Case Nos. 20-3052 & 20-3053

In the United States Court of Appeals for the Eighth Circuit

CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG; and JOSÉ ZHAGÑAY on behalf of themselves and all similarly-situated persons,

Plaintiffs – Appellees,

v.

SHERIFF KYLE KIRCHMEIER; GOVERNOR DOUG BURGUM; FORMER GOVERNOR JACK DALRYMPLE; DIRECTOR GRANT LEVI; and SUPERINTENDENT MICHAEL GERHART JR

Defendants – Appellants.

On Appeal from the U.S. District Court for
the District of North Dakota
Honorable Judge Daniel M. Traynor, District Judge

BRIEF OF PLAINTIFFS-APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiffs-appellees allege that their First Amendment rights to speak and assemble were violated when defendants closed a nine-mile stretch of a public road and its wide curtilage *just* to them and those who shared their viewpoint. This closure followed months of peaceful speech in these forums by plaintiffs, and the closure was intended to freeze speech with which defendants disagreed and to extort political concessions from the Standing Rock Sioux Tribe. Plaintiffs allege that the public road and curtilage in question, which have a long history of use for expressive conduct and are physically conducive to safely hosting such conduct, are public forums.

In the present appeal, defendants premise their arguments on a large body of extrinsic evidence that is specifically alleged to be unreliable in the Amended Complaint. Defendants introduce this evidence for the truth of the matters asserted in an attempt to offer justifications for their closure that are contradicted by plaintiffs' factual allegations. Such evidence should be excluded, and this Court should conclude, as the district court did, that the defense of qualified immunity is not found on the face of the Amended Complaint.

If this Court determines that oral argument is necessary, plaintiffs believe that twenty minutes for each side should be sufficient.

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Most apposite authority:

Kushner v. Beverly Enterprises, Inc., 317 F.3d 820 (8th Cir. 2003)

II. Whether defendants' pervasive reliance on such disputed evidence in an attempt for this Court to resolve the underlying merits of the case renders this matter inappropriate for interlocutory appeal.

Most apposite authority:

Johnson v. Jones, 515 U.S. 304 (1995)

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Most apposite authority:

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IV. Whether this Court should affirm based on two independent grounds reached by the district court and not appealed by defendants.

Most apposite authority:

Nebraska State Legislative Bd., United Transp. Union v. Slater, 245 F.3d 656 (8th Cir. 2001)

STATEMENT OF THE CASE

This case revolves around the five-month closure of a highway in North Dakota to the Standing Rock Sioux Tribe and its supporters at the height of the NoDAPL movement. The highway closure was implemented several days before any supposed damage was done to the Backwater Bridge, and the road remained closed for nearly a month after any purported 'unrest' in the area had ceased. And, for the majority of the duration of the closure, no pipeline construction occurred—or legally could occur—in the area. Indeed, as alleged, defendants' purpose for closing the road was *not* to protect the integrity of the Backwater Bridge (which was never materially damaged), or to quell local unrest (the NoDAPL movement was overwhelmingly peaceful), but to extort political concessions from the Standing Rock Sioux Tribe, an independent sovereign, and to limit peaceful protest with which defendants disagreed.

I. Factual Background

From April 2016 through February 2017, tens of thousands of "Water Protectors" gathered on the northern border of the Standing Rock Reservation to oppose the construction of the Dakota Access Pipeline (DAPL). *See* State Defendants' Appendix ("State App.") at 021-022 [Amend. Compl. ¶ 1]. The grassroots movement drew representatives from over 300 tribal nations from across the U.S. and the world, and was the largest North American gathering of

indigenous people in over 100 years—and possibly ever. *Id.* at 030 [¶ 40]. The "NoDAPL" movement centered around several camps on the reservation border, including Sacred Stone (the founding camp, which was located exclusively on privately and tribally owned land) and Rosebud Camp (which was located exclusively on Reservation land managed by the Army Corps of Engineers designated by the Corps as a "free speech zone"). *Id.* at 021-023 [¶¶ 1-2], 060 [¶ 150]. These camps were only accessible by Highway 1806, a two-lane road that was the primary—and often sole—passable route to Bismarck: the region's population center, and the location of the local press, nearest airport, hospital, and shopping. *Id.* at 030 [¶ 41], 038-039 [¶ 78].

From April through October 2016, supporters of the NoDAPL movement congregated daily to speak and pray in these camps, and in a wide grassy part of Highway 1806's curtilage several miles north of the camps, on which even large groups could (and regularly did) safely gather without impeding or disrupting traffic. *Id.* at 030 [¶ 44], 058 [¶ 141]. This roadside location was of great importance to the movement because it immediately abutted several sites of religious significance to the Lakota people, because it was where the pipeline was slated to and eventually did cross the road, and because it was the only location at which Water Protectors could reach two principal audiences for their speech: construction workers and security officers. *Id.* at 036-037 [¶ 71].

By late-summer 2016, however, political polarization had infected the relationship between those gathered in opposition to the pipeline and law enforcement, led by Defendant Morton County Sheriff Kirchmeier. *Id.* at 023 [¶ 4]. Although the NoDAPL movement was overwhelmingly peaceful, *id.* at 032 [¶ 49-50], state and local officials "engaged in a concerted effort to portray the movement as a whole as far more dangerous or criminal or disruptive than was actually the case," *id.* at 023-024 [¶ 5]. This took the form of "selective, misleading, and false descriptions of Water Protector conduct, including in press statements, official declarations, and criminal charging documents." *Id.*

By the fall, the state and local defendants had identified the crucial role that Highway 1806 played in facilitating and hosting speech in the region. *Id.* at 032 [¶ 53], 039-040 [¶¶ 81-82]. And on October 24, 2016, Sheriff Kirchmeier and Morton County, operating with the assistance of the State defendants, closed a nine-mile stretch of Highway 1806 surrounding (and including) the public roadside location that had served as a spiritual and expressive heart of the NoDAPL movement. *Id.* at 024 [¶ 6], 032 [¶ 54]. The "road closure was directed only at the Tribe and its supporters": defendants regularly arrested Waters Protectors who approached the closed road, using significant force when necessary to prevent any car, foot, horseback, or ATV travel by Water Protectors on the road. *Id.* at 024 [¶ 6], 036 [¶¶ 68, 70]. On the other hand, defendants went to great lengths to ensure that others

who did not oppose the construction of the pipeline could continue to use the "closed" portions of the road for the duration of the closure. *Id.* at 024 [¶ 6], 032-033 [¶ 55], 038 [¶¶ 76-77]. Defendants ultimately maintained this discriminatory closure until March 21, 2017, doing great damage to the local Reservation community. *Id.* at 024 [¶¶ 6-8].

II. Procedural Background

The plaintiffs in this case, respectively a small-business owner, a former Historic Preservation Officer of the Standing Rock Sioux Tribe, Standing Rock's Episcopalian minister, and an elementary school volunteer, *id.* at 042-044 [¶¶ 86-92], filed this lawsuit in October 2018, alleging a range of constitutional violations arising from the discriminatory closure of the public road. Defendants moved to dismiss, and, after almost two years of consideration, the district court denied defendants' motions as to Count I. In its 101-page order, the district court held that plaintiffs had stated a claim to relief for violations of their First Amendment right to speak and assemble under several distinct legal theories: as alleged, the road closure was unconstitutional as (1) an improper time, place, or manner restriction on speech in traditional public forums (the road and its curtilage), *id.* at 214 [Order ¶ 76]; (2) a viewpoint-based restriction on speech, 217-18 [¶¶ 82, 85]; and (3) a per se unconstitutional prior restraint on speech occurring along the road and in its curtilage, and in the camps, 230-32 [¶¶ 116, 120]. In making these determinations,

the district court judge was presented with, but did not consider, "a robust number of documents filed by the State and County Defendants[] . . . includ[ing] over 1500 pages of numerous press releases from different entities, declarations, executive orders, deeds, memorandums, voluminous criminal judgments, plea agreements, and notices." *Id.* at 198-200 [¶¶ 44-45]. The Court also concluded that defendants' extensive reliance on extrinsic evidence rendered their qualified immunity defense best suited for a later stage of litigation. *Id.* at 280 [¶ 229].

III. The Present Appeal

Defendants have filed the present appeal challenging the district court's exclusion of their extrinsic evidence, arguing, with the support of that evidence, that it is not clearly established that either the road or its curtilage are traditional public forums—and, moreover, that their closure survives under a nonpublic forum analysis. Defendants do not challenge, or even acknowledge, the court's rulings on viewpoint-based discrimination or prior restraint.

SUMMARY OF ARGUMENT

There are numerous reasons why this Court can and should affirm the district court: (1) because defendants have rendered the present dispute inappropriate for interlocutory appeal by infusing disputed extrinsic evidence throughout their respective arguments, *see* Part I.B; (2) because the Supreme Court has long recognized that "[n]o particularized inquiry into the precise nature of a

specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora," *Frisby v. Schultz*, 487 U.S. 474, 481 (1988), *see* Part II; (3) because even if there were no such directly applicable governing law, there is a robust consensus of cases recognizing materially similar roads and rights-of-way as public forums, *see* Part II.B; (4) because plaintiffs have alleged numerous facts that establish beyond reasonable debate that *this* road and *this* curtilage are each a public forum when viewed under a particularized inquiry, *see* Part III; (5) because plaintiffs have alleged numerous facts that establish beyond reasonable debate that the road closure in question is unconstitutional under even a nonpublic forum analysis, *see* Part IV.A; and (6) because there are two independent grounds for affirming not raised by defendants in this appeal (and therefore forfeited) that do not turn on the forum status of the road or a nonpublic forum analysis, *see* Part IV.B. For any one—and each—of these reasons, the district court's denial of defendants' motions to dismiss Count I should be affirmed.

ARGUMENT

Standard of Review

Courts of appeals review qualified immunity rulings de novo. *See Samuelson v. City of New Ulm*, 455 F.3d 871, 875 (8th Cir. 2006). Qualified immunity "will be upheld on a 12(b)(6) motion only when the immunity is established on the face

of the complaint." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). In undertaking this review, a court "must accept as true all of the complaint's factual allegations and view them in the light most favorable to the Plaintiffs." *Stodghill v. Wellston Sch. Dist.*, 512 F.3d 472, 476 (8th Cir. 2008).

