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

PLAINTIFF-APPELLANT'S REPLY BRIEF

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INTRODUCTION

"[T]ime and again," this Court has held it violates the Fourth Amendment for an officer to use more-than-*de-minimis* force on someone who is not threatening, suspected of a serious crime, fleeing, or actively resisting arrest. *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022); *see*, *e.g.*, *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009).

Here, Mr. Locke alleged precisely those circumstances: he alleged that, while he remained still, chained to an excavator in nonviolent protest, not fleeing, threatening, or actively resisting arrest, Defendants repeatedly and deliberately exerted extreme pressure on his facial and cranial nerves. App.5-6, R. Doc. 1 at 2-3. He alleged this force caused excruciating pain that "rose to the level of torture" and resulted in tinnitus and partial facial paralysis. App.4, 7, R. Doc. 1 at 1, 4. And he alleged this infliction of force was entirely "gratuitous": indeed, the complaint makes clear Defendants did not need to use force at all to remove him because they had trained "extraction teams" that could do so painlessly. *See* App.4-7, R. Doc. 1 at 1-4. Those allegations are more than sufficient to state a Fourth Amendment claim, and decades of clearly

established law gave Defendants fair warning that the force they inflicted was objectively unreasonable. *See* Opening Br. ("OB") 16-26, 31-41.

Defendants' contrary arguments are unavailing. Defendants' contention that their use of force was reasonable "[a]s a matter of law," Response Br. ("RB") 13, hinges on a version of events that is wholly divorced from the allegations in the complaint. Accepting Mr. Locke's allegations as true and drawing all reasonable inferences in his favor, *see Cole v. Homier Distributing Co.*, 599 F.3d 856, 861 (8th Cir. 2010), there can be no question he stated a valid Fourth Amendment claim.

Defendants' claim to qualified immunity turns on the same mistake the district court made—insisting on a prior case involving the precise method of force Defendants used. But this Court has rejected such a "prohibitively difficult standard," *Banks v. Hawkins*, 999 F.3d 521, 528-29 (8th Cir. 2021), and repeatedly held it "clearly established" that more-than-*de-minimis* force is prohibited under these circumstances. Defendants did not need a case involving these exact methods to understand that pressing on Mr. Locke's skull to the point of causing neurological damage is more-than-*de-minimis* force.

Defendants' arguments regarding Mr. Locke's official capacity and state-law claims are similarly unavailing. Although Defendants concede that Sheriff Aukes is Hubbard County's final policymaker for law enforcement under Minnesota law, they fault Mr. Locke for not specifically alleging that conclusion. But whether an official is a final policymaker is a question of law, not of fact; plaintiffs are not required to allege legal conclusions in a complaint. Finally, factual disputes preclude granting official immunity on Mr. Locke's state-law claims.

ARGUMENT

I. Defendants Are Not Entitled to Qualified Immunity at the Complaint Stage.

A. Mr. Locke States a Fourth Amendment Violation.

Defendants concede that Mr. Locke—having attached himself to an idle excavator as a form of protest—was "nonviolent," not fleeing, and not actively resisting arrest. RB17. Defendants also concede that Hubbard and Cass Counties had trained "extraction teams" that could—and ultimately did—remove him from the excavator without causing him any harm whatsoever. RB3.

Defendants nevertheless argue their use of force against Mr. Locke before the extraction teams arrived was objectively reasonable "[a]s a

matter of law." RB13. Their argument turns on invented circumstances that find no support in the complaint, as well as a misunderstanding of this Court's precedent.

1. Defendants invent a speculative and abstract urgency that is not supported by the complaint.

First, Defendants suggest there were exigent circumstances making it necessary to try to "expedite[]" Mr. Locke's "arrest and removal," rather than simply waiting for the extraction teams. RB19. In doing so, Defendants manufacture a host of speculative and abstract exigencies that are neither contained in nor fairly inferable from the complaint. Defendants argue, for example, that they needed to try to "expedite[]" Mr. Locke's arrest through force, *id.*, because:

- the protest created "public safety concerns" and an "increased risk of violent confrontation" between the protesters and the "property owner," RB15;
- "vandalism and interference of the property rights of others understandably leads to frequent breaches of peace and increased conflict and confrontation," RB18-19;
- the "massive effort to trespass and disrupt a public utility project" created a "strain on law enforcement resources," *id.*;

- the protesters were "prevent[ing] workers from executing their job duties," RB23; and
- the protesters "could have significantly injured themselves," *id.*

None of these invented urgencies are alleged in, or even inferable from, the complaint. The complaint alleges Defendants were dispatched to a pipeline protest where four protesters had attached themselves to idle construction equipment. App.5, R. Doc. 1 at 2. There is no suggestion the protesters were committing "vandalism," at risk of "significantly injur[ing] themselves," or "prevent[ing] workers from executing their job duties." RB18-19, 23. Indeed, the complaint does not mention the presence of workers at all. Nor does it mention a "property owner," much less indicate there was some "conflict" or "risk of violent confrontation" between a "property owner" and Mr. Locke. RB15, 19.

