No. _____

In The

Supreme Court of the United States

SAN JUAN COUNTY,

Petitioner,

v.

ROSALIE CHILCOAT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A prosecutor in San Juan County, Utah, acted on behalf of the State of Utah when he made allegedly false statements at the preliminary hearing in the State's prosecution of Rosalie Chilcoat. The County, therefore, could not be held liable under 42 U.S.C. § 1983 for the prosecutor's unconstitutional actions as alleged in Ms. Chilcoat's complaint. So held the United States Court of Appeals for the Tenth Circuit in the proceedings below, affirming the district court's ruling.

But a majority of the Tenth Circuit panel reversed the district court's decision denying Ms. Chilcoat leave to amend her complaint to allege that the County involved itself in Ms. Chilcoat's prosecution at a secret meeting among the County commissioners and the County Sheriff, holding that the allegation supported a plausible municipal liability claim. The district court had denied the proposed amendment on futility grounds.

The question thus presented is whether a municipality may be exposed to liability under Section 1983 and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978), if municipal officials influence a State actor's decision to take an unconstitutional action, even where the municipality lacks authority to make that decision itself.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Tenth Circuit below are as follows:

ROSALIE CHILCOAT, Plaintiff, Counter Defendant, and Appellant;

SAN JUAN COUNTY, Defendant and Appellee;

KENDALL G. LAWS, Defendant and Appellee;

ZANE ODELL, Defendant Counterclaimant; and

MARK FRANKLIN, Counter Defendant.

RELATED PROCEEDINGS

Chilcoat v. Odell, United States District Court for the District of Utah, No. 4:19-cv-00027-DN. Judgment entered February 24, 2021.

Chilcoat v. San Juan County, United States Court of Appeals for the Tenth Circuit, No. 21-4039. Judgment entered July 22, 2022.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner San Juan County respectfully requests a petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 41 F.4th 1196. It is also reprinted in the Appendix to the Petition ("App'x") at 1a–48a.

The court of appeals' decision denying panel rehearing and denying rehearing *en banc* is reprinted at App'x 49a–50a.

The district court's opinion granting Petitioner's Motion for Judgment on the Pleadings is not reported in the Federal Supplement but is found at 2020 WL 1516141. It is also reprinted at App'x 51a–63a.

The district court's opinion denying Respondent's Motion to Amend is not reported in the Federal Supplement but is found at 2021 WL 212232. It is also reprinted at App'x 64a–70a.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2022. App'x 1a. The court of appeals denied

a petition for panel rehearing and rehearing *en banc* on August 22, 2022. App'x. 49a–50a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983.

STATEMENT OF THE CASE

The State of Utah's criminal prosecution of outspoken environmental activist Rosalie Chilcoat was

the subject of an alleged secret meeting among the commissioners of San Juan County, Utah, and the County sheriff. After the secret meeting supposedly occurred, the County prosecutor escalated the charges against Ms. Chilcoat to include two felonies. As a result of the prosecution, and the prosecutor's allegedly false statements in support of the escalated charges at the preliminary hearing, Ms. Chilcoat sued the prosecutor and the County under 42 U.S.C. § 1983 for violating her constitutional rights.

The district court granted the defendants' motion for judgment on the pleadings, ruling that because the prosecutor acted on behalf of the State when prosecuting Ms. Chilcoat, (1) the prosecutor was entitled to prosecutorial and sovereign immunity, and (2) the complaint failed to state a claim for municipal liability under Section 1983 and *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

The district court later denied Ms. Chilcoat's motion for leave to amend her complaint to include the allegations related to the secret meeting of the County commissioners. The district court ruled that the amendment would be futile because it would still fail to state a claim for municipal liability against San Juan County.

The Tenth Circuit affirmed the district court's grant of the County's motion for judgment on the pleadings but reversed its denial of Ms. Chilcoat's motion for leave to amend her complaint. The majority opinion held, over a dissent by Judge Carson, that the

amended complaint stated a plausible *Monell* claim against the County. According to the Tenth Circuit, and in contrast to other courts and circuits, a municipality exposes itself to liability merely for influencing a State actor's decision to take an unconstitutional action—even where the County has no authority to make the decision, or take the unconstitutional action, itself.

A. Factual Background

The San Juan County Sheriff's Office began investigating a suspected trespassing incident on April 1, 2017. Aplt. App. Vol. 1 at 20, ¶¶ 11-13. The investigation began after Zane Odell, a cattle rancher in the area, called the Sheriff's Office to report a trespasser who had shut a gate on one of his corrals. *Id.* But for a small gap in the fence, shutting the gate would have deprived the cattle of water. *Id.* Mr. Odell reported to Sergeant Wilcox that he had a trail camera that caught an image of the trespasser's partial license plate and trailer. *Id.* at ¶ 12.