Establishing qualified immunity at the motion-to-dismiss stage is difficult; "As we have repeatedly cautioned, 'it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although an officer's 'entitlement to qualified immunity is a threshold question to be resolved at the earliest possible point,' that point is usually summary judgment and not dismissal under Rule 12.'" *Anders v. Cuevas*, 2021 WL 70029, at *5 (6th Cir. Jan. 8, 2021); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) (reporting that just 0.6% of Section 1983 claims were dismissed on qualified immunity grounds at the motion-to-dismiss stage).

I. Defendants' Reliance on Extrinsic Evidence is Improper

As a threshold matter, in deciding the present appeal, this Court should exclude the voluminous materials outside the pleadings introduced by defendants. The purpose of a Rule 12(b)(6) motion is to test the sufficiency of the *plaintiffs'* pleadings, and not to resolve factual issues that may be put into dispute after discovery.

The inappropriateness of relying on defendants' extrinsic evidence is heightened here, because the Amended Complaint specifically alleges that the extrinsic evidence in question is unreliable, constituting part of a persistent effort by state and local officials, including Kirchmeier and the State defendants, to mischaracterize the NoDAPL movement "as far more dangerous or criminal or disruptive than was actually the case." *See* State App. at 023-024 [Amend. Compl. ¶ 5]. Moreover, the inferences that defendants seek for this Court to draw from this extrinsic evidence—namely, that the movement was so violent as to require the extraordinary measure of closing the road; and that the road and its accompanying right-of-way cannot safely accommodate speech—contradict factual allegations set forth in the Amended Complaint. *See, e.g.*, *id.* at 030 [¶ 44], 032 ¶¶ [49-50]; *cf. Stodghill*, 512 F.3d at 476 ("[W]e must accept as true all of the complaint's factual allegations and view them in the light most favorable to the Plaintiffs."). This is not an instance in which plaintiffs have artfully crafted their pleadings to avoid undisputable but inconvenient truths: the Amended Complaint directly addresses the matters in question, specifically alleging a reality with which defendants' asserted counternarrative is in direct tension.[1]

[1] Given that defendants have attached extrinsic evidence totaling over 1,000 pages, and make numerous claims without specific citation to this evidence, plaintiffs are unable to discuss and rebut every extrinsic contention. Where plaintiffs are silent, this Court should assume that any factual contention made by defendants either

Neither the Federal Rules of Civil Procedure nor the court-created rules of qualified immunity permit a court to consider such material on an interlocutory appeal arising from the denial of a Rule 12(b)(6) motion to dismiss.

A. The Federal Rules Do Not Permit Consideration of this Evidence

The Federal Rules are explicit about what courts must do when presented with matters outside the pleadings on a motion to dismiss: "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to *and not excluded by the court*, the motion *must* be treated as one for summary judgment under Rule 56." Fed. R. Civ. Pro. 12(d) (emphasis added).

The Eighth Circuit has recognized several limited exceptions to this rule. A court may consider extrinsic evidence when it consists of: (A) "matters incorporated by reference or integral to the claim," (B) "matters of public record" and "items subject to judicial notice," (C) "items appearing in the record of the case," or (D) "exhibits attached to the complaint whose authenticity is unquestioned." *Miller v. Redwood Toxicology Lab, Inc.*, 688 F.3d 928, 931 n.3 (8th Cir. 2012). Each of these exceptions are narrowly construed and none properly applies to the extrinsic evidence in question. As such, this Court should exclude the

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contradicts plaintiffs' well-pled factual allegations or is likely to come into dispute following discovery.

extrinsic evidence and decide whether defendants' "12(b)(6) motion will succeed or fail based upon the allegations contained in the face of the complaint." *Id.*

Kirchmeier argues only that the extrinsic evidence consists of judicially noticeable public records. Kirchmeier Br. at 31-39; *see also id.* at 34 (referencing, without more, the other exceptions). In his brief, Kirchmeier provides a list of contentions he believes should be judicially noticed, including the supposedly "purely legal" question at the heart of the present appeal: that "The Backwater Bridge and Highway1806 in the vicinities at issue in this lawsuit were not traditional public fora at any time prior to [or during] the DAPL protests in 2016." Kirchmeier Br. at 8; *see also id.* 6-15 (including claims made by defendants themselves, which Kirchmeier seeks to notice for the truth of the matters asserted). State defendants do not advance any substantive argument as to why the evidence in question may be considered, including in their brief only the repeated admonition that "no purpose is served" by ignoring their extrinsic evidence, State Def. Br. at 26, 29, and the statement that "these matters of public record . . . are subject to notice by this Court," *id.* at 24, followed by a string cite of cases with parentheticals referencing the full range of exceptions, *id.* at 24-25.

Judicial notice allows courts to declare facts as true without the need for any formal adjudication or presentation of evidence. Because judicially noticed facts are facts that are universally accepted as true, they may be considered on a motion

to dismiss along with a plaintiff's allegations—which are also accepted as true. Because the district court in this case decided not to take judicial notice, State App. at 198-200 [Order ¶¶ 44-45], the applicable standard of review is abuse of discretion, *see Cravens v. Smith*, 610 F.3d 1019, 1029 (8th Cir. 2010) ("We review a district court's decision not to take judicial notice for abuse of discretion.").

"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. "[A] high degree of indisputability is the essential prerequisite." Advisory Notes to Rule 201; *see also U.S. v. Gould*, 536 F.2d 216, 219 (8th Cir. 1976) (Judicial notice is appropriate for facts that are "capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary.").

For example, a court may take judicial notice of a geographical location: "The Court takes judicial notice that Section 1 of Township 24, Range 12 East, lies in Stoddard County, Missouri. The Court further takes judicial notice of the fact that this section borders New Madrid County." *Joyce v. Federal Crop Ins.*, 356 F. Supp. 928, 931 (E.D. Mo. 1973). This is the prototypical example of the sort of fact "generally known within the trial court's territorial jurisdiction." *Id.*

Likewise, a court may take judicial notice of public records—not for the truth of the matters asserted within those records, but to establish the *fact* of those records. *See, e.g.*, *Rosemann v. Sigillito*, 785 F.3d 1175, 1177 n.3 (2015) (taking judicial notice of "the fact of Sigillito's conviction and his sentence"). This is because the existence of a court opinion or a public record will generally be indisputable; there may be grounds to dispute the *correctness* of such a record (and parties regularly do), but not the fact that it exists. *See Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 830, 832 (8th Cir. 2003) (holding that public documents offered "for the truth of the matters therein" are not properly subject to judicial notice); *cf. Baker Elec. Co-op., Inc. v. Chaske*, 28 F.3d 1466, 1475 (8th Cir. 1994) (setting forth the standard—collateral estoppel—for when a court can view prior judicial decisions to establish the underlying truth of a matter). Given the essentially undisputable nature of facts subject to judicial notice, any contention that is contradicted by allegations in a complaint is almost certainly not a fact the court may judicially notice.

In this case, nearly all of the extrinsic claims set forth by defendants are either disputable or contradict plaintiffs' pleadings—and are therefore not properly subject to judicial notice. Prominent among such allegations are public records to which defendants cite for the truth of the matters asserted in those records. Indeed, the essence of defendants' argument is that *any* claim made in the public record,

including defendants' own characterizations of the NoDAPL movement, is "subject to judicial notice" and "may be considered by the Court" for any purpose. Under this logic, to render a fact "not subject to reasonable dispute," Fed. R. Evid. 201, one must merely declare or discover that fact in a public record. This is plainly incorrect.

Putting aside Kirchmeier's request to take judicial notice of the truth of the matters asserted in defendants' own public statements, defendants also cite extensively to *Dakota Access v. Archambault* and *Dundon v. Kirchmeier*, two orders involving different plaintiffs and different legal claims with different factual bases. Defendants cite to these cases, not to show that these orders were filed or when, but for the truth of the matters asserted. With due respect to district courts everywhere, that a court describes a factual matter in dicta does not render that matter beyond reasonable dispute. In *Dundon*, for example, the order refers to issues that were undisputed *in that case*. *See* State Def. Br. at 8 (citing *Dundon*); Kirchmeier Br. at 16. That the attorneys for Ms. Dundon chose not to dispute certain matters (on a motion for preliminary injunction, no less) does not render those matters beyond dispute and therefore properly subject to judicial notice.

Here, much of the discussion in those cases on which defendants now seek to rely—and essentially all of the inferences that defendants seek for this Court to draw from them—conflicts with facts pled by plaintiffs in this case. It is only

appropriate to consider the truth of the matter asserted in a previous case when a doctrine such as collateral estoppel applies.[2] *See, e.g.*, *Kushner*, 317 F.3d at 830, 832. The district court judge here, who inherited this case from the judge who decided *Dundon* and *Archambault*, properly declined to take judicial notice of the truth of any matters described in those decisions.

The cases cited by defendants do not suggest otherwise. In *Freshman v. Atkins* (cited by Kirchmeier at 35 and State defendants at 25), the Court took judicial notice of a previous denial of discharge in a bankruptcy proceeding, because "[d]enial of a discharge from the debts provable . . . bars an application under a second proceeding for discharge from the same debts." 269 U.S. 121, 123 (1925). It was the *fact* of the prior decision—the existence of a previous denial of discharge—that was judicially noticed. *Id.* Likewise, in *Levy v. Ohl* (cited by State defendants at 25), the Eighth Circuit held that the district court could appropriately have considered "the state court's record *of* the dismissal with prejudice in the underlying suit—a public document—to rule that Levy's malicious prosecution claim was barred by the statute of limitations." 477 F.3d 988, 991 (8th Cir. 2007)

[2] Collateral estoppel does not apply here: (1) the issues decided in *Dundon* and *Archambault* differ from those presented in this case; (2) neither *Dundon* nor *Archambault* involve final judgments on the merits; (3) there are no overlapping plaintiffs between this case and *Dundon* or *Archambault*; and (4) plaintiffs here were given no opportunity to be heard on the issues in question in either *Dundon* or *Archambault*. *See Baker Elec. Co-op.*, 28 F.3d at 1475.