Defendants' assertion that protests theoretically "*can* lead to increased risk of violent confrontation," RB15 (emphasis added), is beside the point. The *Graham* inquiry concerns actual threats, not hypothetical ones. *See Nieters v. Holtan*, 83 F.4th 1099, 1108-09 (8th Cir. 2023) (officer must identify "facts suggesting an immediate threat to his safety or the safety of others," not merely an abstract "threat of harm"); *Westwater v.*

Church, 60 F.4th 1124, 1129 (8th Cir. 2023) (whether individual "posed a realistic threat" to safety is the "critical factor" under *Graham*).

Defendants' assertion that extraction team removal involved a "lengthy process," RB19, is likewise unsupported by the complaint. The complaint does not describe what the extraction process entailed nor how long it took, and certainly does not describe it as "lengthy." *See* App.7, R. Doc. 1 at 4. This Court cannot draw inferences in Defendants' favor at the motion-to-dismiss stage. *Cole*, 599 F.3d at 861.

Defendants also take issue with Mr. Locke's characterization of their actions as "gratuitous," OB24-25, suggesting maybe Aukes and Parks did not "kn[ow] extraction teams were en route" when they decided to torture him, RB3-4. But it is reasonable to infer that Aukes and Parks—the Sheriff and Chief Deputy Sheriff of Hubbard County—were in communication with both their dispatchers and their extraction team and thus were aware the team had been dispatched to the protest, if not the ones who ordered the team to report. Indeed, it strains credulity to think the two highest-ranking law enforcement officers in the county would have been ignorant of that fact and somehow surprised to see their extraction teams arrive on the scene. Perhaps Defendants will produce

evidence of this in discovery, but at this stage, all reasonable inferences must be taken in Mr. Locke's favor.[1] *Cole*, 599 F.3d at 861.

In short, Defendants will have an opportunity to try to establish the existence of exigent circumstances that might have justified attempting to "expedite[]" Mr. Locke's arrest through force rather than simply waiting for the extraction teams to arrive. RB19. But "[u]nless and until discovery tells a different story," Mr. Locke's allegations control. *Mitchell*, 28 F.4th at 899.

2. Mr. Locke's form of protest did not justify Defendants' extreme infliction of force, much less as a matter of law.

Second, Defendants contend that because Mr. Locke remained passively attached to the excavator in protest notwithstanding their "pain compliance" tactics, that somehow justified their inflicting *more* force, to the point of causing neurological damage. RB13, 16. But, again, there was no need for Defendants to inflict *any* force on him *at all*—they could have simply waited for the extraction teams to arrive and remove

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[1] If this Court believes it necessary for Mr. Locke to allege explicitly that Defendants "were aware extraction teams had been dispatched," it should remand to allow him leave to add that statement. *See* R. Doc. 17 at 18 n.10 (requesting leave to amend); OB54 & n.17.

him from the excavator painlessly. *See McDaniel v. Neal*, 44 F.4th 1085, 1090 (8th Cir. 2022) (court considers the "need for the use of force").

As the Ninth Circuit observed in *Headwaters*, "it is the *need* for force which is at the heart of the *Graham* factors." *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002) (emphasis added). Here—just as in *Headwaters*—it was entirely "unnecessary" to use extreme force to remove Mr. Locke from the excavator when Defendants had an alternative method that would cause him "[n]o pain or injury" and there was no urgency or emergency requiring them to arrest him sooner. *Id.* at 1129-30 (objectively unreasonable to inflict extreme pain on nonviolent protesters just because they were passively resisting). That Defendants' "pain compliance" techniques were not succeeding did not itself create any urgency, much less one necessitating an escalation of force to the point of inducing facial paralysis. *See id.*; OB29-30.

Contrary to Defendants' suggestion, *see* RB16-19, 21-24, an individual's "passive resistance" does not automatically entitle the police to use force to effectuate an arrest—much less the extreme force Defendants employed here. Rather, there still must be a "*need* for the

use of force" that is reasonably commensurate with "the amount of force used." *McDaniel*, 44 F.4th at 1090 (emphasis added). Here, given the availability of the extraction team, there was no "need" for Defendants to use any force to remove Mr. Locke from the excavator, much less to continue inflicting force on him until it induced facial paralysis. *See, e.g.*, *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010) ("[W]e cannot say that a reasonable officer on the scene would have felt the need to use any force against" the "drunk and belligerent" plaintiff, "much less enough force to cause the injuries of which he complains.")

