Complaint against an unnamed John Doe officer, which Defendants moved to dismiss. After 18 months of inaction, the court granted the motion in part and sua sponte converted the remainder into a motion for summary judgment, deferring decision until the parties had conducted limited discovery on qualified immunity. *Id.* at 10.

When the limited discovery ended, the district court ordered the summary judgment motion be re-briefed. *Id.* at 10–11. Sophia did so and moved to amend her complaint to name the officers she had identified by then. *Id.* at 11. Defendants again moved to dismiss and moved to strike many of Sophia's amended allegations. *Id.* After eight more months' inaction, the district court issued a show-cause order requiring Sophia to justify each amendment she had made to her complaint. *Id.* at 11–12. It then ordered her to file a Second Amended Complaint containing only specific allegations it had approved. *Id.* at 12. Sophia filed this Complaint while specifically preserving her objection to being required to do so. Fearing that the limitations periods would expire, Sophia then filed the Companion Complaint, alleging the same facts as the Primary Complaint, against the newly named Defendants the district court had stricken. *Id.* at 12–13.

At times, Defendants have agreed that this case's unique history favors some procedural adaptation—at least when it suits them. For example, the State Defendants argue now that the "unique context of this case" supports considering Sophia's deposition testimony despite the usual rules for dismissal motions. State Br. at 17. (Sophia has no objection;

everything she said in her deposition was true to the best of her knowledge and she stands by all of it.) The State Defendants also rely on the case's "unusual procedural background" to request oral argument before this Court. *Id.* at i.

In these singular circumstances, this Court should step in to impose procedural regularity on the proceedings. If the Court reverses the judgments below, it should also expressly instruct the district court to combine the two lawsuits and grant Sophia leave to file a consolidated amended complaint that contains all the good faith allegations she wishes to make against all Defendants. That course would best "secure the just, speedy, and inexpensive determination" of these proceedings as they move forward. Fed. R. Civ. P. 1.

CONCLUSION

For the foregoing reasons and those in Appellant's Brief, the final judgments dismissing the complaints should be reversed and the cases should be remanded to the district court with instructions to combine the cases and allow Sophia to file a consolidated Third Amended Complaint containing the good-faith allegations she chooses.

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Respectfully submitted,

/s/ Joseph H. Lang, Jr.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the Appellant's Amended Reply Brief as defined by Federal Rule of Appellate Procedure 27(d)(2) contains 5,320 words of proportionally spaced text as determined by the automated word count of Microsoft Word and has been prepared in 14-point Century Schoolbook font. I also certify that, pursuant to Circuit Rule 28A(h), a version of the amended reply brief in non-scanned PDF format has been filed electronically. I further certify that the amended brief has been scanned for viruses and is virus free.

/s/ *Joseph H. Lang, Jr.*
Joseph H. Lang, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Appellant's Amended Reply Brief was filed electronically with the Court using the CM/ECF system, which action will cause automatic electronic notification of the filing from the Court to be served upon all parties who have registered for electronic service with this Court's efiling portal on this 28th day of October, 2024.

/s/ *Joseph H. Lang, Jr.*
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