Shortly after reporting the incident, Mr. Odell thought he found the trailer parked at Sand Island Campground. *Id.* at ¶ 13. After Mr. Odell questioned the campers, he realized they were not the trespassers he was looking for. *Id.* at ¶ 14. But on April 3, 2017, Mr. Odell found another vehicle pulling a camper that matched the one in the photograph from his trail camera. Aplt. App. Vol. 1 at 21, ¶ 15. Mr. Odell stopped the driver and reported to the Sheriff's Office that he had the people who had closed the corral gate detained. *Id.*

Deputy Begay responded to the scene and interviewed the witnesses. *Id.* Later, Sergeant Wilcox, who initially started the investigation, discussed potential charges against Rosalie Chilcoat, and her husband, with Mr. Odell. Aplt. App. Vol. 1 at 22, ¶ 15.

After the confrontation between Mr. Odell, Ms. Chilcoat, and Ms. Chilcoat's husband, Ms. Chilcoat sent a letter to the Federal Bureau of Land Management ("BLM") that accused Mr. Odell of accosting and assaulting her. Aplt. App. Vol. 1 at 24, ¶ 22. The letter also said Mr. Odell falsely accused Ms. Chilcoat's husband of endangering livestock. Ms. Chilcoat stated that she would like to "lodge a complaint" that would be "included in [Mr. Odell's] files[.]" *Id.*

While Sergeant Wilcox was investigating the case, he researched Ms. Chilcoat's background and found that she was part of the "Great Old Broads for Wilderness[.]" Aplt. App. Vol. 1 at 25 at ¶ 25. After finishing his investigation, Sergeant Wilcox took the evidence to the County Attorney, Kendall Laws ("Prosecutor Laws"). Prosecutor Laws reviewed the information and said he would file charges. *Id.* at ¶ 26.

On April 11, 2017, Prosecutor Laws filed an Information against Ms. Chilcoat charging her with two misdemeanor counts: (1) Trespassing on Trust Lands and (2) False Personal Information to a Peace Officer. *Id.* at ¶ 27. A few days later, Prosecutor Laws filed an Amended Information charging Ms. Chilcoat with two additional felonies: (1) Attempted Wanton Destruction of Livestock and (2) Retaliation against a Case

Witness, Victim, or Informant. *Id.* at ¶ 28. The accusations against Mr. Odell in Ms. Chilcoat's complaint to the BLM were the factual basis for the witness retaliation charge.

During the preliminary hearing, Mr. Odell and Deputy Begay testified as sworn witnesses. Aplt. App. Vol. 1 at 57. Prosecutor Laws and defense attorneys examined Mr. Odell and Deputy Begay and offered exhibits into evidence. After the State and Defense rested, the parties made closing arguments. *See* Aplt. App. Vol. 1 at 58-140. Following closing arguments, the judge raised his concerns regarding the witness retaliation charge. Specifically, the judge was concerned that he may not be able to consider the State's theory that by falsely accusing Mr. Odell of assaulting her in her letter to the BLM, Ms. Chilcoat had retaliated against a witness. Aplt. App. Vol. 1 at 134-135. The judge's concern hinged on the disparity between legal and colloquial definitions of the term "assault." *Id.* As a result, the court informed Prosecutor Laws that it was going to limit the evidence the State could use for the witness retaliation charge. Prosecutor Laws could only use evidence showing that Ms. Chilcoat's BLM complaint contained statements that were "factually incorrect or . . . are so distorting the law that . . . you can't count [them]." *Id.* After giving this limiting instruction, the Court asked Prosecutor Laws if he still wanted to move forward with the charge. *Id.* Prosecutor Laws responded that he did. *Id.* at 136.

Prosecutor Laws also stated that there was another "false allegation . . . in the [BLM] complaint[.]"

He said that the false allegation was the "scope of [the] repairs to [the] ponds[.]" *Id.* Prosecutor Laws also said "there would be sufficient evidence to show that some of the exhibits that were presented to the BLM with that letter were embellished or changed, altered, to make those repairs look worse than they are." *Id.* Moreover, he thought there was "more than enough to move forward. [But he] relied on the [false allegation of the] assaultive behavior because [he thought] that [was] the most obvious." *Id.* Ms. Chilcoat's defense attorney did not object or make any statement in response. *See id.* The Court responded to Prosecutor Laws by saying "okay" and then moved on to the next matter. *Id.* Later on during the hearing, the judge said the only way the State could proceed on the witness retaliation charge was with "non-good faith information outside of the assault." *Id.* at 140.