To be sure, this Court has sometimes recognized that "[w]hen a suspect is passively resistant, somewhat more force *may* be reasonably required." *Kohorst v. Smith*, 968 F.3d 871, 876 (8th Cir. 2020) (citation omitted; emphasis added). But the force used must still be "necessary to effect [the] arrest." *Id.*; *see also Brown*, 574 F.3d at 497 (non-compliance with commands may justify force when it creates "a realistic threat to [the officer's] personal safety" but not when it is "nothing more than an affront to his command authority"). Indeed, in the cases Defendants rely on, the use of force was warranted either because there was no way for the officers to effectuate the arrest *without* using force or because the

officers faced circumstances "fraught with danger and unpredictability." *Karels v. Storz*, 906 F.3d 740, 745 (8th Cir. 2018) (describing *Ehlers v. City of Rapid City*, 846 F.3d 1002 (8th Cir. 2017)).

In *Ehlers*, for example—Defendants' primary authority—"an officer took a fleeing arrestee to the ground after he ignored repeated warnings to put his hands behind his back." *Rokusek v. Jansen*, 899 F.3d 544, 547 (8th Cir. 2018) (summarizing *Ehlers*); *see Ehlers*, 846 F.3d at 1007, 1011. Here, it is undisputed that Mr. Locke never fled—indeed, he was chained to an excavator and another protester. Defendants' reliance on the Tenth Circuit's unpublished opinion in *Valencia v. De Luca*, 612 F. App'x 512 (10th Cir. 2015), is similarly unpersuasive. *Valencia* involved "active," not passive resistance. *See Davis v. Clifford*, 825 F.3d 1131, 1136 n.2 (10th Cir. 2016). Defendants concede Mr. Locke was not actively resisting, and his act of passively sitting still in peaceful protest while Defendants tortured him is not comparable to the argumentative "two-minute struggle" Valencia engaged in during a chaotic traffic stop and drug arrest. *Valencia*, 612 F. App'x at 515.

Defendants' reliance on *Ferguson v. County of Clearwater*, __ F. Supp. 3d __, 2024 WL 1255505 (D. Minn. Mar. 25, 2024), is also off-point.

In *Ferguson*, a district court found that the plaintiff was "actively resisting" arrest and that the officers "had no alternative but to use force" to remove her from the protest site—explicitly distinguishing cases, like this one, where protesters can be removed with extraction teams. *Id.* at *4-*5. And the other cases Defendants cite for their "passive resistance" point all concerned radically different factual scenarios that are far removed from the facts here. *See, e.g.*, *Cravener v. Shuster*, 885 F.3d 1135, 1137-40 (8th Cir. 2018) (upholding use of force to subdue "paranoid schizophrenic" who "had not taken his antipsychotic medication," was acting aggressively, and was physically resistant, after officer "made multiple attempts to limit the amount of force"); *Wertish v. Krueger*, 433 F.3d 1062, 1064-67 (8th Cir. 2006) (upholding use of force to arrest an erratic driver who had fled police, resisted commands to exit his vehicle, and potentially "posed a serious threat to public safety" and "[o]fficer safety"); *see also infra* pp. 16-17 (discussing *Forrester* and *Green*).

Defendants suggest that, as in those cases, "[t]he only way they could effect [Mr. Locke's] arrest was to get him to release himself" from the excavator through force. RB21-22; *see also* RB18 (stating that "officers would have to use some amount of force to remove him"). But

that is obviously not true: the County had a dedicated extraction team that could—and did—remove him from the excavator without incident, a point Defendants do not dispute.

Defendants also repeat their assertion that Mr. Locke was a "felony suspect," suggesting that this somehow justified their extreme use of force. RB15, 22, 27, 46. Mr. Locke explained in his opening brief why that argument fails: put simply, no reasonable officer would have perceived him to be committing more than misdemeanor trespass, and the subsequent creative criminal complaint charging him with felony theft based on the excavator's monetary value did not somehow transform him into a security threat. OB20-21, 26-28. If anything, the fact that he was attached to an excavator made him *less* of a threat than the freestanding activists in *Mitchell*, as he could not flee or pose any real danger to the officers, who walked freely among him and his fellow protesters. Defendants do not attempt to rebut these points.

3. Defendants' use of force, as alleged in the complaint, was far more than de minimis.

Alternatively, Defendants contend they "did not use more than *de minimis* force." RB12; *see* RB19-26. Defendants largely ignore Mr.