(emphasis added). In *Levy*, it was the existence and timing of the dismissal in question, essentially undisputable matters established by the public record, that could be considered. *Id.* Indeed, this proper use of judicial notice is made explicit in *Insulate SB Inc. v. Advanced Finishing Sys.* (cited by State defendants at 25): "Federal Rule of Evidence 201(b) allows this court to take judicial notice of public documents for the purpose of noting undisputed adjudicative facts, but judicial notice is inappropriate to the extent Insulate offers these documents for the 'truth of the matters within them and inferences to be drawn from them—matters which [Graco] disputes.'" 797 F.3d 538, 543 (8th Cir. 2015). None of the remaining cases cited by defendants hold otherwise.

This Court should also not take judicial notice of any of the extrinsic evidence introduced by defendants regarding criminal charges, convictions, or pleas for purposes of establishing the underlying truth of those matters. *See, e.g.*, *Kushner*, 317 F.3d at 830 ("The government's sentencing memorandum, . . . which the defendants dispute[,] . . . should not be the subject of judicial notice on a motion to dismiss."). It is well recognized that criminal defendants plead guilty for a variety of reasons, of which actual guilt is only one. *See, e.g.*, John H. Blume & Rebecca K. Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, 100 CORNELL L. REV. 157, 172-80 (2014). Defendants plead guilty to facts that did not occur with particular frequency in the context of misdemeanors, where

the cost of pleading guilty may be significantly less than the price of a round trip plane ticket to defend oneself in court—in, say, Bismarck. *Cf.* State. App. at 030 [Amend. Compl. ¶ 42] ("[T]he majority of individuals at these camps were out-of-state visitors to the region.").

The inherent unreliability of misdemeanor convictions in particular is formally recognized in Rule 803 of the Federal Rules of Evidence, which provides that evidence of prior misdemeanor convictions is *not even admissible* to prove the truth of the matter asserted. Fed. R. Evid. 803(22). As the Advisory Notes make clear: "Practical considerations require exclusion of convictions of minor offenses . . . because motivation to defend at this level is often minimal or nonexistent"; such evidence "may be of *no effect at all*." Advisory Notes to Rule 803(22) (emphasis added). Indeed, the Federal Rules allow that evidence of *felony* convictions is no more than admissible—not conclusive (except where res judicata applies). *Id.* Even then, such evidence is only admissible for the limited purpose of "prov[ing] any fact essential to the judgment." *Id.*

Much of the extrinsic evidence introduced by defendants in this case consists of misdemeanor pleas (and associated documents), and much of the remainder consists of deferred sentences—which are misdemeanor pleas in which the defendant's conviction is expunged and the record becomes sealed after a relatively short period of time (e.g., a category of plea in which the costs of

pleading are *even lower*). This is not evidence that is, by its nature, of "a *high* degree of indisputability." Advisory Notes to Rule 201 (emphasis added). Moreover, it bears repeating that the charging and plea documents in question are unreliable as alleged, State App. at 023-024 [Amend. Compl. ¶ 5], and are cited to give rise to inferences that contradict facts alleged in the Amended Complaint. Under such circumstances, the district court judge here—who inherited this case from the judge who took the federal pleas in question—properly declined to take judicial notice of the underlying truth of matters asserted in this extrinsic evidence.

Defendants do not assert they are submitting these outside materials for any limited purpose, such as establishing a timeframe for a statute of limitations or bringing the court up to speed on the procedural posture of the case. The existence of earlier court orders in *Dundon* (which is now in discovery) or *Archambault* (which ultimately resolved in favor of the Water Protectors) are of no import to the present appeal. Although the fact *of* these cases is established by public records and is essentially undisputable, the underlying conduct described therein is not.

Defendants' impatience to litigate the facts of this case might be understandable, but the well-delineated rules of civil procedure designate a subsequent time for doing so. A Rule 12(b)(6) motion is supposed to be about the *legal* sufficiency of plaintiffs' claims, taking all the facts alleged therein as true. It is decidedly not the time for defendants to contest those facts.

B. Qualified Immunity Does Not Permit Consideration of this Evidence

Defendants suggest that this Court should consider their extrinsic evidence—and indeed, that this Court should favor that evidence over the factual allegations in the Amended Complaint—because this appeal arises under the doctrine of qualified immunity. The opposite is true: by infusing their own disputed extrinsic contentions throughout each of their claims and nearly every *sentence* of their briefs, defendants provide this Court with an independent basis for dismissing the present appeal: namely, that this is not the proper subject of an interlocutory appeal.

In *Johnson v. Jones*, the Supreme Court held that a defendant could not immediately appeal the "fact-related district court determination" of an evidence sufficiency claim; such disputes are not a proper subject for interlocutory appeal on qualified immunity grounds. 515 U.S. 304 (1995). The Court reached this decision "essentially for three reasons," *id.* at 313, all of which apply with similar force to the present appeal.

First, the Court noted that *Mitchell v. Forsyth* "explicitly limited its holding [regarding the immediate appealability of denials of qualified immunity] to appeals challenging, not a district court's determination about what factual issues are 'genuine,' but the purely legal issue of what law was 'clearly established.'" *Id.* As *Mitchell* made clear, "the appealable issue is a purely legal one: whether the facts

alleged . . . support a claim of violation of clearly established law." *Id.* The Court continued: "a qualified immunity ruling is a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case. . . . [A]n appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Id.*

The crux of defendants' argument here is pointedly *not* "whether the facts alleged support a claim of violation of clearly established law." *Id.* Defendants barely acknowledge the facts alleged—citing to the Amended Complaint a sum total of *seven* (State defendants) and *four* (Kirchmeier) times—preferring instead to rely on their own extrinsic evidence. Moreover, defendants plainly wish for this Court to "consider the correctness of the plaintiff's version of the facts," *id.*; *see, e.g.*, Kirchmeier Br. at 38-39 (contending that plaintiffs' "claims are all premised upon the assertion there was no legitimate nondiscriminatory reason [for the challenged closure]," but that "the materials the district court should have properly considered in relation to Sheriff Kirchmeier's motion to dismiss establish [such] legitimate nondiscriminatory reasons"). The limited exception created by *Mitchell* does not, therefore, apply in these circumstances. *Johnson*, 515 U.S. at 313-14.

Second, the *Johnson* Court observed that a properly appealable "'final' district court decision . . . involves issues significantly different from those that

underlie the plaintiff's basic case." *Id.* at 314. The Court continued: "Where, however, a defendant simply wants to appeal a district court's determination [of evidentiary sufficiency], it will often prove difficult to find any such 'separate' question—one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits." *Id.* This is a serious problem for a number of reasons, including that these sorts of fact-related issues are "the kind of issue[s] that trial judges, not appellate judges, confront almost daily. Institutionally speaking, appellate judges enjoy no comparative expertise in such matters," and "interlocutory appeals are [therefore] less likely to bring important error-correcting benefits here." *Id.* at 315-16. The Court also added that such evidentiary questions "can consume inordinate amounts of appellate time," potentially requiring an appellate court to "read[] a vast pretrial record." *Id.* at 316.

Here, too, defendants' appeals fall afoul of *Johnson*: their appeals cut straight to the merits "that underlie the plaintiff[s'] basic case." *Id.* at 314. There is no "'separate' question" here; defendants seek for this Court to resolve numerous matters best suited for trial, including regarding the nature of the NoDAPL movement. And, in so doing, defendants either expect this Court to take their word as to what their extrinsic evidence reflects, or to spend countless hours poring over their corpulent appendixes, totaling well over 1,000 pages. This is, of course, after the district court judge, sitting significantly closer to the matters at hand, declined

to consider such evidence. *See* State App. at 198-200 [Order ¶¶ 44-45]. For these reasons as well, the present dispute is ill suited for immediate appeal.

Third, *Johnson* noted that "the close connection between this kind of issue and the factual matter that will likely surface at trial means that the appellate court, in the many instances in which it upholds a district court's decision . . . may well be faced with approximately the same factual issue again." 515 U.S. at 316. Such an interlocutory appeal "force[s an appellate court] to decide in the context of a less developed record, an issue very similar to one they may well decide any way, on a record that will permit a better decision." *Id.* at 317.

This final justification for limiting the applicability of *Mitchell* carries particular weight here: *Johnson* considered an interlocutory appeal from summary judgment, whereas this case involves one arising from a motion to dismiss. That means that the issues presented to this Court today by defendants will likely surface again on *two* occasions: after trial (as in *Johnson*), and after summary judgment. Discovery has been stayed for defendants since the filing of this case, over two years ago, so there is essentially *no* record, let alone a developed one. Allowing the present interlocutory appeal is accordingly an even more "unwise use of appellate courts' time," *id.*, than the one at issue in *Johnson*.

This Court need not proceed any further: defendants' appeals are framed with the intention of requiring this Court to undertake a detailed evidentiary

review, and in so doing resolve numerous factual issues key to the merits of the underlying case. Such a matter is not, under *Mitchell* and *Johnson*, properly subject to immediate appeal.[3]

II. Public Roads are Traditional Public Forums

The reason why defendants stress their extrinsic evidence so substantially is not because the evidence has any independent import in the present matter. It is because defendants rely extensively on this extrinsic evidence in asserting their sole remaining issue on appeal: that it is not clearly established that a public road or its wide grassy curtilage are traditional public forums. In so arguing, defendants ignore or misconstrue what plaintiffs have actually pled about the locations in question, while conveniently overlooking the large body of case law that clearly establishes that roads and their accompanying rights-of-way are traditional public forums.

There are few precepts of constitutional law that are more clearly established than that public roads are traditional public forums. For over three decades, the Supreme Court has maintained that "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S.

[3] *Johnson* also illustrates why State defendants are incorrect (at 19-20) in claiming that qualified immunity applies whenever there is a "legitimate fact issue." *See also* Fed. R. Civ. Pro. 56(a).

474, 481 (1988). Indeed, the Supreme Court, the Eighth Circuit, and courts throughout the country have again and again and again recognized public roads as the quintessential *example* of a traditional public forum. *See*, *e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 456 (2011) ("[W]e have repeatedly referred to public streets as the archetype of a traditional public forum."); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (describing roads as the "quintessential" example of public forums because they have "been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions"); *U.S. v. Grace*, 461 U.S. 171, 177 (1983) ("'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'").