The court also bound Ms. Chilcoat over on the trespassing and destruction of livestock charges. A few months later, Prosecutor Laws dropped the witness retaliation charge but continued to pursue the remaining charges. Aplt. App. Vol. 1 at 27 at ¶ 35. Ultimately, the State dropped all charges against Ms. Chilcoat. Ms. Chilcoat's husband, who was facing similar charges for the same incident, entered a plea in abeyance.

B. Procedural History

i. Ms. Chilcoat files her original complaint

Ms. Chilcoat filed a complaint on April 10, 2019, alleging claims under 42 U.S.C. § 1983 against Prosecutor Laws, San Juan County, and Mr. Odell, as well as a state-law assault claim against Mr. Odell. Ms. Chilcoat claimed Prosecutor Laws made a statement during the preliminary hearing that violated her First, Fourth, and Fourteenth Amendment rights. Ms. Chilcoat alleged that Prosecutor Laws is a final decision-maker for San Juan County and that San Juan County should therefore be liable under 42 U.S.C. § 1983 for Prosecutor Laws' statement.

Prosecutor Laws and San Juan County moved for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure. The district court granted Defendants' motion and dismissed Ms. Chilcoat's claims against Prosecutor Laws and San Juan County. It held that (1) absolute prosecutorial immunity barred Ms. Chilcoat's Claims against Prosecutor Laws in his individual capacity; (2) Eleventh Amendment sovereign immunity barred Ms. Chilcoat's claims against Prosecutor Laws in his official capacity; and (3) Ms. Chilcoat failed to plead a municipal liability claim because Prosecutor Laws acted for the State, not the County, when he prosecuted Ms. Chilcoat.

ii. Ms. Chilcoat moves to amend her complaint

After the district court dismissed all her claims against Prosecutor Laws and San Juan County, Ms.

Chilcoat continued litigating her remaining claims against Mr. Odell. Toward the end of discovery, Ms. Chilcoat deposed former County Commissioner Phillip Lyman. In his deposition, Commissioner Lyman testified that the San Juan County Sheriff briefed the County Commission on the Chilcoat trespassing incident during a closed meeting. Based upon that information, Ms. Chilcoat moved to amend her complaint under Rule 15(a)(2) of the Federal Rules of Civil Procedure to add a new municipal liability claim and reinstate San Juan County as a defendant. She also requested additional discovery.

The proposed amended complaint alleged that the "San Juan County commissioners held a secret, closed meeting in which they discussed . . . the gate incident and Rose Chilcoat specifically," Aplt. App. Vol. 2 at 231, and that the commissioners "made an official decision whereby they directed or encouraged a [C]ounty employee to pursue criminal charges against Ms. Chilcoat in retaliation for her political views," *id.* at 232–33. The district court denied Ms. Chilcoat's motion to amend, concluding the proposed amendment was futile.

iii. Ms. Chilcoat appeals

Ms. Chilcoat appealed the district court's order granting judgment on the pleadings as well as the district court's denial of her leave to amend. A panel consisting of Circuit Judges Carson, Briscoe, and Rossman heard the appeal. On July 22, 2022, the panel issued a Decision unanimously affirming the grant of judgment

on the pleadings. The majority, consisting of Judges Briscoe and Rossman, reversed the district court's denial of leave to amend, finding that Ms. Chilcoat's proposed amended complaint is not futile because it alleges a plausible *Monell* claim against the County—not because Prosecutor Laws decided to prosecute Chilcoat but because of the allegation that San Juan County Commissioners held a secret, closed meeting wherein they decided to direct or encourage a county employee to pursue criminal charges in retaliation for Ms. Chilcoat's political views. App'x at 39a–40a.

Judge Carson dissented from the majority with respect to the reversal of the denial of leave to amend, concluding that the proposed amended complaint was futile because even if the County made the decision to direct or encourage an employee to pursue charges, Laws remained the only employee with any power to do so, and he was an agent of the State, not the County. App'x 46a–49a.

The County filed a Petition for Panel Rehearing and Rehearing *En Banc* on August 5, 2022. That Petition was denied on August 22, 2022.

REASONS FOR GRANTING THE PETITION

As explained below, the question whether a municipality can be liable under Section 1983 and *Monell* for encouraging or otherwise influencing a prosecutor who acts squarely on behalf of the State has arisen in multiple cases across the circuits. And the Tenth Circuit

decision below contributes to the lack of clarity on the question. Municipalities, local officials, and Section 1983 plaintiffs across the country would benefit if the Court were to resolve this question.