Locke's allegations describing both their conduct and its effects and instead urge characterizations that find no support in the complaint.

Mr. Locke's complaint describes police force that "rose to the level of torture." App.4, R. Doc. 1 at 1. While he sat exercising his First Amendment rights, Defendants repeatedly and systematically pressed their hands into the nerves behind his ears, under his nose, and beneath his jaw bone. App.6, R. Doc. 1 at 3. The very purpose of these techniques, according to the complaint, was to "caus[e] excruciating pain," *id.*, and fellow protesters subjected to the same techniques described "screaming" in agony and fearing for their safety as the officer "put all of his weight" on their nerve, App.14, R. Doc. 18-1 at 2.[2]

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[2] These and other descriptions of Defendants' conduct and its effects are from a video that was referenced, and therefore incorporated, in Mr. Locke's complaint. *See* App.4, R. Doc. 1 at 1 (citing https://twitter.com/MorePerfectUS/status/1440780477644763138 (hereinafter "Incorporated Video"). One must be logged into an X account to access the Twitter link; however, the video is also available at https://www.youtube.com/watch?v=O5hDJddQ6nM. For ease of reference, Mr. Locke cites a verbatim transcript of the video, which was entered into the record below, without objection, at App.14-17, R. Doc. 18-1; the descriptions quoted above are at 0:19-0:33 and 2:10-2:25 of the video. Although Defendants criticize the video as "heavily edited," RB5, they do not dispute it was incorporated in Mr. Locke's complaint and therefore proper to consider on a motion to dismiss. *See* OB4 n.1.

Mr. Locke alleged that, at one point, an officer was "pushing so hard into [his] nasal cavity" that his "nasal airwaves were completely blocked," depriving him of oxygen. *Id.* (Incorporated Video 0:41-0:49). Eventually, Defendants' repeat applications of force—at least six total—caused him and another protester to suffer facial paralysis known as Bell's Palsy; Mr. Locke also experienced ongoing tinnitus. *See* App.7, R. Doc. 1 at 4; App.14, R. Doc. 18-1 at 2 (Incorporated Video 2:41-3:20). Repeatedly pushing on an arrestee's face and skull with enough pressure to cause debilitating pain, suffocation, and neurological damage is not a *de minimis* use of force. *See, e.g.*, *Montoya v. City of Flandreau,* 669 F.3d 867, 872 (8th Cir. 2012) (single "leg sweep" to trip suspect was more than *de minimis*); *Brown*, 574 F.3d at 495 (2 to 3 seconds of Taser in "drive stun mode" to upper arm was more than *de minimis*). Defendants' attempt to paint their infliction of force as "simple and minimal," RB19, bears no resemblance to the prolonged, horrific "torture" depicted in the complaint and incorporated video footage, App.4, 6, 8; R. Doc. 1 at 1, 3, 5.

Defendants' characterization of their torture as "brief" and lasting only "a few seconds," RB20, 27, likewise finds no support in the complaint. Mr. Locke alleged repeated applications of targeted pressure

on multiple different nerves—at least six total, by each officer in succession. App.6, R. Doc. 1 at 3. He stated that Defendants released him only "[a]fter they thought that it was long enough," suggesting that each hold lasted some duration. App.14, R. Doc. 18-1 at 2 (Incorporated Video 1:51-1:57). And, indeed, another protester described each technique as lasting "probably 30 to 45 seconds." *Id.* (Incorporated Video 0:10-0:15). It is reasonable to infer from these allegations that Defendants' repeated holds against Mr. Locke's nerves were not momentary or fleeting but sustained across several minutes. Perhaps discovery will disprove Mr. Locke's allegations, but at this stage, all reasonable inferences must be drawn in his favor. *Cole*, 599 F.3d at 861.

Defendants also ask this Court to ignore Mr. Locke's serious injuries, urging that the degree of injury is not "dispositive" because force can "have different effects on different people." RB25-26 (quoting *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011)). But "[t]he degree of injury is certainly *relevant* insofar as it tends to show the amount and type of force used." *Chambers*, 641 F.3d at 906 (emphasis added). That not one but two protesters developed Bell's Palsy as a result of Defendants' actions is a strong indication that the force they employed

was considerable, and certainly not *de minimis*. A "simple and minimal" touch to a person's face "for a few seconds," RB19, 20, does not typically result in facial paralysis.

