

UNITED STATES DISTRICT COURT
 DISTRICT OF SOUTH DAKOTA
 WESTERN DIVISION

DAKOTA RURAL ACTION, DALLAS)
 GOLDTOOTH, INDIGENOUS)
 ENVIRONMENTAL NETWORK, NDN)
 COLLECTIVE, SIERRA CLUB, and)
 NICHOLAS TILSEN,)

Case No. 19-5026

Plaintiffs,)

**REPLY TO PLAINTIFFS’
 OPPOSITION TO DEFENDANT
 THOM’S MOTION TO DISMISS**

v.)

KRISTI NOEM, in her official capacity as)
 Governor of the State of South Dakota, JASON)
 RAVNSBORG, in his official capacity as)
 Attorney General, and KEVIN THOM, in his)
 official capacity as Sheriff of Pennington County,)

Defendants.)

COMES NOW Defendant Kevin Thom, in his official capacity as Sheriff of Pennington County, by and through J. Crisman Palmer and Rebecca L. Mann or Gunderson, Palmer, Nelson & Ashmore, LLP, his attorneys, and respectfully submits this Reply to Plaintiff’s Opposition to his Motion to Dismiss. Plaintiffs lack standing to sue Sheriff Thom and have failed to articulate a municipal policy for *Monell* liability. The Complaint should be dismissed against Sheriff Thom pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

1. There is No Municipal Liability

Pre-enforcement challenges seeking prospective injunctive relief against a municipality are subject to *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978) and must satisfy *Monell’s* “policy or custom” requirement. *Martin v. Evans*, 241 F. Supp. 3d 276, 284 (D. Mass. 2017) (citing *Los Angeles County v. Humphries*, 562 U.S. 29, 39 (2010)). The Complaint fails to identify any Pennington County policy with precision to impose *Monell*

liability. Instead, Plaintiffs contend in their brief that Sheriff Thom will need to adopt a policy *at some point in the future* in regards to how to enforce the Criminal Statutes. (Doc. 36 at p. 20.) Plaintiffs essentially concede there is no actual Pennington County policy they are challenging and that their claim against Sheriff Thom is unripe. *See KCCP Trust v. City of North Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) (A claim is not ripe if the alleged injury “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

Plaintiffs cite *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986) arguing municipal liability attaches where “a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question” but fail to identify the “deliberate choice” Sheriff Thom allegedly took. Neither the Complaint nor Plaintiffs’ brief articulate one single decision, official policy, or custom by Pennington County or Sheriff Thom that is objectionable¹.

Plaintiffs’ suggestion in their brief that Pennington County has developed or will develop written policies as to the Criminal Statutes (Doc. 23 at p. 18) because municipal policy authorizes written plans for responding to “unusual occurrences” does not state a *Monell* claim either. First, there is no identification as to what these policies do contain or might contain. Second, there is no contention that any such policies are or will be unconstitutional. More importantly, however, none of these allegations are contained in the Complaint. Simply put, Plaintiffs have failed to allege a *Monell* claim in their Complaint and it must be dismissed as to Sheriff Thom. Plaintiffs seem to suggest that any policy Pennington County might have in

¹ Plaintiffs brief does cite to Pennington County Sherriff’s Office Law Enforcement Policies, in particular Criminal Process 112-03, for the argument that Sheriff Thom has discretion to enforce the challenge Criminal Statutes. (Doc. 36 at p. 18.) However, Plaintiffs are not contending this municipal policy is unconstitutional.

regards to a riot, whether in existence now or to be determined in the future, creates *municipal liability*. And they make this allegation without identifying a single policy or what it says. That Pennington County *might* have an unconstitutional policy or *could* develop one in the future is wholly speculative and inadequate to state a claim for *Monell* liability against Sheriff Thom.

2. There is No Discretion to Enforce the challenged Criminal Statutes

Plaintiffs contend municipal liability attaches to *Pennington County* for enforcing *state statutes* arguing Sheriff Thom has discretion as to whether or not to enforce the challenged Criminal Statutes. (Doc. 36 at p. 17.) Plaintiffs make this “discretion” argument because although the Eighth Circuit has not determined whether a municipality can be liable for enforcing state law, “the prevailing view is that a local government’s exposure to *Monell* liability for enforcing state law turns on the degree of discretion the local government retains and whether the locality has made its own deliberate choices with respect to the law.” *Bruce & Tanya & Associates. v. Board of Supervisors*, 355 F. Supp. 3d 386, 400 n.6 (E.D. Va. 2018) (collecting cases).

Plaintiffs argue Sheriff Thom has discretion to enforce the challenged Criminal Statutes because the Pennington County Sheriff’s Law Enforcement Policies, 112-03 Criminal Process, provides that deputy sheriffs should use discretion in determining whether to arrest someone. (Doc. 36 at pp. 17-18) (Doc. 36-2.) This argument lacks merit because a deputy sheriff’s discretion as to whether to *arrest* someone does not mean Sheriff Thom has discretion to *enforce* the challenged Criminal Statutes. Deputy sheriffs can still *enforce* a law without *arresting* someone, as demonstrated by the policy itself which provides, “[d]eputies should make an arrest when appropriate. Deputies are encouraged to consider alternatives to arrest whenever possible (i.e., citations, summonses, referral, informal resolution and warnings) to address the variety of problems they confront.” 112:03 § III(A) (emphasis added).