A. There Is Conflict over the Question Presented

The confusion here turns on the proper interpretation of *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). *Monell* held that local governments are "persons" for purposes of 42 U.S.C. § 1983 and can therefore be sued for constitutional violations under the statute. *Id.* A municipal liability claim must include factual allegations that a particular municipal custom or policy was the moving force behind a constitutional injury. *Id.* at 694. Since *Monell* was decided, this Court has held that "an unconstitutional governmental policy [may] be inferred from a single decision taken by the highest officials responsible for setting policy in the area of the government's business." *City of St. Louis v. Praprontik*, 485 U.S. 112, 123 (1988); *see also Pembaur v. City of Cincinnati*, 475 U.S. 469, 181–83 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."). In other words, a county may be held liable for an isolated constitutional violation inflicted by officials with "final policymaking authority" with respect to the action taken or decision rendered. Whether an official has "final policymaking authority" is a question of State law. *City of St. Louis*, 485 U.S. at 123.

Once a Section 1983 plaintiff has identified a decision of a final policymaker, the plaintiff must then show that "the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 403 (1997).

It is undisputed that the decision of a county commission, or even the decision of a single municipal employee, satisfies the "policy or custom" requirement if the employee serves as a final policymaker for the municipality "in a particular area or on a particular issue." *McMillian v. Monroe Cnty.*, 529 U.S. 781, 785 (1997). But for a county to be held liable under *Monell*, the county official must have acted on behalf of the county with respect to the particular act. *Id.* In other words, a county commission or municipal employee cannot be a final policymaker subjecting the county to liability for a *Monell* claim where the official acts on behalf of the State. *See id.* (holding the district court's dismissal of claims against the county proper where they were based on action by a sheriff who represented the state when executing law enforcement duties).

It is clear that a county cannot be directly liable under Section 1983 for the actions an official takes on behalf of the State. But it is less clear whether such liability attaches if a county official influences, directs, or encourages a county employee to take action, on behalf of the State, which action causes constitutional injury to a plaintiff. For example, a county prosecutor,

under the laws of many states, including Utah, acts on behalf of the county when bringing charges for violations of county ordinances, but on behalf of the State when bringing charges for violations of State law. Utah Code § 17-8a-401. And there have been cases where county officials, for whatever reason, have encouraged or influenced the prosecutor to bring charges. But where a violation of State law has occurred, the ultimate decision to prosecute is made on behalf of the State. Courts among the various circuits have taken different approaches in determining whether a county official's encouraging, influencing, or directing a prosecutor to bring charges for violations of State law can constitute a decision by a final policymaker subjecting the county to a *Monell* claim.

i. The Second Circuit has held that municipalities cannot be liable for State action

In *Baez v. Hennessy*, a plaintiff brought a Section 1983 action against the district attorney of Onondaga County, New York, and against the county itself, after a mistake by the district attorney led to the plaintiff's wrongful indictment. 853 F.2d 73, 74 (2d Cir. 1988). In affirming the district court's decision to dismiss the claims against the county, the Second Circuit first analyzed the role a district attorney occupies when bringing criminal charges. *Id.* at 76–77. After a lengthy analysis of New York law, the court determined that "[w]hen prosecuting a criminal matter, a district attorney in New York State . . . represents the State not the county." *Id.* at 77. As such, the prosecutor's actions

could not "fairly be said to represent official policy" of the county. *Id.* at 76. The court went on to explain that a county had "no right to establish a policy concerning how [an] official should prosecute violations of State penal laws" and that "it would be a violation of a district attorney's ethical obligations . . . to permit himself to be influenced in the performance of his duties by . . . the county." *Id.* at 77. Since the county's authority over the district attorney was limited by controlling law, the court said the county could "not be said to be responsible for the conduct at issue." *Id.*

In other words, in the Second Circuit, if a county has no legal right to make decisions on behalf of the State, it cannot be liable for the State's unconstitutional acts under Section 1983.

ii. Courts in the Ninth Circuit have also held that municipalities cannot be liable for State action

In *Bledsoe v. Ferry County, Washington*, the plaintiff was charged with criminal mischief by the Ferry County prosecuting attorney after the plaintiff, in an act of protest, wrote messages with chalk on the walkway to the county commission building. No. 2:19-CV-227-RMP, 2020 WL 376611, at *1 (E.D. Wash. Jan. 23, 2020). The charges were dismissed, and the plaintiff brought a Section 1983 action against a number of defendants, including the county, claiming that the prosecution was wrongful and that it violated her First Amendment rights. *Id.* at *2. The plaintiff claimed that

the county commissioners' office "was in close contact with the Prosecuting Attorney's Office before and after the [criminal] Complaint was filed" and that it encouraged the prosecuting attorney to seek a conviction and obtain the maximum punishment. *Id.* at *1.