The cases Defendants rely on do not support a conclusion that their use of force was *de minimis*, much less "[a]s a matter of law." RB13. Defendants rely principally on *Green v. Missouri*, 734 F. Supp. 2d 814 (E.D. Mo. 2010), a nonbinding district court opinion. RB21. In *Green*, the court concluded that an officer's act of grabbing an arrestee's arm with "absolutely no violence" and pulling him from a public meeting—causing minor pain but no injuries—constituted a "*de minimis* use of force." 734 F. Supp at 839. Even if *Green* were binding, it hardly suggests the force Defendants used was *de minimis*: briefly pulling a noncompliant arrestee from an auditorium without injury is plainly different in degree and kind from two officers systematically pressing their body weight into a peaceful protester's cranial nerves for several minutes to the point of causing neurological damage.

Defendants' reliance on *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), RB22-23, is likewise misplaced. *Forrester* did not hold that the force the officers used there—twisting cords around protesters'

wrists to induce compliance—was *de minimis*, much less as a matter of law. Instead, *Forrester* concluded that "ample evidence" supported a jury verdict that the officers "acted reasonably" in using those techniques, where trial evidence showed that the "more than 100 protesters" who had "converged upon a medical building, blocking entrances, filling stairwells and corridors, and preventing employees and patients from entering," posed a "risk of injury to the medical staff, patients of the clinic, and other protesters." 25 F.3d at 805, 807.

Here, of course, there has been no "evidence" presented at all—the action was dismissed on the complaint—and nothing in Mr. Locke's complaint suggests he or his fellow protesters posed a "risk of injury" to anyone at the rural construction site. *Id.* In fact, he alleged the exact opposite: that he "did not pose any threat of harm to anyone." App.6, R. Doc. 1 at 3. As in *Forrester*, Aukes and Parks will have an opportunity to try to develop evidence supporting their position. But on the facts Mr. Locke alleged, their use of force, which was prolonged, painful, and caused serious neurological injury, was both extreme and unjustified.

In the end, Defendants ask, "what if the pressure point pain compliance techniques worked, and Locke released himself from the

sleeping dragon?" RB26-27. But that counterfactual is irrelevant. Any number of barbarous torture tactics could have "worked" to end the peaceful protest. It does not follow that all such tactics would be reasonable, much less "[a]s a matter of law." RB13. Here, Mr. Locke alleged that two officers, faced with zero urgency and a ready alternative to force, nevertheless chose to hurt him until one "side of [his] face wasn't working anymore." App.14, R. Doc. 18-1 at 2 (Incorporated Video 0:55-1:00). That use of force was unquestionably more than *de minimis* and thus, under the circumstances alleged, violated the Fourth Amendment.

B. Clearly Established Law Put the Officers on Notice That Their Use of Force Was Unreasonable.

Qualified immunity does not shield Aukes and Parks here, particularly at the complaint stage. In a dozen different cases, this Court has held *both* that the Fourth Amendment prohibits more-than-*de-minimis* force against a nonthreatening, non-fleeing, non-actively resisting individual suspected only of low-level offenses, *and* that such a rule is "clearly established" and sufficiently specific to give officers "fair warning" even in cases involving new methods of inflicting harm. *See, e.g.*, *Mitchell*, 28 F.4th at 898; OB31-36 (collecting cases). And at least four other circuits have specifically condemned the use of "pain

compliance techniques" to inflict harm on nonviolent protesters—including under very similar circumstances as this case. *See, e.g.*, *Headwaters*, 276 F.3d at 1129–31; OB37-41 (describing cases). These bodies of precedent gave Defendants ample notice that repeatedly jamming their body weight into the face and skull of a nonviolent protester, to the point of causing him facial paralysis and tinnitus, violated the Fourth Amendment.

In response, Defendants make the same mistake the district court did, arguing it was "not clearly established" that the particular "pressure point pain compliance techniques" they used were "more than *de minimis* force." RB28; *see also* RB20, 31, 32. Mr. Locke explained in his opening brief why that reasoning is flawed, OB41-48, and two *amicus* briefs elaborate on this point, *see* Brief of *Amicus Curiae* Institute for Justice in Support of Appellant and Reversal, at 8-16; Brief of the National Police Accountability Project as *Amicus Curiae* in Support of Reversal, at 5-10.

Put simply, this Court has rejected Defendants' "prohibitively difficult" weapon-by-weapon approach to qualified immunity, *Banks v. Hawkins*, 999 F.3d 521, 528–29 (8th Cir. 2021), and numerous other circuits have explained persuasively why the lawfulness of force "does not

depend on the precise instrument used to apply it," *Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012); *see* OB42-47. Courts "need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). Especially where a principle of law is clear and longstanding, as this one is, police officers can "be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two." *Id.*