The special role of roads for hosting speech and assembly has been well established for nearly 100 years, *see, e.g.*, *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939) ("[A]s we have said, the streets are natural and proper places for the dissemination of information and opinion."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."), and

streets and sidewalks were recognized in this circuit as traditional public forums just months prior to the challenged closure, *see Ball v. City of Lincoln, Nebraska*, 197 F. Supp. 3d 1177, 1184 (D. Neb. Jun. 23, 2016), *aff'd*, 870 F.3d 722 (8th Cir. 2017). "The Supreme Court has made clear that once an 'archetype' of a public forum has been identified, it is not appropriate to examine whether special circumstances would support downgrading the property to a less protected forum." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1129 (10th Cir. 2002).

Defendants now argue that a particularized inquiry into the precise nature of a specific road *is* necessary, and that not all public roads (or their accompanying rights-of-way) are traditional public forums. Roads through rural areas and roads that are called highways, defendants contend, should be treated differently from other roads for purposes of a forum analysis. This distinction is required, defendants argue, not because the Supreme Court or the Eighth Circuit has said so, but because, defendants claim, the legislative purposes of such roads are incompatible with speech, because no court has *directly* held that such roads or their accompanying public rights-of-way are traditional public forums, and because a small handful of lower court cases suggest that such spaces may not be traditional public forums. Defendants are wrong on each count.

Regardless, *even if* defendants' contentions had some merit—and they do not—that would not be sufficient to overcome the clear rule, established by the Supreme Court and repeatedly reaffirmed by the Eighth Circuit, that public roads are traditional public forums.

A. This Road's Legislative Purposes Do Not Render it a Nonpublic Forum

Defendants' contention that Highway 1806 is not a public forum is centered on the claim that a right-of-way designated as part of the North Dakota highway system cannot be a traditional public forum because expressive conduct is incompatible with the purposes to which the North Dakota highway system has been dedicated. As a matter of statutory interpretation, this is incorrect: the North Dakota legislative scheme does not support treating roads called highways differently from other roads for purposes of a forum analysis. Regardless, the Supreme Court has already considered—and rejected—this exact argument, holding that a road is not rendered a nonpublic forum by any apparent incompatibility between the road's purposes as set forth by the legislature and speech along the road.

According to defendants, "North Dakota's legislature has specifically designated the purposes of the state highway system, including State Highway 1806." State Def. Br. at 18. "[T]he legislative purposes of the . . . state highway system, set forth in statute, are clear evidence of contrary intent to create a public

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forum." *Id.* In support, State defendants state that the "primary dedicated purpose of Highway 1806 is safe and efficient transportation," citing NDCC 39-01-01.1. *Id.* (claiming, also, that "[p]ermitting people to assemble and discuss the environment amid cars, trucks and semis traveling at high speeds is a recipe for personal injury and death, which does not advance First Amendment principles"). Similarly, but not perfectly consistently, Kirchmeier asserts that "the dedicated purpose of North Dakota's state highway system is to provide for the 'free flow of traffic' and 'protecting the health and safety of the citizens of the state.'" Kirchmeier Br. at 30.

As a threshold matter, NDCC § 39-01-01.1 does not actually designate transportation as the "primary" purpose of the state highway system—or in any way discuss or delineate the system's "primary" or "secondary" purposes. *See* NDCC 39-01-01.1; *see also* NDCC 24-01-01.1 (listing other purposes in addition to this, without specifying whether any purpose is more important, let alone of "primary" importance). It would not support defendants' argument if the statute did, however: the primary legislative purposes of the roads at issue in *Frisby*—which were adjudged traditional public forums—were transportation. Indeed, "[u]se of a forum as a public thoroughfare is often regarded as a key factor in [support of] determining public forum status." *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1101 (9th Cir. 2003).

Nor do these statutes expressly or implicitly suggest that speech is incompatible with the purposes of the state highway system, or that roads designated as state highways cannot also host speech. To the contrary, North Dakota law expressly allows pedestrians use of the road in question. NDCC 39-10-33 ("any pedestrian walking along and upon a highway shall walk only along the shoulder, [or, if no shoulder is available], any pedestrian walking along and upon a highway shall walk as near as practicable to an outside edge of the roadway"). If defendants are correct, the North Dakota legislature intended to allow pedestrians to walk along this road, but not to in any way express themselves while doing so. *Cf., e.g.*, *First Unitarian Church*, 308 F.3d at 1128 ("Expressive activities have historically been compatible with, if not virtually inherent in, spaces dedicated to general pedestrian passage.").

Indeed, the very legislative provisions cited by defendants make explicit that there is little import to whether a road is called a highway, street, or road in North Dakota: "'Highway, street, or road' means a general term denoting a public way for purposes of vehicular travel, including the entire area within the right of way. A highway in a rural area may be called a 'road', while a highway in an urban area may be called a 'street'." NDCC 24-01-01.1; *see also* Morton Co. Land Use Code, Art. 12, § 12-010 ("The words 'road' and 'street' are used interchangeably.'"). Highway 1806 is, in fact, a "street" as defined by applicable North Dakota law. *See*

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NDCC 39-01-01 ("'Street' means the entire width between boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."); *cf.* NDCC 40-48-1 ("'Street' includes streets, highways, avenues, boulevards, parkways, roads, lanes, walks, alleys, viaducts, subways, tunnels, bridges, public easements and rights of way, and other ways."). Moreover, in describing the purposes of the state highway system, the statute uses the phrase "roads and streets"—and not "highway"—as a stand-in for the rights-of-way in question. NDCC 24-01-01. This is because the ND highway system is an integrated (and often undifferentiable) part of the state's "efficient transportation system," that consists of "highways, bridges, rail, transit, pedestrian and bicycle paths." https://www.dot.nd.gov/public/about.htm. It is not an entirely new *mode* of transportation that is materially distinct from the other roads of the state. *See* NDCC 24-01-02 (describing the process by which a road becomes part of the state highway system—by "designation").

Accepting defendants' argument, in order to transform a road into a nonpublic forum, the state must only designate it a part of the state highway system.[4] This cannot be: the government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public

[4] Indeed, one of the four streets bordering the North Dakota state capital complex—State Street—has already been so designated (as Highway 1804).

forums . . . . Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property." *Grace*, 461 U.S. at 180.

Most crucially, the Supreme Court has already considered and rejected the argument that a road's character, location, or purpose can render it a nonpublic forum. In *Frisby*, the appellants centered their argument around the same contention now raised by defendants in this appeal, asserting that "Not all Streets are Full Public Fora for First Amendment Activities." Appellant's Reply Br., *Frisby v. Schultz*, 487 U.S. 474 (1988), 1988 WL 1031674, at *12. Like defendants here, the *Frisby* appellants argued that "Some streets . . . are as narrow as thirty feet and without sidewalks. Other streets are as wide as the major arteries of the interstate highway system, which also are without sidewalks." *Id.* at 13. What mattered, the appellants argued, was not whether the forum was technically a road, but rather "[t]he character of the property at issue." *Id.* The appellants continued: the roads impacted by the statute in *Frisby*—"Highway[s,]" broadly defined—"were designed primarily for vehicular travel. *See* Wis. Stat. § 340.01(22). Picketing on these narrow streets will impede the purpose for which they exist—vehicular travel. In addition, picketers create a safety hazard, both to themselves and to other pedestrians, as vehicles attempt to use the streets." *Id.* at 15. This purpose-based contention was repeated in the dissent in the underlying Seventh

Circuit case: "Although 'highway' has a broad meaning (basically including any street, city or rural), the purposes of a highway . . . envisioned by the Wisconsin legislature—vehicular travel—would be inherently incompatible with pedestrians' picketing, and the use of the street for picketing as a matter of right is lost." *Schultz v. Frisby*, 807 F.2d 1339, 1361 (7th Cir. 1986) (Coffee, J., dissenting) (recognizing, also, that the roads impacted by the Wisconsin ordinance "have not by tradition or designation been held open for public communication").

In its decision (which was 8-1 as to this issue[5]), the Supreme Court resoundingly put these arguments to rest: "We reject this suggestion [that the particular nature of a road, such as its physical characteristics or location, could render it a nonpublic forum]." 487 U.S. at 480. "In short, our decisions identifying public streets and sidewalks as traditional public fora are not accidental invocations of a 'cliché,' but recognition that '[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.' No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Id. at* 480-81. Thus, the roads in question "are traditional public fora.

[5] *See* 487 U.S. at 492, n.1 (J. Brennan and J. Marshall, dissenting, while "wholeheartedly agree[ing] with this portion of the Court's opinion," and decrying the "rogue argument that residential streets are something less than public fora")).

The [] character of those streets may well inform the application of the relevant test, but it does not lead to a different test." *Id.* at 481.

Even were there some tension between the legislative purposes of the state highway system and the recognition of this road as a traditional public forum—and there is not—there can be little doubt after *Frisby* that roads are traditional public forums irrespective of whether their characteristics, their locations, or their legislative purposes are seemingly at odds with speech.

B. Numerous Courts Have Treated Similar Roads as Traditional Public Forums

Defendants also suggest—incorrectly—that qualified immunity is appropriate because there is no "authority directly addressing whether a rural highway is a traditional forum." State Def. Br. at 14; Kirchmeier Br. at 28. As a threshold matter, there is no need for additional authority regarding the forum status of the road in question: *Frisby* (and *Snyder* and *Perry* and *Grace* and *Schneider* and *Hague*) put the matter beyond dispute. These cases leave little doubt: "no particularized inquiry into the precise nature of a specific street is necessary; public streets are held in the public trust and are properly considered traditional public fora." *Frisby*, 487 U.S. at 480-81.[6]

[6] There is little question, moreover, regarding "[p]ublic place[s] adjacent to a public street," which also "occup[y] a special position in terms of First Amendment protection." *Snyder*, 562 U.S. at 456; *cf. Ball*, 870 F.3d at 730 (listing "sidewalks" among "'quintessential' examples of [] traditional public forums").