The county argued that it could not be subject to *Monell* liability because the final decision to prosecute was made by the prosecutor's office, not the county. *Id.* at *8. In deciding whether the county could be liable under *Monell*, despite the prosecutor's office having final authority to prosecute, the court examined the relationship between the county commissioners' office and the prosecuting attorney's office. *Id.* at *9. The Court emphasized that the county commissioners' office governed the budget and the size of the prosecuting attorney's office, thereby exercising some control. *Id.* The court also considered that the county commissioners' office also looked to the prosecutor as its legal advisor and relied on its representations in civil and criminal actions to which the county was a party. *Id.* At the pleading stage, the court held that these basic factual allegations, combined with the county commissioners' ability to control the prosecutor to some extent, was enough to survive a motion to dismiss. *Id.* But when the case reached the summary judgment stage, the court held that these facts alone were not enough to impose liability on the county:

> The Court concludes that the Commissioners' ability to influence the Prosecutor's Office via its legislative powers, including controlling the Office's size and budget, does not equate

> to "final policymaking authority" with respect to the action ordered: the filing of a criminal complaint or information. There is no evidence before the Court that the Commissioners exercise control over prosecutorial decisions or the Prosecutor's Office's policies. This does not preclude a finding that the 'final policymaker' of prosecutorial decisions is subject to influence by the legislative branch. Based on the record before the Court, a genuine issue of material fact remains as to whether the Commissioners exercised "final policymaking authority" as to Ms. Bledsoe's prosecution. Accordingly, the Court will not impute liability to Ferry County for Ms. Bledsoe's § 1983 claim for retaliatory prosecution at this juncture.

Bledsoe v. Ferry County, Washington, 499 F. Supp. 3d 856, 882 (E.D. Wash. 2020).

In *Galbraith v. County of Santa Clara*, a plaintiff brought Section 1983 claims against Santa Clara County, alleging that the county's chief medical examiner had made false statements that influenced the prosecutor's decision to bring charges against the plaintiff without probable cause. No. C 03-2506 JSW, 2006 WL 954182, at *2 (N.D. Cal. Apr. 12, 2006), *rev'd and remanded*, 231 F. App'x 576 (9th Cir. 2007). Acknowledging that the medical examiner was not the final decisionmaker with respect to the decision to file charges, the court explained that, to hold the county liable, the plaintiff needed to show that the medical examiner's allegedly false statements were a "County

policy or practice" that either constituted a "moving force behind," or "b[ore] a direct causal link to," the prosecution of the plaintiff. *Id.* at *3. Ultimately, the court did not believe the plaintiff had met its burden of showing this "causal link" between the county official's actions and the prosecution and therefore dismissed the case. *Id.*

In a footnote, the court added that "[e]ven if Plaintiff could demonstrate the existence of a genuine issue of fact regarding whether [the medical examiner's] conduct . . . directly caused the District Attorney to file charges," the claim could not be maintained, because "the Ninth Circuit has held that in California, a district attorney acts as a state official and not a county official when he or she decides to proceed with a criminal prosecution. . . . Therefore, the *Monell* claim . . . suffers from the additional defect that the State, and not the County, was the actor with respect to the Plaintiff's alleged constitutional violation." *Id.* at *3, n.4.

In other words, a county cannot be liable under *Monell* even where a county official influences the acts of a prosecutor, because the prosecutor acts for the State.

When *Galbraith* was appealed, the Ninth Circuit, in a very short opinion, remanded on the issue of whether a direct causal link was shown between the County official's actions and the constitutional harm but did not address the district court's footnote. *Galbraith v. County of Santa Clara*, 231 F. App'x 576, 577 (9th Cir. 2007). This leaves unclear whether a county

can be liable for influencing a State official who violates a person's constitutional rights.

iii. Unlike courts in the other circuits, the Tenth Circuit would impose liability on municipalities for State action

In the case at bar, the Tenth Circuit has taken a far broader approach than did the courts in the Second and Ninth Circuits. In the Tenth Circuit, according to the majority opinion below, even where a county official acts on behalf of the State, a county can be held responsible under *Monell* for encouraging, in a private meeting, the State official's allegedly unconstitutional action.