Defendants acknowledge these cases but argue that "the use of an officer's hands to apply pressure is not a novel development in weapons platforms available to officers." RB38. Defendants' focus on "novel technology," *id.*, misses the mark. The very point of the cases Mr. Locke and *amici* cite is that "[l]awfulness of force…does *not* depend on the precise instrument used to apply it." *Newman*, 703 F.3d at 763-64 (emphasis added). While those cases recognize the perverse incentive Defendants' weapon-by-weapon approach would give officers to "invent creative and novel means of" inflicting excessive force, *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 102 (4th Cir. 2017), they quite obviously do not stand for the *inverse* proposition Defendants suggest:

that officers somehow require a *heightened* standard of notice when they employ age-old, low-tech methods of harming an arrestee.[3]

Indeed, many of the cases Mr. Locke cites do not involve technological innovation at all but cruder, less sophisticated ways to inflict harm. In *Montoya v. City of Flandreau*, for example, the officer used a "leg sweep" to trip the plaintiff. 669 F.3d at 870. In *Rohrbough v. Hall*, 586 F.3d 582, 585 (8th Cir. 2009), the officer punched an arrestee in the face then wrestled him to the ground. In *Howard v. Kansas City Police Department*, 570 F.3d 984, 989-90 (8th Cir. 2009), the police pushed a shirtless arrestee onto hot asphalt. And in *Thompson*, 878 F.3d at 102, the officers gave a detainee a "rough ride" in a prison van.

In all of these cases, the Court held the officers were on notice that their uses of force were constitutionally excessive, without demanding or even citing a case involving the same method of force. *See Montoya*, 669 F.3d at 873 (holding that *Brown*—a Taser case—provided notice that it

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[3] To be clear, Mr. Locke does not concede the techniques Defendants employed are "not a novel development" in policing tactics. RB38. Because his action was dismissed at the complaint stage, there has been no discovery on the history of this particular form of "pain compliance" or its adoption by the Hubbard County Sheriff's Department.

was objectively unreasonable to leg-sweep a "nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee"); *Howard*, 570 F.3d at 991-92 (cases involving "overly-tight handcuffs" provided fair warning that leaving arrestee on hot asphalt was excessive); *Thompson*, 878 F.3d at 102 (cases involving "punches and kicks" clearly established unconstitutionality of a "rough ride"). Indeed, in *Rohrbough*, this Court held that *Graham* itself was enough to give notice that punching and wrestling to the ground a person who had "created a disturbance" in a shop and then pushed an officer was an unconstitutionally excessive response. 586 F.3d at 586-87. As in those cases, Defendants did not need a case involving the exact same "pain compliance" methods to understand the force they exerted on Mr. Locke was more than *de minimis*. Defendants' methods were "simply a different means of effectuating the same constitutional violation" this Court has recognized for decades. *Thompson*, 878 F.3d at 102.

Defendants suggest that more specificity was required because, unlike a leg sweep or a punch, the "pain compliance" techniques they used could not have been "expected to cause" injury. RB20. But that

defies reason: one does not need a medical degree, much less guidance from a federal court, to understand that two adult men pressing their body weight into the sensitive nerves on someone's face and skull could cause him injury. Indeed, the defendants made essentially the same claim in *Montoya* about their "leg sweep" and this Court rejected it. 669 F.3d at 872 (rejecting claim that plaintiff's broken leg was "simply an 'unfortunate' and 'unintended' consequence" of leg sweep).

Defendants attempt to sidestep this Court's precedent on the ground that Mr. Locke was "engaged in passive resistance"—*i.e.*, remained still and attached to the excavator in protest. RB32; *see* RB30-31, 35-36. But Mr. Locke's conduct does not take this case outside the longstanding, clearly established law prohibiting more-than-*de minimis* force in these circumstances. That case law, from *Brown* on, makes clear that it is *active* resistance to arrest—*i.e.*, actions that create danger or unpredictability, like fighting and struggling—that could warrant the use of more-than-*de minimis* force, not mere passive resistance that does not otherwise pose a security threat. *See, e.g.*, *Brown*, 574 F.3d at 499 ("[I]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or *actively resist arrest* and pose little or

no threat to the security of the officers or the public.") (emphasis added).[4] Indeed, *Graham* itself speaks of someone "actively resisting arrest" as the circumstance potentially giving rise to the need for force. *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see* RB13 (quoting *Graham*).