But even if *Frisby* (and *Snyder* and *Perry* and *Grace* and *Schneider* and *Hague*) were to vanish from the case law overnight, numerous other cases have treated highways (including rural highways specifically) and rights-of-way accompanying highways as traditional public forums. *See, e.g.*, *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (holding, in considering a ban on solicitation "while in the highway," that there is "no question that public streets and medians qualify as 'traditional public forum[s]'"); *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 463 (6th Cir. 2005) (accepting the district court's conclusion that "the public right-of-way" between an auto dealership and highway—"a grassy area"—is a traditional public forum); *Preachers Fellowship v. Town of Columbia*, 245 F. App'x 336, 347 (5th Cir. 2007) (unpublished) (accepting the district court's holding that "the paved portion of Highway 165"—a rural highway—"was 'the archetype of a traditional public forum'"); *Ater v. Armstrong*, 961 F.2d 1224, 1226 (6th Cir. 1992) (holding that "there can be no doubt" that a statutory requirement that "[n]o person shall stand on the highway for the purpose of soliciting contributions" restricted speech in a traditional public forum); *Luce v. Town of*

Thus, "[o]nce it is determined that the forum at issue is public roads, it is clear that [the adjacent right-of-way] is a public forum." *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1070-71 (3d Cir. 1994) (striking down, on this basis, a regulation on speech that applied to "property within 25 feet of the right of way"; "[R]ights of way" adjacent to public roads are public forums") (then-Judge Alito concurred with the judgment and the forum analysis).

Campbell, Wisconsin, 872 F.3d 512, 518 (7th Cir. 2017) (applying time, place, or manner analysis to a regulation of speech occurring within 100' of an interstate highway overpass); *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge, Mo.*, 983 F. Supp. 2d 1137, 1144 (E.D. Mo. 2013) (concluding that the intersection of Oak and Desloge Drive—Route 67, a state highway—was a traditional public forum), *rev'd on other grounds*, *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969 (8th Cir. 2014) (accepting that "the public streets of Desloge [are] a traditional public forum"); *Jacobson v. U.S. Dep't of Homeland Sec.*, 882 F.3d 878 (9th Cir. 2018) (examining speech along two-lane road running through rural Arizona—not technically a highway, but otherwise similar to Highway 1806—as a traditional public forum); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (holding that an ordinance banning anyone from "stand[ing] on a street or highway [to solicit]" limited speech in a traditional public forum); *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) (holding that an ordinance restricting the posting of signs in "public properties," which the ordinance specifically defined to include "highways," restricted speech in a traditional public forum, and that the plaintiffs were likely to succeed in showing that the ordinance's content-based restrictions were "unconstitutional in every conceivable application"); *Jackson v. City of Markham, Ill.*, 773 F. Supp. 105, 108 (N.D. Ill. 1991) (holding that a private

sidewalk is a traditional public forum because it is "within the public highway right-of-way"; holding also that the highway shoulder is a traditional public forum); *Pineros Y Campesinos Unidos del Noroeste v. Goldschmidt*, 790 F. Supp. 216, 220 n.1 (D. Or. 1990) ("public roadways running adjacent to farms, ranches or orchards belong to the category of roads and streets that may be used as public forums"); *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge, Mo.*, 914 F. Supp. 2d 1041, 1049 (E.D. Mo. 2012) (examining ordinance regulating solicitation "upon any public highway, thoroughfare or street within [a town of 5,000 in rural Missouri]" as regulating speech in a traditional public forum); *State ex rel. Dep't of Transp. v. Pile*, 603 P.2d 337, 341 (O.K. 1979) (concluding under U.S. constitutional law that "the highway, as the equivalent in this day of the streets of a former time, is an appropriate public forum for the dissemination of speech activity," and that the challenged "act affects a substantial portion of the available forum, to wit: all rural locales"); *cf. McCullen v. Coakley*, 573 U.S. 464, 476 (2014) (considering speech near clinics in Boston and Springfield that occurred along a U.S. highway and a state highway and holding that "there is no doubt" that a statute that "regulates access to 'public way[s]' and 'sidewalk[s]'" "restricts access to traditional public fora and is therefore subject to strict scrutiny"); *First Unitarian Church*, 308 F.3d at 1129 (considering and rejecting the argument that the "mere fact the government has an easement rather than fee title .

. . defeat[s] application of the First Amendment": "public highways and streets are often easements held for the public." "Because *such traditional public fora* are often easements, it is evident the property here is not exempt from the First Amendment merely because it is an easement" (emphasis added)).

Indeed, courts have repeatedly held that it is *clearly established* that highways and their accompanying rights-of-way are traditional public forums for purposes of qualified immunity. *See, e.g.*, *Lewis v. McCracken*, 782 F. Supp. 2d 702, 713 (S.D. Ind. 2011) (holding, for purposes of qualified immunity, that it was "clearly established" that a "privately owned sidewalk adjacent to a public highway [running through rural Indiana is] a traditional public forum"); *Lytle v. Brewer*, 77 F. Supp. 2d 730 (E.D. Va. 1999) (holding, for purposes of qualified immunity, that "a person had a clearly established right to protest their individual beliefs on traditional public fora, such as sidewalks and pedestrian crosswalks," including the pedestrian sidewalk abutting the interstate highway at issue); *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 515 (D. Md. 2011) (considering speech occurring in the "grassy shoulder along Route 24"—a state highway running through rural Harford County—and holding that the protestors' First Amendment free speech claims were clearly established for purposes of qualified immunity); *cf. Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep't*, 807 F. Supp. 1427, 1435 (W.D. Ark. 1992) ("The court believes that it is undeniable that in this

day and time that public highway rights-of-way have become places where 'speech' of one type or another is engaged in." "The court believes that highway rights-of-way are traditional public forums."); *Corral v. Montgomery Cty.*, 4 F. Supp. 3d 739, 751 (D. Md. 2014) (holding that it is clearly established that "where there is a 'thoroughfare,' a traditional public forum exists," and therefore denying qualified immunity to officer's policing of a sidewalk easement "integrated into the street grid").

Put simply, there is *both* directly controlling case law *and* a robust consensus of cases of persuasive authority that resolve this question: the road and its accompanying right-of-way are traditional public forums.

C. The Cases on which Defendants Rely Do Not Change this Conclusion

In their two briefs, defendants cite to a total of seven cases (and one student note) that they represent as concluding that "locations adjacent to or related to modern high-speed highway systems . . . are nonpublic forums." State Def. Br. at 14-15; *see* Kirchmeier Br. at 28-29. But none of these cases actually hold that roads or their accompanying public rights-of-way are nonpublic forums; these cases instead analyze materially *different* forums—a Caltrains overpass, interstate rest areas, and Adopt-a-Highway Programs—and they therefore do not support defendants' contention that both a road and its accompanying right-of-way are nonpublic forums. Regardless, even if *every single one* of these cases squarely held

that a road and its accompanying right-of-way were not traditional public forums, and again, they do not, that would still mean that the overwhelming majority of precedent, including directly governing Supreme Court and Eighth Circuit precedent, holds that roads "are considered, without more, to be 'public forums.'" *Grace*, 461 U.S. at 177. Case law need not be unanimous to be clearly established—a small handful of contrary cases will not render an otherwise clear rule unclear for purposes of qualified immunity—and the balance of authority here holding that public roads and their accompanying rights-of-way are traditional public forums is more than sufficient to deny the extraordinary relief of qualified immunity. *See Turner v. Arkansas Ins. Dep't*, 297 F.3d 751, 759 (8th Cir. 2002).

That the forum at issue in these cases is *not* the road or its accompanying public right-of way is, for the most part, made explicit by the courts themselves. In *Brown v. Cal. Dep't of Transp*, for example, the court considered whether a flag hung from a Caltrans overpass fence above a highway was speech in a public forum: "In defining the relevant forum, the Court has focused on the access sought by the speaker. Because Courtney and Brown hung their banners from highway overpass fences, the *forum at issue is the highway overpass fence*." 321 F.3d 1217, 1222 (9th Cir. 2003) (emphasis added). Likewise, in *State of Texas v. Knights of Ku Klux Klan*, the Fifth Circuit analyzed the forum status of the Texas Adopt-A-Highway *Program* (not, as defendants here suggest, the streets or curtilage along

which the Program signs were posted): "The *Program* is not a traditional public forum, as are public streets and parks." 58 F.3d 1075, 1078 (5th Cir. 1995) (emphasis added); *cf. also Jacobsen v. Bonine*, 123 F.3d 1272, 1273-74 (9th Cir. 1997) (considering whether "the *perimeter walkways of the interstate rest areas*, where [plaintiff] wishes to place his newsracks, are public fora" (emphasis added)); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1203 (11th Cir. 1991) (considering whether "[*safety*] *rest areas* are 'traditional' public fora" (emphasis added)); s*ee also* Suzanne Stone Montgomery, *When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed*, 77 WASH. U. L.Q. 557, 575 (1999) (noting that the Adopt-A-Highway cases illustrate how much the "public forum analysis can depend upon a court's determination of the forum in question").