B. The Question Presented Is Important to Municipalities and Others

The proper construction and scope of municipal liability under Section 1983 is an important question, as the Court has recognized on the numerous occasions it has granted certiorari over the decades and properly narrowed the appropriate circumstances where a municipality may be held liable.

The type of municipality action that gives rise to *Monell* liability is an increasingly important issue, especially where the Tenth Circuit has now held that not only official action gives rise to such liability, but that a simple conversation or encouragement can do the same. Moreover, simple conversation or encouragement opens the door to liability even where the

municipality in question is not the final policymaker and does not have control over the outcome.

If the Court does not provide guidance on the issue there will be numerous ramifications. This case provides one example. Here, a municipality could be exposed to potential liability where it had no control over the ultimate outcome. If mere encouragement or offhand comments made at a county commission meeting regarding a prosecutor's decision to prosecute—where the prosecutor was not even alleged to be present—leads to *Monell* liability, then a loophole is opened in the *Monell* framework. This loophole opens municipalities up to liability where they are not the final decision maker. This can lead to situations where municipalities face liability for numerous unforeseen circumstances stemming from mere comments.

If *Monell* liability is expanded in this way, this will have a major chilling effect on municipalities and the speech of their leaders going forward. Specifically, the confusion and broadening of *Monell* liability will cause municipal governments no longer to be able to discuss ideas or thoughts freely without fear of repercussions and lawsuits stemming from their mere words or encouragement of ideas or actions—even where they are not the final decision maker on an issue or policy. This precedent and confusion will interfere with and stifle a municipal government's ability to function and engage in political discourse that is necessary to effectively govern.

Municipal liability is intended to be very narrow, and clear guidance to prevent the expansion of Section 1983 liability is necessary. Municipalities need direction on what single actions are sufficient to give rise to municipal liability, including clarification as to whether mere discussions or encouragement to a separate policymaker may lead to liability.

This case is an ideal vehicle for this Court to resolve this important, recurring question. The only contested issue is one of law. There are no disputed material facts because the issue was decided at the motion to dismiss stage. At this stage of the case, the Tenth Circuit made its decision accepting all Ms. Chilcoat's allegations as true, including that the County commission encouraged a prosecutor to pursue criminal charges against Ms. Chilcoat. The issue is solely a legal one whether discussions, influence, or encouragement to a separate decision maker is a sufficient final decision or policy that gives rise to municipal liability. By taking this case, the Court could resolve not just this case but an important issue on the scope of municipal liability that lower courts have faced on numerous occasions. It should do so.

C. Under This Court's Precedents, the Majority of the Tenth Circuit Panel Is Wrong on the Law

The Court of Appeals erred in reversing the district court's denial of Ms. Chilcoat's *Motion to Amend Complaint* ("*Motion*") because the proposed amended

complaint ("*Complaint*") is futile in that it fails to allege a plausible municipal liability claim. While the majority concludes that Ms. Chilcoat alleged enough in the complaint to explore a *Monell* claim, the analysis only includes a brief mention of one of the requirements for municipal liability under *Monell*, while ignoring the remaining elements.

Under *Monell*, municipal liability based on an unlawful official policy may attach only (1) when the municipal representative(s) acted under color of State law; (2) the policy deprived the claimant of constitutional rights; (3) the representative acted pursuant to an expressly adopted official policy; and (4) the policy directly caused or was so closely related to the deprivation of the claimant's constitutional rights so as to be the moving force that caused the ultimate injury. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690–95 (1978).

Similarly, municipal liability based on the act of a final policymaker may attach only when the municipal representative(s) (1) acted under color of State law; (2) deprived the claimant of constitutional rights; (3) had final policymaking authority from the defendant municipality; (4) was acting as final policymaker for the municipality; and (5) directly caused or was so closely related to the deprivation of the claimants constitutional rights so as to be the moving force that caused the ultimate injury. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127, 108 S. Ct. 915, 926, 99 L. Ed. 2d 107 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 477, 106 S. Ct. 1292, 1297, 89 L. Ed. 2d 452 (1986);

Monell, 436 U.S. at 690–95. According to the majority's conclusions, the Complaint fails to satisfy the above requirements under both analyses. However, the majority failed to correctly apply those conclusions in its *Monell* analysis, yielding an improper reversal of the district court's denial.

i. The complaint does not support a municipal liability claim based on an official policy

Following the Court of Appeals' decision that Prosecutor Laws was entitled to absolute prosecutorial immunity and that neither his decision to prosecute nor statements made at the preliminary hearing could form the basis for a Section 1983 claim, Ms. Chilcoat was resigned to look to actions by the San Juan County commissioners as her only remaining path to municipal liability. But the specific act that allegedly violated Ms. Chilcoat's constitutional rights—the filing of felony charges in retaliation for her activism—is facially pleaded as undertaken by prosecutor Laws. The majority sidesteps this issue by stating that because Ms. Chilcoat's proposed amended pleading alleges that the county commissioners directed or encouraged Prosecutor Laws to pursue felony charges, constitutional injury occurred as an act of official policy. This analysis conflicts with precedent from this Court.