Moreover, the plaintiffs in *Headwaters* were passively resisting in virtually identical circumstances to Mr. Locke: they were "sitting peacefully," chained to one another using "self-releasing lock-down devices," and "refused to release" themselves despite the officers' repeated inflictions of pain. 276 F.3d at 1127, 1130. Yet, the Court did not hold that their passive resistance justified the officers attempting to remove them by force; to the contrary, the Court held it was clear that inflicting *any* harm on the protesters was objectively unreasonable, much less harming them "*repeatedly*" just because they passively resisted. *Id.*;

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[4] *See also Montoya*, 669 F.3d at 873; *Johnson v. Carroll*, 658 F.3d 819, 827-28 (8th Cir. 2011); *Shannon*, 616 F.3d at 862-63, 865. It is perplexing that Defendants rely so heavily on *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019) (en banc), *see* RB36, as there this Court explicitly distinguished between passive and active resistance and characterized the *Brown* line of cases as "[d]ecisions concerning the use of force against suspects who were compliant or *engaged in passive resistance*," *Kelsay*, 933 F.3d at 980 (emphasis added).

see also Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 119, 123-24 (2d Cir. 2004) (unconstitutional to use "pain compliance techniques" like choke holds and wrist bends on protesters practicing "passive resistance"). Defendants' main response to *Headwaters* is that the officers there used a different method of inflicting harm than Aukes and Parks used here. RB32-33. But that is a distinction without a constitutional difference, as Mr. Locke has already explained.

Finally, Defendants never respond to Mr. Locke's argument that "in an obvious case," the *Graham* test itself "can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)); *see* OB47-48. Viewing Mr. Locke's allegations as true and drawing all reasonable inferences in his favor, he engaged in peaceful protest and Defendants tortured him to the point of inducing facial paralysis. Defendants did not need to consult a casebook to be on notice that such conduct was unreasonable.

Because clearly established law prohibits officers from using more-than-*de-minimis* force under the circumstances here, and because it would be clear to any reasonable officer that the force Defendants

employed was far more than *de minimis*, this Court should reverse the district court's decision to grant qualified immunity on the pleadings.

II. The District Court Erred in Dismissing the Official-Capacity Claims Under § 1983.

Defendants do not dispute that the actions of a municipal official with "final policymaking authority" can constitute "municipal policy," thereby subjecting a municipality to § 1983 liability in an official-capacity suit. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483 (1986); *see* OB51-51. Defendants also do not dispute that Sheriff Aukes is, under Minnesota law, the final policymaker for Hubbard County on matters of law enforcement tactics. *See* RB38-42.

And with good reason: Minnesota law leaves no doubt that county sheriffs exercise final policymaking authority for their county on law enforcement matters. *See* OB51 (citing law); *In re Olson*, 300 N.W. 398, 399-400 (Minn. 1941) (the county sheriff is, under "common and statutory law," the "chief magistrate of his county, wielding the executive power for the preservation of the public peace"); *see also* Brief of *Amici Curiae* Jessica Pishko and Farhang Heydari in Support of Appellant Locke, at 9-16 (explaining how the history, traditions, and structure of the office of elected county sheriff reflect independence from county control).

Defendants argue, however, that "the Complaint contains no *facts* regarding the Sheriff's capacity as a final policymaker." RB40 (emphasis added). But whether an individual is a final policymaker for municipal-liability purposes is a question of law, not of fact. *See Soltesz v. Rushmore Plaza Civic Ctr.*, 847 F.3d 941, 946 (8th Cir. 2017). Mr. Locke is not required to plead the answer to a question of law in his complaint. *Whitney v. Guys, Inc.*, 700 F.3d 1118, 1129 (8th Cir. 2012) (question on a motion to dismiss is whether the plaintiff "adequately asserted facts," not "naked legal conclusions").

Indeed, pleading "Sheriff Aukes is a final policymaker" would simply be a conclusory allegation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-81 (2009) (court is "not bound to accept as true a legal conclusion couched as a factual allegation"); *see also Groden v. City of Dallas*, 826 F.3d 280, 284 (5th Cir. 2016) ("the specific identify of the policymaker is a legal question that need not be pled"); *Davis v. City of Apopka*, 734 F. App'x 616, 620 (11th Cir. 2018) (complaint need not "state expressly" police chief was final policymaker "because whether an individual is a final policymaker is a question of law, not of fact," and "[c]omplaints must allege facts; they are not required to allege conclusions of law").

Moreover, this Court has recognized that a § 1983 plaintiff is "not required to specifically plead the existence of an unconstitutional policy or custom." *Watkins v. City of St. Louis, Missouri*, 102 F.4th 947, 953 (8th Cir. 2024). Indeed, the Supreme Court has held that a complaint need not even "expressly invoke § 1983," much less state a "legal theory" of municipal liability. *Johnson v. City of Shelby*, 574 U.S. 10, 11-12 (2014) (summarily reversing dismissal of § 1983 complaint against municipality); *see also In re SuperValu, Inc.*, 870 F.3d 763, 772 (8th Cir. 2017) ("'[I]t is unnecessary to set out a legal theory for the plaintiff's claim for relief' in a pleading." (quoting *Johnson*, 574 U.S. at 12)). Rather, it need only allege facts supporting "the existence of an unconstitutional policy or custom," such as a "deliberate choice of a guiding principle or procedure" made by a final policymaker. *Watkins*, 102 F.4th at 953-54.