Additionally, the “discretion” retained by the municipality refers to the challenged law, such as when the state statute authorizes enforcement without requiring it, not to general discretion held by law enforcement. *See e.g. Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005) (“While the unconstitutional statute *authorized* Dillon to act, it was his *deliberate decision to enforce* the statute that ultimately deprived Cooper of constitutional rights and therefore triggered municipal liability.”) (emphasis added). This is because a “policy” pursuant to *Monell* is “a deliberate choice”.² *Pembaur*, 475 U.S. at 483. A municipality must make a deliberate or conscious choice in regards to the challenged statutes to be held liable under *Monell*. Merely enforcing state statutes is not enough. In *Vives v. City of N.Y.*, 524 F.3d 346, 352 (2d Cir. 2008), the Second Circuit analyzed whether enforcing a state law constituted municipal liability:

Therefore, in addressing the conscious choice requirement, we agree with all circuits to address state laws mandating enforcement by municipal police officers that a municipality’s decision to honor this obligation is not a conscious choice. As a result, the municipality cannot be liable under *Monell* in this circumstance. On the other hand, if a municipality decides to enforce a statute that it is authorized, but not required, to enforce, it may have created a municipal policy. However, we do not believe that a mere municipal directive to enforce all state and municipal laws constitutes a city policy to enforce a particular unconstitutional statute. In our view, the “conscious” portion of the “conscious choice” requirement may be lacking in these circumstances. While it is not required that a municipality know that the statute it decides to enforce as a matter of municipal policy is an unconstitutional statute, *see Owen*, 445 U.S. at 650, it is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question. We, therefore, hold that there must have been conscious decision making by the City’s policymakers before the City can be held to have made a conscious choice. Evidence of a conscious choice may, of course, be direct or circumstantial.

Vives v. City of N.Y., 524 F.3d 346, 352 (2d Cir. 2008).

² Municipal liability can also attach on the basis of “custom”, when there is a pattern of persistent and widespread practices which become so permanent and well settled as to have the effect and force of law. *Monell*, 436 U.S. at 691. Plaintiffs have not identified any custom of Pennington County or alleged municipal liability based on a “custom”.

The challenged Criminal Statutes do not provide any discretion to law enforcement as to whether they want to enforce them. The Criminal Statutes indicate that encouraging or soliciting violence in a riot is a criminal offense. SDCL §§ 22-10-6, -6.1. The statutes do not authorize Sheriff Thom to act without a requirement he do so or give him the option as to whether he will enforce them. They do not give Sheriff Thom discretion as to whether he will *enforce* the statute. There is no indication or allegation that Sheriff Thom has “made [his] own deliberate choices with respect to the [Criminal Statutes].” *Bruce & Tanya Associates*, 355 F.Supp.3d at 400, n. 6. Enforcing state law is simply not enough to state a claim for municipal liability. Nor is it enough to satisfy the causation prong for standing because there is no action by Sheriff Thom to which the Plaintiffs’ alleged injury can be fairly traced. *See Gray v. City of Valley Park*, 567 F.3d 976, 983 (8th Cir. 2009) (“the injury must be fairly traceable to defendant’s challenged action”) (citations omitted) (emphasis added). The challenged statutes are not Pennington County’s and Plaintiffs fail to identify any challenged action by Sheriff Thom.

Finally, Plaintiffs argue Sheriff Thom has discretion to enforce the Criminal Statutes because Keloland news reported that he will not follow the South Dakota Attorney General’s opinion with respect to CBD oil. (Doc. 36 at p. 19.) Even assuming Plaintiffs’ citation to a news article constitutes “public record” that can be judicially noticed,³ the argument is unconvincing. The barebones report indicates that the Pennington County State’s Attorney will not prosecute CBD oil cases and that he came to that decision “after speaking with Ravensborg’s staff and

³ “The court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). “Courts may properly take judicial notice of newspapers and other publications as evidence of what was in the public realm at the time, but not as evidence that the contents in the publication were accurate. . . . Unless the newspaper articles contain matter that has not been disputed” *Cheval Int’l v. Smartpak Equine, LLC*, 2015 U.S. Dist. LEXIS 23324, at *8 (D.S.D. Feb. 26, 2015) (citations omitted).

examining relevant state laws” and that Pennington County Sheriff Thom will be “following Vargo’s direction and won’t arrest people for CBD oil.” <https://www.keloland.com/news/local-news/county-prosecutor-says-he-won-t-prosecute-cbd-oil-cases/1931540510> (last visited May 28, 2019).

What the article cited by Plaintiff lacks is *why* State’s Attorney Vargo will not prosecute CBD oil cases. The Rapid City Journal quoted State’s Attorney Vargo as explaining, “CBDs themselves are not scheduled and not marijuana under our statutes”.

https://rapidcityjournal.com/news/local/pennington-county-state-s-attorney-says-he-won-t-prosecute/article_c3892a04-151f-5d38-b46e-833d1c5d73ed.html (last visited May 28, 2019).

State’s Attorney Vargo did not take the position that the marijuana statutes should not be *enforced* or are optional. His opinion was that he did not believe CBDs fell within the statutes. *Id.* Nor did Sheriff Thom determine *he would not enforce* the marijuana statutes. He is quoted as saying, “[w]e will not be arresting people for CBD oil. I defer to the local state’s attorney regarding his opinion on CBD oil. Ultimately, either the courts and/or the Legislature may have to provide further clarification on the issue.” *Id.* (emphasis added). Deferring to the State’s Attorney’s opinion that a substance is not covered by the marijuana statutes does not constitute discretion as to whether or not criminal statutes will be enforced. Sheriff Thom respectfully requests dismissal from the Complaint.

Dated: May 28, 2019.

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