A governmental entity may be held liable under 42 U.S.C. § 1983 for a municipal policy or custom that is the moving force behind a constitutional injury. *Monell*, 436 U.S. at 658, 694. Section 1983 liability

attaches to a municipality only 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. . . ." *Id.* This Court has held that the "official policy" requirement "was intended to distinguish acts of the *municipality* from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible" 475 U.S. at 479 (1986). In other words, municipal liability cannot attach based on an action for which the municipality is not actually responsible or for which it has no authority to implement. Yet, that is precisely the result of the majority's decision.

Even though a public prosecutor is an employee of a county, that "[c]ounty has no authority over how [the county attorney] exercises his law enforcement duties; his discretionary authority does not derive from [the] [c]ounty, but from the state. . . . Thus, the county attorney's actions cannot be attributable to the Board of County Commissioners under a municipal liability theory." *Nielander v. Bd of Cnty. Comm'rs of Cnty. of Republic, Kan.*, 582 F.3d 1155, 1170 (10th Cir. 2009). Along these lines, any alleged "decision [by the county] to direct or encourage" discretionary authority expressly reserved by the State cannot serve as the basis for municipal liability.[1]

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[1] The majority's decision to the contrary presents another problem requiring reconciliation: whether a decision by a municipality that is entirely lacking in action, power, substance, and capacity to effectuate the desired scheme can qualify as an

Finally, the majority panel decision overlooked the question of whether Ms. Chilcoat's proposed amended complaint adequately pled other elements of a *Monell* claim. Ms. Chilcoat must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, . . . [she] must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397, 404 (1997) (emphasis omitted). Ms. Chilcoat failed in her attempt to create such a link.

As discussed above, the injury alleged is the filing of federal charges by Prosecutor Laws, which is itself not actionable. Alternatively, Ms. Chilcoat alleges that the adoption of a decision to encourage prosecution amounts to a violation of her constitutional rights. But the amended complaint contains not a single allegation that purports to establish a causal link between the alleged encouragement and the decision to prosecute. Ms. Chilcoat does not allege that Prosecutor Laws attended the alleged closed-door meeting; she does not allege that Prosecutor Laws spoke to any of the

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"official policy" within the meaning of *Monell.* Presumably, such a hollow edict cannot plausibly be the moving force behind a constitutional injury because municipal liability may be found "only when the execution of the government's policy or custom inflicts the injury that the municipality may be held liable under § 1983." *Lewis v. McKinley Cnty. Bd. of Cnty. Comm'rs*, 425 F. App'x 723, 725 (10th Cir. 2011) (quoting *City of Canton v. Harris*, 489 U.S. 378, 385 (1989)). The issue merits further exploration.

attendees regarding Ms. Chilcoat. Other than a cursorily alleged motive to retaliate against her activism and her political opposition to Commissioner Lyman, it would appear that Prosecutor Laws acted wholly of his own accord—not at the bidding of the commissioners following an allegedly "secret meeting."

Although the court is required to accept Ms. Chilcoat's statements as true, the Tenth Circuit majority placed undue weight on the idea of "secrecy" and "temporal proximity" as relating to the closed-door meeting and any encouragement that may have followed therefrom. However, it matters little what was discussed at the alleged meeting. Even if anything discussed at the meeting was brought to Prosecutor Laws' attention—which has not been alleged—it would still be irrelevant because Laws is not beholden to the commissioners or the county, but instead derives his prosecutorial authority exclusively from the State. Ultimately, the County cannot be liable for decisions which it had absolutely no power to effectuate.

For the foregoing reasons, Ms. Chilcoat's alleged injury, "the filing of felony charges" was not the execution of the county commission's policy or custom. Aplt. App. Vol. 2 at 246. Accordingly, San Juan County may not be held liable under 42 U.S.C. § 1983. *See Lewis*, 425 F. App'x 723.

ii. The complaint does not support a municipal liability claim based on the act of a final policymaker

a. The commissioners did not have final policymaking authority in the particular area or issue by which Ms. Chilcoat alleges to have been injured

A municipal liability claim must include factual allegations that a particular municipal custom or policy was the moving force behind a constitutional injury. *Monell*, 436 U.S. at 694. The decision of a municipal employee satisfies this "policy or custom" requirement if the employee serves as a final policymaker for the municipality "in a particular area, or on a particular issue." *McMillian v. Monroe Cnty.*, 520 U.S. 781, 785 (1997). The question of who is a "policymaker" is a question of State law. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988).