Here, Mr. Locke's complaint did just that: it alleged that Aukes, in his official capacity as Hubbard County Sheriff, both committed unconstitutionally excessive force himself and ratified Chief Deputy Sheriff Parks's infliction of excessive force. App.4-7, R. Doc. 1 at 1-4; *see* OB52-53. Because Sheriff Aukes is, by law, Hubbard County's highest authority on law enforcement matters—a legal conclusion Defendants do

not dispute—the County can be held liable for his official acts. *See Dean v. County of Gage*, 807 F.3d 931, 941-43 (8th Cir. 2015) (sheriff's presence for, and acquiescence in, unconstitutional activity constituted evidence of county policy); *Rynders v. Williams*, 650 F.3d 1188, 1195 (8th Cir. 2011) (single action by final policymaker can constitute "municipal policy"). Mr. Locke, therefore, sufficiently stated an official-capacity claim.

If this Court believes Mr. Locke needed to specifically plead "Sheriff Aukes is a final policymaker" to state a valid claim, it should remand to allow him leave to amend. *See Johnson*, 574 U.S. at 12 ("For clarification and to ward off further insistence on a punctiliously stated 'theory of the pleadings,' petitioners, on remand, should be accorded an opportunity to add to their complaint a citation to § 1983.").

Indeed, it would be particularly unjust to deny him an opportunity to perfect this claim given that (1) the district court raised the municipal-liability issue *sua sponte* in its final order, without giving him an opportunity to brief it or address it at argument, *see* RB41 (conceding that "Appellees did not separately brief the official capacity claims" and the court dismissed them *"sua sponte*"), and (2) Mr. Locke requested leave to amend below but the district court did not address that request, *see*

R. Doc. 17 at 18 n.10; App.18-26, R. Doc. 23. If adding that simple, conclusory sentence to his complaint is all Mr. Locke needed to do to state an official-capacity claim, then justice demands giving him an opportunity to do so. *See* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires.").[5]

III. The District Court Erred in Dismissing the State-Law Claims on Official Immunity Grounds.

This Court has been clear: where there is "a factual dispute regarding whether the officers used excessive force," a jury could find they are "not entitled to official immunity." *Johnson*, 658 F.3d at 829. Because such a factual dispute exists here, the district court erred in dismissing the state-law claims on official immunity grounds.

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[5] Defendants' argument that "the district court was not required to dismiss…without prejudice," RB42, is confusing and, in any event, beside the point. Mr. Locke's claim is not that the court erred by dismissing with prejudice; his claim is that the court erred by dismissing *at all*. Leave to amend is simply an alternative remedy he requests in the event this Court concludes his complaint was technically deficient for failing to allege the legal conclusion that Aukes was a final policymaker. Defendants offer no reason to deny him an opportunity to make that simple amendment, which would be in the interest of justice. *See Johnson*, 574 U.S. at 12; Fed. R. Civ. P. 15(a)(2).

Defendants' contrary arguments are meritless. First, Defendants contend their actions were "legally justified" because the protestors "were effectively preventing workers from performing their jobs." RB46. But the complaint makes no mention of workers. That invented assertion does not immunize Defendants' conduct as a matter of law.

Second, Defendants argue that Mr. Locke "failed to plead any facts establishing" they "acted in bad faith." RB47. But the burden is on Defendants to demonstrate "that the offending acts were taken in good faith," not on Mr. Locke to plead and prove *bad* faith. *Gleason v. Metro. Council Transit Operations*, 563 N.W.2d 309, 314, 318 (Minn. Ct. App. 1997); *but see* App.4, R. Doc. 1 at 1 (alleging Defendants harmed him "to obtain sadistic pleasure"). "[U]nder most circumstances, a legal determination on the existence of 'good faith' will be precluded by the existence of disputed facts." *Gleason*, 563 N.W.2d at 318. That is the case here.

Finally, Defendants argue that official immunity is warranted because it was not "clearly established" their conduct violated the law. RB47. That argument fails for the same reason their qualified-immunity argument fails; the cases clearly establishing the law for qualified-

immunity purposes preclude the application of state-law official immunity here. *See, e.g.*, *Brown*, 574 F.3d at 501.

CONCLUSION

For the foregoing reasons, this Court should reverse and remand for further proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because it contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Pursuant to Circuit Rule 28A(h)(2), this brief and the attached addendum have been scanned for viruses and are virus-free.

s/ Christine A. Monta

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2024, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Christine A. Monta