The fact that these cases discuss materially *different* forums contextualizes the language excerpted by defendants. For instance, in *Int'l Krishna Consciousness v. Lee (ISKCON)*, the Court discussed the "relatively new" nature of the forum in question: "modern air terminals" (not, as State defendants misleadingly suggest (at 17), "the state highway system"). 505 U.S. 672, 680 (1992). The Court recognized that the "rather short history of air transport" meant that "airport terminals have only recently achieved their contemporary size and character." *Id.* Thus, *ISKCON* distinguished the modern air terminal from the very forum at issue in this case—

"public streets . . . [which] have immemorially been held in trust for the use of the public." *Id.* Similarly, in *Sentinel Commc'ns Co.* (cited by State defendants at 15), the Eleventh Circuit's discussion of the "relatively modern" nature of interstate highways was relevant because "rest areas have never existed independently of the Interstate [Highway] System." 936 F.2d at 1203. And like the *ISKCON* Court, the Eleventh Circuit distinguished the newness of these interstate highway rest areas from that of the exact forum at issue here, streets (and parks and sidewalks). *Id.* at 1201, 1203.[7]

Indeed, the only cases that defendants cite that even come close to considering a similar question to the one at issue here are three district court cases, one from the E.D. Va. and two from the E.D. Mo., all of which focus on the narrow question of programs providing for the placement of signs along highway rights-of-way—two of which were Adopt-A-Highway programs. The three cases ultimately reach a similar conclusion with respect to the forum analysis—"[t]his question need not be resolved today," *Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cty., Virginia*, 355 F. Supp. 3d 386, 408 (E.D. Va. 2018)—

[7] The ND state highway system was established in 1917, not in 1943 as State defendants suggest, making it well over 100 years old. *See* https://www.dot.nd.gov/public/history.htm#1901-1920. Even so, the date at which State defendants mistakenly place the formation of the highway system, 1943, lies significantly closer to the admission of North Dakota as a state in 1889 than it does the present day. As a point of comparison, the "relatively modern" rest areas discussed in *Sentinal Commc'ns* were 35-years old at the time of the decision.

and, as a result, they do not discuss the forum status of the roads or their accompanying rights-of-way in significant detail (none of these cases so much as acknowledge *Frisby* or *Grace*, let alone discuss these cases). *See Bruce & Tanya*, 355 F. Supp. 3d at 408 (evaluating the state's "Highway Signs Statute"); *Robb v. Hungerbeeler*, 281 F. Supp. 2d 989, 1000 (E.D. Mo. 2003) (concluding that in creating the Missouri Adopt-A-Highway *Program*, "the undisputed facts demonstrate that the Commission attempted to create a nonpublic forum"); *aff'd on other grounds*, 370 F.3d 735 (8th Cir. 2004); *Cuffley v. Mickes*, 44 F. Supp. 2d 1023, 1027 (E.D. Mo. 1999) (same), *aff'd on other grounds*, 208 F.3d 702 (8th Cir. 2000).

Most crucially, even if this Court identified a handful of lower court decisions with contrary holdings—which is not the case here—that would not be sufficient to render a matter as clearly established as this unclear for purposes of qualified immunity. The Eighth Circuit has addressed this exact question, holding that courts do not have to unanimously agree for an issue to be clearly established. In *Turner v. Arkansas Ins. Dep't*, this Court recognized that the Seventh and Eleventh Circuits had questioned whether the legal claim at issue could stand, and four district courts expressly held it could not. 297 F.3d 751, 759 (8th Cir. 2002). Nevertheless, in the face of this contrary precedent, the Eighth Circuit concluded that "one Supreme Court case, which strongly implies that [plaintiff's] position is

the correct one, plus two courts of appeals cases and fifteen district court opinions that expressly state that [plaintiff's] position is the correct one, is enough to show the law in question was 'clearly established.'" *Id*.

Here, there are multiple Supreme Court cases directly on point, including one that explicitly rejects the exact arguments made by defendants here. *See, e.g.*, *Frisby*, 487 U.S. at 480. And plaintiffs' search of Westlaw indicates that there are well over 100 cases that cite some version of the applicable governing rule from *Frisby* or *Grace*. Indeed, plaintiffs have cited *twenty* cases in this brief alone (mostly federal courts of appeals cases) that directly apply this rule to highways and other similar roads. A number of these cases reached this conclusion in the context of qualified immunity, holding that it is *clearly established* that such roads or their accompanying public rights-of-way are traditional public forums. In the face of this large body of precedent, two, three, or even seven lower court cases suggesting otherwise would not upset the long-established and near-universally recognized rule that roads are public forums, *see Turner*, 297 F.3d at 759, (and again, no more than three of these cases—all district court cases—even debatably offer more than dicta on the subject).

III. *This* Public Road and its Accompanying Right-of-Way are Each a Traditional Public Forum

Even if defendants were hypothetically correct and it was unclear whether all public roads are traditional public forums—and a particularized inquiry into the

precise nature of this road and its accompanying right-of-way is therefore necessary, *contra, e.g.*, *Frisby*, 487 U.S. at 481—the facts alleged in the Amended Complaint put it beyond debate that these spaces are traditional public forums.

A. The Supreme Court's Forum Analysis

The question of when a public space is a traditional public forum has come up repeatedly in the Supreme Court. Most influentially, Justice Kennedy set out three factors in his *ISKCON* concurrence: "whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property." 505 U.S. at 698-99 (Kennedy, J., concurring); *see, e.g.*, *First Unitarian Church*, 308 F.3d at 1125 (adopting this test and concluding that the space in question was a public forum despite express governmental intent to the contrary). Justice Kennedy concluded: "if the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum." 505 U.S. at 698.

These factors all weigh strongly in favor of concluding that the road and its curtilage here are traditional public forums. First, the road and its curtilage each

"share[] physical similarities" with other traditional public forums, such as roads, sidewalks, and parks. *Id.* at 698-99. The road itself is paved and "[t]he wide shoulders in question slope gradually from the paved road surface and are flanked by fence lines delineating the private property that abuts the public thoroughfare." State App. at 031 [Amend. Compl. ¶ 46]. Like other roads and sidewalks, *this* road and *this* curtilage have "historically been used not only for travel by cars, trucks, horseback, ATVs, and pedestrians but also, as the only public space throughout much of this area, for a range of expressive activity." *Id.* [¶ 45]; *see also* NDCC 39-10-33 (authorizing pedestrian travel on the road and curtilage); NDCC 39-10-02.1 (authorizing horseback travel). And, like a city park, the road's expansive grassy curtilage can safely accommodate the wide range of expressive activity for which it has "historically been used." State App. at 030-031 [Amend. Compl. ¶¶ 44-46].

Second, "the government has permitted or acquiesced in broad public access to the[se] properties." *ISKCON*, 505 U.S. at 698-99. The road and its curtilage are open to the public 24 hours a day, 7 days a week, and 365 days a year, including, by both custom and by statute, for not just cars and trucks, but horseback and ATV riding, and for pedestrians. *See* State App. at 030-031 [Amend. Compl. ¶¶ 44-45]; NDCC 39-10-33, NDCC 39-10-02.1. Moreover, these public spaces have historically been used for a wide range of expressive activity by the public,

including for expressive activity similar to that extinguished by the challenged road closure. *See* State App. 030-031 [Amend. Compl. ¶¶ 44-45]. This near-universal degree of public access compares favorably with that in other spaces adjudged public fora. *See, e.g.*, *ACLU of Nevada*, 333 F.3d at 1102 (noting that although the Fremont Street Experience allowed only limited vehicular access, because it was "a route for pedestrians [that] remain[ed] open at all times," it was sufficiently open to the public to support the conclusion that it is a traditional public forum); *First Unitarian Church*, 308 F.3d at 1117 (holding that an otherwise closed street sold to the LDS Church was "open to the public" for purposes of this factor because a city easement maintained "a pedestrian throughway for the general public").

Third, "expressive activity would [*not*] tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the propert[ies]." *ISKCON*, 505 U.S. at 698-99. Courts must "inquire whether the manner of expression is *basically incompatible* with the normal activity of a particular place at a particular time . . . it is not sufficient that the area in which the right of expression is sought to be exercised be dedicated to some purpose other than use as a public forum, or even that the primary business to be carried on in the area may be disturbed by the unpopular viewpoint expressed." *Greer v. Spock*, 424 U.S. 828, 843 (1976) (Powell, J., concurring). As the Amended Complaint makes

clear, the uses to which the spaces in question have been dedicated, as a factual matter, *include* speech—and also "travel by cars, trucks, horseback, ATVs, and pedestrians." State App. at 031 [Amend. Compl. ¶ 45]; *see also* NDCC 39-10-33; NDCC 39-10-02.1. It is a truism, but should nevertheless be said, that expressive activity would not interfere with expressive activity. Moreover, because of the accommodating "wide shoulders" of the road in question, this area "could be (and routinely was) visited safely [for speech, assembly, and prayer] without impeding or disrupting traffic." State App. at 030-031 [Amend. Compl. ¶¶ 44-46]. Finally, the surfeit of space in the combined road and curtilage area allows expressive activity to coexist with the curtilage's only other alleged uses: "for runoff control during the spring melt and for the occasional highway repair." *Id.* [¶ 46]. As alleged, it is clear that expressive activity would not significantly interfere with the uses to which the government has as a factual matter dedicated the property—and it certainly is not "basically incompatible" with such uses. *Greer*, 424 U.S. at 843.

Altogether, the Amended Complaint contains numerous factual allegations that show that "'the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government' indicate that expressive activity would be appropriate and compatible with those uses." *ISKCON*, 505 U.S. at 698-99. As such, under Justice Kennedy's widely adopted framework, the property at issue here "is a public forum." *Id.*

B. Additional Factors

This conclusion—that a particularized inquiry indicates that the road and its curtilage are traditional public forums—is further reinforced by looking at several additional factors that the Supreme Court and Eighth Circuit have identified as helpful for ascertaining when a public space is a traditional public forum: "[a] traditional public forum is a type of property that 'has the physical characteristics of a public thoroughfare, the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, and historically and traditionally has been used for expressive conduct." *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006). The Supreme Court and Eighth Circuit have also considered whether the property provides a reasonable person with any indication that she has "entered some special type of enclave [in which speech may not be permitted]." *Grace*, 461 U.S. at 180.

It is not necessary for a public space to share each of these characteristics to be a traditional public forum. *See, e.g.*, *ISKCON*, 505 U.S. at 698-99 ("[O]pen, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property."); *ACLU of Nevada*, 333 F.3d at 1101 ("[When a property is used for open public access or as a public thoroughfare, we need not expressly consider the compatibility of expressive activity because these uses are

inherently compatible with such activity."). Most courts holding that a public space is a traditional public forum do so because just two or three of these (or the *ISKCON*) factors support such a conclusion. Nevertheless, accepting the facts alleged in the Amended Complaint as true, *all* of these factors—significantly more than what would be sufficient—strongly indicate that this road and curtilage are traditional public forums.

First, both spaces have "the physical characteristics of a public thoroughfare, the objective use and purpose of open public access[,] or some other objective use and purpose inherently compatible with expressive conduct." *Bowman*, 444 F.3d at 975. The Amended Complaint leaves little question about this fact, in alleging that this is "an area that has long been open to the public for, among other things, use as a thoroughfare." State App. at 030-031 [Amend. Compl. ¶¶ 44-45]; *see also* NDCC 24-01-01.1, NDCC 39-01-01.1, NDCC 39-10-02.1, NDCC 39-10-33. The Amended Complaint does not stop there, however: as the "most direct road connecting the Standing Rock Sioux Reservation . . . to Bismarck and Mandan, Highway 1806" is, for thousands of local residents, the "primary means of visiting family, shopping, seeking medical attention, and conducting other routine and necessary life activities." State App. at 023 [Amend. Compl. ¶¶ 2-3]; *see also id.* at

030 [¶ 41], 039 [¶ 81].[8] The pleadings thus put beyond debate that the road and its accompanying right-of-way have "the physical characteristics of a public thoroughfare," and "the objective use and purpose of open public access." *Bowman*, 444 F.3d at 975.