In looking to State law, a court must determine which official has final, unreviewable discretion to make a decision or take an action. *Id.* at 127. Liability will be imposed on a government entity for the actions of an official who is subject to review by other policymakers or who is limited by the policy and decisions of others only if the final policymaker ratifies the decision of the subordinate. *Id.* The final policymaker must not only approve the decision, but also adopt the basis for the decision, and the ratification must be the moving force, or cause, of the alleged constitutional violation. *Id.*

Ms. Chilcoat did not plausibly allege that the county commissioners acted as final policymakers in directing or encouraging the State to pursue criminal charges. The Section 1983 claim against San Juan County in the proposed amended complaint, which alleges violation of constitutional rights by the county commissioners through direction or encouragement to file felony charges, also refers to Prosecutor Laws as the final decision-making authority. *See* Aplt. App. Vol. 2 at 246. Ms. Chilcoat correctly alleged that Prosecutor Laws was the final policymaker. The county commissioners do not have authority over a prosecutor acting on behalf of the State. In Utah, public prosecutors "conduct, on behalf of the state, all prosecutions for a public offense committed within a county." Utah Code § 17-18a-401.

Further, "[t]o determine the identity of the final policymaker, we consider whether: 1) the official is meaningfully constrained by policies made by another; 2) the official's decisions are subject to meaningful review; and 3) the decisions are within the realm of the official's authority." *Randle v. City of Aurora*, 69 F.3d 441, 448 (10th Cir. 1995).

San Juan County is not actually responsible for Ms. Chilcoat's felony prosecution because Prosecutor Laws' authority does not derive from his discretionary authority from the county. *See Nielander*, 582 F.3d 1170. The county commissioners are not final policymakers because, in prosecuting felony charges, Prosecutor Laws is not meaningfully constrained by policies they make, his decisions are not subject to their review,

and are not within the county commission's realm of authority. *See Randle*, 69 F.3d 448.

As a result, Ms. Chilcoat's proposed amended complaint fails to allege that San Juan County commissioners exerted final policymaking authority over the charges brought by Prosecutor Laws on behalf of Utah. Therefore, Section 1983 liability cannot be imposed against San Juan County.

b. The amended complaint fails to sufficiently allege a causal link between any act by the commissioners and the alleged deprivation of Ms. Chilcoat's constitutional rights so as to be the moving force that caused the ultimate injury

As with municipal liability based on an official policy, to prevail on a claim of municipal liability based on a final policymaker, Ms. Chilcoat must "demonstrate that, through its deliberate conduct, the municipality was the 'moving force' behind the injury alleged. That is, . . . [she] must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Brown*, 520 U.S. at 404 (emphasis omitted). She has not done so. Ultimately, Ms. Chilcoat has failed to identify any plausible facts supporting a direct causal link between a meeting that she alleges occurred, the filing of felony charges that she alleges was at the direction of

the county commissioners, and subsequent false statements by Prosecutor Laws at the preliminary hearing.

Because of the degree of independence Prosecutor Laws holds as a matter of precedent from this Court, the alleged direction and encouragement of the County commission cannot plausibly be a sufficient causal link between the alleged municipal action and the deprivation of federal rights. Accordingly, the majority erred in finding the proposed amended complaint is not futile.

* * *

In sum, a plaintiff's proposed amendments are futile if the complaint, as amended, would be subject to dismissal for any reason. *Watson v. Beckel*, 242 F.3d 1237, 1239–40 (10th Cir. 2001). Ms. Chilcoat's proposed amendments to the complaint were correctly denied by the district court because she has not alleged facts demonstrating a Section 1983 municipal liability claim against the County. The majority erred in finding otherwise.

The majority below incorrectly decided that Ms. Chilcoat's proposed amended allegations show that the County commission, which is the legislative body of the County, directed Prosecutor Laws to file the charges against Ms. Chilcoat. As a matter of precedent, it was Prosecutor Laws' decision as a final policymaker to file the charges. Any direction from the County commission is not sufficient as a causal link to the alleged violation of rights.

CONCLUSION

For each of the foregoing reasons, San Juan County respectfully requests that this Court grant the Petition.

Respectfully submitted,

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