Second, as the facts alleged in the Amended Complaint make clear, Highway 1806 and its curtilage "historically and traditionally ha[ve] been used for expressive conduct." *Id.* The Amended Complaint is explicit about this: the use of this road and its curtilage for "hanging prayer ties and signs within sight of passing drivers, as well as speaking and praying individually and in small, medium, and large groups" "was in keeping with the longstanding use of this road and other similar roads in the region." State App. at 030-031 [Amend. Compl. ¶¶ 44-45]. The road and its curtilage, the Amended Complaint continues, "have historically been used . . ., as the only public space throughout much of this area, for a range of expressive activity." *Id.* "This [range of expressive activity] has long included traditionally indigenous expressive practices, such as hanging prayer ties and undertaking horseback 'rides' (like the Bigfoot Ride and the Dakota 30+8 Ride, which each occur in the broader region and seek to raise awareness of Lakota and

[8] The pleadings also make clear that, unlike the private sidewalk in *Kokinda*, these spaces were constructed "to facilitate the daily commerce and life" of the region in which they were located. *See U.S. v. Kokinda*, 497 U.S. 720, 728 (1990); *see also* NDCC 24-01-01; State App. at 061 [Amend. Compl. ¶ 159].

Dakota history, and to promote reconciliation)." *Id.* These allegations put this factor, too, beyond reasonable dispute.

Third, neither space gives a reasonable person any indication that she has "entered some special type of enclave [in which speech may not be permitted]." *Grace*, 461 U.S. at 180. To the contrary, as has been described, both spaces are open to the public—including to pedestrians—around the clock and throughout the year. As in *Grace*, "[t]here is no separation, no fence, and no indication whatever to persons stepping from the street to the curb" or to the wide grassy curtilage accompanying the road "that they have entered some special type of enclave." *Id.*

C. Defendants' Argument is Unavailing

Defendants' argument regarding a particularized inquiry into the precise nature of this road and this curtilage requires this Court to ignore or badly distort what plaintiffs have actually alleged.

First, defendants claim that the "amended complaint acknowledges that Highway 1806's primary purpose is efficient transportation." State Def. Br. at 3 (citing Amend. Compl. ¶¶ 2-3). This is not true. None of the allegations cited by defendants, or found elsewhere in the pleadings, describe efficient transportation as the road's primary purpose, let alone as a purpose in tension with speech, which is presumably why defendants make this claim. To the contrary, the quoted allegations all regard the use and importance of this road as a thoroughfare and

support the essentially public road-like character of this public road. Accepted as true, these allegations therefore weigh strongly *in favor* of concluding that these spaces are traditional public forums, not against. *See* Part III.B. It is also plainly incorrect that a "primary purpose [of] transportation" can be a significant reason to adjudge a road a nonpublic forum; under that logic, few roads would be traditional public forums. *Cf. Frisby*, 487 U.S. at 480.

Second and similarly, State defendants contend that "[t]he amended complaint also acknowledges that the purpose of the ditches beside the highway is for something other than the free exchange of ideas or for assembly." State Def. Br. at 3. This, too, is false. To support their claim, State defendants have selectively quoted from the Amended Complaint, excising from their quote the very part of the sentence that makes clear that the historical use of the curtilage *includes* expressive activity. *Compare* State Def. Br. at 3 (citing: "Id. at 031 ¶ 46 ('Highway 1806's wide curtilage has historically been used for runoff control during the spring melt and for the occasional highway repair.')") *with* State App. at 031 [Amend. Compl. ¶ 46] ("*In addition to hosting expressive activity and travel*, Highway 1806's wide curtilage has historically been used for runoff control during the spring melt and for the occasional highway repair" (emphasis added)). Put simply, the Amended Complaint says the exact opposite of what State defendants

claim it says—and it strongly supports the conclusion that the curtilage is a public forum.

Third, defendants repeatedly characterize the road in question as "high-speed," seeking for this Court to infer that "[t]he nature of the property (i.e., accommodating high speed traffic) is wholly incompatible with expressive activity." State Def. Br. at 18; *see* Kirchmeier Br. at 30. But plaintiffs have not alleged that the road is high-speed. This is not an artful omission by plaintiffs: the road in question is probably best described as a *low*-speed highway. As the Amended Complaint makes clear, this is a road that is regularly used for travel by "cars, trucks, *horseback*, *ATVs*, and *pedestrians*." State App. at 031 [Amend. Compl. ¶ 45] (emphasis added). Although speed maximums may sometimes capture the character of a road, they do not here, where the speed of travel regularly moves only as fast as a trotting horse or walking pedestrian. Defendants repeat this characterization of the road to evoke a different kind of road than the one at issue in this case. Highway 1806 is not a four-lane (or more) highway, an interstate highway, or a controlled-access highway. It is a two-lane road open to pedestrians with a long history of expressive activity. *See, e.g.*, *id.* at 030-031 [¶¶ 44-45]. Even were Highway 1806 a "high-speed highway[]"—whatever that means—there is no particular import to such a designation for purposes of a forum analysis, unless it gives rise to the inference that the forum's purpose and use

might be incompatible with speech. *But see Frisby*, 487 U.S. at 480. Here, though, the Amended Complaint makes clear that the use of this property for travel is wholly *compatible* with expressive activity, alleging, as a matter of fact, that the area in question "could be (and routinely was) visited safely without impeding or disrupting traffic." State App. at 030 [Amend. Compl. ¶ 44]; *see also id.* at 031 [¶ 45] (alleging that the "longstanding" and "historical[]" use of the road and its curtilage include *both* travel *and* "a range of expressive activity"); *id.* [¶ 46] (describing the physical characteristics of the space).

Finally, defendants claim that plaintiffs have only alleged "expressive conduct from the DAPL protest itself" in order to "establish[] a longstanding or traditional use of Highway 1806." State Def. Br. at 5, 9-10, 19; *see* Kirchmeier Br. at 26. This is not true, either. The Amended Complaint is explicit in pleading that the "*historical*[]" and "*longstanding* use of this road and other similar roads in the region" has included "a range of expressive activity." State App. at 030-031 [Amend. Compl. ¶¶ 44-45] (alleging, also, that the expressive activity in question "has *long* included traditionally indigenous expressive practices") (emphasis added); *cf. id.* at 186 [Order ¶ 12], 205-06 [¶ 59] (describing and recognizing these "historical[] and "longstanding" uses). If there is a tortured reading of the Amended Complaint that somehow confines its allegations of prior expressive activity to the "DAPL protest itself," defendants have yet to provide it, despite

having repeated this exact same misrepresentation in their motion to dismiss and their motion for a stay of discovery. Regardless, the question is not whether it is possible to colorably misread what plaintiffs have alleged, but, rather, what those allegations show when *viewed in the* "*light most favorable to the Plaintiffs*." *Stodghill*, 512 F.3d at 476 (emphasis added). Viewed in such a light and accepted as true, plaintiffs' allegations factually establish that the spaces in question have a long history and tradition of use for expressive activities.

IV. Plaintiffs' Claims are Clearly Established Under a Nonpublic Forum Analysis

Defendants argue that if it's not clearly established that this road *or* its wide accommodating curtilage is a public forum, qualified immunity applies under a nonpublic forum analysis.[9] This is incorrect for two independent reasons: first, the facts alleged in the Amended Complaint establish the manifest unconstitutionality of the road closure as a regulation of speech in a nonpublic forum; and second, there are at least two alternative grounds for upholding Count I reached by the district court but not raised by defendants in this appeal, and therefore forfeited.

[9] Defendants do not advance any argument under a public forum analysis. If this Court concludes that it is clearly established that the road *or* its curtilage is a public forum, it should therefore affirm. *See* Part IV.B (discussing forfeiture and waiver).

A. Nonpublic Forum[10]

A "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985). Specifically, "[t]he restriction on access must be 'reasonable in light of the purpose which the forum at issue serves.'" *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329, 335 (8th Cir. 2011). A restriction that "deprives [plaintiff] of access to his desired audience," may not be reasonable. *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 737 (8th Cir. 2017). On the other hand, "[t]he reasonableness of a restriction on access is supported when 'substantial alternative channels' remain open for the restricted communication." *Id.* Finally, although the government need not have a compelling interest for restricting access to a nonpublic forum, its purposes must at least be "legitimate." *Id.*

Accepted as true, the facts pled establish that the road closure is unreasonable when viewed "in light of the purpose which the forum at issue

[10] Plaintiffs have not forfeited this argument: "The appellee is also free to present arguments in support of the judgment below by any reasoning from facts disclosed in the record, even though that reasoning . . . was not even advanced below by the appellee." Wright & Miller, FED. PRAC. & PROC. JURIS. § 3974.2 (5th ed.); *cf.* Plaintiffs' Appendix at 012-014, 022-024 [Plaintiffs' 12(b)(6) Opposition Br.] (advancing many of these same arguments).

serves," *Lee's Summit*, 640 F.3d at 335, and when considering its effect of depriving plaintiffs "access to [their] desired audience," *Ball*, 870 F.3d at 737. Moreover, the government's alleged purpose in closing the road was not legitimate. *Id.* The challenged road closure cannot, therefore, survive under even a nonpublic forum analysis.

As alleged, the discriminatory closure was not reasonable in light of the road's purposes, namely hosting travel and expressive conduct. *See, e.g.*, State App. at 030-031 [Amend. Compl. ¶¶ 44-45]; *cf.* State Def. Br. *et seq.* (travel); Kirchmeier Br. *et seq.* (travel and "protecting health and safety"). Rather than aiding these purposes, closing the road severely disrupted travel throughout the region, State App. at 035 [Amend. Compl. ¶ 65], 038-039 [¶ 78], 059 [¶ 148], while extinguishing any expression by supporters of the NoDAPL movement in what had been, up to that point, one of the movement's most significant forums, 030-032 [¶¶ 44, 47-48]; *see also* 039 [¶ 78] (describing the closure's burdens on health and safety). Far from being *reasonable* "in light of the purpose which the forum at issue serves," *Lee's Summit*, 640 F.3d at 335, the challenged closure was unequivocally harmful to those purposes.

Moreover, the closure operated as a *nine-mile* buffer zone, depriving plaintiffs "access to [their] desired audience." *Ball*, 870 F.3d at 737. As plaintiffs allege (and common-sense dictates), this kept "Plaintiffs *miles* away (well out of

line-of-sight or earshot) from the construction workers, security guards, and sites that had for months prior been a primary locus of Plaintiffs' First Amendment activity. This effectively left Plaintiffs without any means of communicating with one of their principal desired audience[s] (construction workers and security officers) or in one of their most symbolically important forums (Highway 1806's curtilage abutting the identified sacred and ceremonial sites near to where the pipeline would and eventually did cross)." State App. 036-037 [Amend. Compl. ¶ 71].

Finally, the pleadings establish that defendants' purpose for closing this road was not a legitimate purpose, *see Ball*, 870 F.3d at 737: "Defendants' true purpose for discriminatorily closing the road in question (in addition to hindering Plaintiffs' exercise of their constitutional rights)" was "to extort political concessions from the Standing Rock Sioux Tribe," State App. at 039 [Amend. Compl. ¶ 79]; *see also id.* at 039-41 [¶ 80] (describing how this purpose is shown through the "extent and duration" of the closure), [¶ 81] (and through "a formal report completed prior to the discriminatory road closure"), [¶ 82] (and through "a strategic plan similarly circulated in the weeks before the discriminatory closure"), [¶¶ 83-84] (and through numerous public and private statements made by defendants); *see also id.* at 061-063 [¶¶ 159-61, 168].

As over a century of Supreme Court precedent makes clear, this is not a legitimate government interest. The Supreme Court has long recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). "Because of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). State regulatory authority may not, therefore, "infringe on the right of reservation Indians to make their own laws and be ruled by them." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

As alleged, defendants sought through the road closure to control the Standing Rock Sioux Tribe's sovereign government in, among other things, the Tribe's regulation of tribal members on sovereign Reservation land. *See, e.g.*, State App. at 039-041 [Amend. Compl. ¶¶ 79-84]. Far from being legitimate, this purpose is soundly at odds with long-settled Supreme Court doctrine limiting state and local control over tribes and tribal governments. *See, e.g., Williams v. Lee*, 358 U.S. 217, 220 (1959) (To allow states to exercise jurisdiction on the Reservation without express authorization from Congress "would infringe on the right of the Indians to govern themselves."); *id.* ("The cases in this Court have consistently

guarded the authority of Indian governments over their reservations."); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 806 (2014) (Sotomayor, J., concurring) (recognizing, also, the crucial interest of "[c]omity—'that is, a proper respect for a sovereign's functions'"—implicated in this context).

Defendants argue in response that the road closure is permissible when viewed under a nonpublic forum analysis because (they claim) the Backwater Bridge was damaged in a manner requiring closure and the NoDAPL movement was so violent as to require these extraordinary measures. Both contentions rely on extrinsic evidence, and therefore cannot be credited at this stage of litigation.

Moreover, both claims are contradicted by plaintiffs' factual allegations. First, plaintiffs have alleged that the road was *not* closed because of any damage to the bridge, and that defendants' claims regarding bridge damage have always been pretextual. *See, e.g.*, State App. at 035-036 [Amend. Compl. ¶¶ 66-69], 039 [¶ 79]. Far from "acknowledge[ing] the bridge required repairs," as State defendants baldly claim (at 11 and 24), the Amended Complaint makes clear that there was *no* significant damage to the Bridge, let alone damage sufficiently serious to justify closing the road: "the bridge was and had been structurally sound." *Id.* at 034 [¶ 61].

Second, plaintiffs have also alleged that defendants' claims regarding the supposedly "riotous, violent, and/or dangerous conduct" associated with the

NoDAPL movement were similarly pretextual. *Id.* at 023-024 [¶ 5], 039 [¶ 79], 058 [¶ 143]. Accepting plaintiffs' allegations as true, the NoDAPL movement was overwhelmingly peaceful. *Id.* at 032 [¶¶ 49-50].

Indeed, even if defendants had had a genuine interest in limiting traffic in the immediate vicinity of a sufficiently damaged bridge, or in controlling disorder around the pipeline's construction—and the Amended Complaint asserts that they did not here, *see id.* [¶¶ 49-50], 034 [¶ 61]—neither interest justifies creating a buffer zone of anywhere close to the geographic or temporal reach of the one at issue. As alleged, 8+ out of the nine miles of the forum closed by defendants here, and *at least* 130 out of 148 of the days that the road was closed, could "not serve to advance" any of defendants' given bridge- or construction-related public safety justifications. *Id.* at 034-039 [¶¶ 60-61, 64-69, 71-73, 78, 80]. Thus, even if the bridge had been structurally damaged *and* there had been so much violence associated with construction to necessitate the creation of a buffer zone—and as alleged, neither is true—this roughly 47,000-foot and five-month long buffer zone was manifestly unreasonable. *Compare, e.g.*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (striking down a 36-foot buffer zone on private property).[11]

[11] State defendants baldly suggest (at 2, 6, 22-24, and 26) that closing miles of the highway "corresponds with a detour required by the bridge closure." Nothing of

There is no need, however, to make an easy case more difficult. An objectively reasonable officer would have understood that it is not appropriate to discriminatorily close nine miles of a public road and its curtilage for purposes of extorting political concessions from the neighboring sovereign tribe and chilling speech with which the government disagrees—destroying, in the process, the forum's ability to be used for its dedicated purposes and depriving plaintiffs of *any* means of communicating with one of their principal desired audiences. Qualified immunity therefore does not apply to the closure in question under a nonpublic forum analysis.

B. Alternative Grounds for Affirmance

Even if this Court fully agrees with defendants, it should nevertheless affirm: there are at least two alternative grounds for affirming that defendants have not raised (and have therefore forfeited).

"Claims not raised in an initial brief are waived, and [the Eighth Circuit] generally do[es] not consider issues raised for the first time on appeal in a reply brief." *Nebraska State Legislative Bd., United Transp. Union v. Slater*, 245 F.3d 656 n. 3 (8th Cir. 2001); *cf.* State Def. Br. at 11-12, 22-23 (emphasizing their belief that any issue not addressed in a brief is waived); Kirchmeier Br. at 20, 28 (same);

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the sort is found in the Amended Complaint, and plaintiffs expect to contest this claim if defendants make it at trial.

U.S. v. Olano, 507 U.S. 725, 733 (1993) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.'").

Plaintiffs reference these alternative bases for the sole purpose of alerting this Court to their existence.

First, the district court concluded that "[t]he Plaintiffs here allege facts which a fact-finder could depend upon to find the closure was viewpoint-based, or in the alternative, even if it was neutral on its face, motivated by a discriminatory purpose or pretextual reason." State App. at 217 [Order ¶ 82]. This claim stands even if the public spaces in question are nonpublic forums: "the exclusion of a speaker from a nonpublic forum must not be based on the speaker's viewpoint." *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 682 (1998); *Cornelius*, 473 U.S. at 811.

Second, plaintiffs also asserted that the road closure (1) impermissibly burdened and (2) was a prior restraint on speech in two *other* forums, respectively "located on tribally and privately owned land and operated as a permitted forum for speech" and "on Army Corps of Engineers land that was 'expressly held out as a 'free speech zone'." Plaintiffs' Appendix at 11-12, 27 [Plaintiffs' 12(b)(6) Opposition Br.]. Although the district court did not reach the first part of this

question,[12] it held that "Plaintiffs have alleged sufficient facts to show the defendants' closure of the road in question constituted a per se unconstitutional prior restraint." State App. at 230-32 [Order ¶¶ 116, 120]. This conclusion isn't impacted by the forum status of the road or its curtilage: this speech alleged, on which the road closure was a prior restraint, occurred in *different* forums.

By failing to address either claim—neither appellant even uses the phrase "prior restraint" or "viewpoint discrimination" in its brief—defendants have forfeited or waived any argument on these independent bases for affirming.

V. This Court Should Not Remand for a More Formal Decision on Qualified Immunity

Finally, plaintiffs agree with defendants that this case should not be remanded for a more definite statement on qualified immunity. Given that any subsequent ruling would be reviewed by this Court *de novo*, such remand would serve no purpose beyond further delay. *See* State Def. Br. at 30-32; Kirchmeier Br. at 24-26.[13]

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[12] *This* Court still can. *See Transcon. Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 758 (8th Cir. 2004) ("We may affirm a judgment on any ground raised in the district court.").

[13] Plaintiffs do wish to clarify one aspect of defendants' relevant discussion: *Payne* held that a court may *not* consider disputed extrinsic evidence at the motion-to-dismiss stage, even if it appears necessary to resolve the question of qualified immunity. *See Payne v. Britten*, 749 F.3d 697, 702 (8th Cir. 2014) ("Courts may ask only whether the facts as alleged plausibly state a claim and whether that claim asserts a violation of a clearly established right.").

Defendants contrast *Payne v. Britten* with several cases that suggest that remand is not appropriate here. There are two additional cases not cited by defendants that also suggest *Payne* does not require remand. First, in *Saylor v. Nebraska*, the Eighth Circuit considered a district court's failure to address a properly raised qualified immunity defense in its denial of summary judgment. 812 F.3d 637, 645 (8th Cir. 2016). After favorably citing *Payne*, *Saylor* did not remand; instead, the court "review[ed] the facts determined by the district court," and granted summary judgment. *Id.* at 645-47. Second, in *Dundon v. Kirchmeier (II)*, the Eighth Circuit considered the district court's conversion of a motion to dismiss to summary judgment without formally ruling on qualified immunity. After briefing that focused largely on *Payne* and remand, this Court dismissed the appeal, thereby upholding the district court's deferral of qualified immunity. *Dundon v. Kirchmeier (II)*, No. 20-3106 (Nov. 25, 2020).

Indeed, *Payne* is distinguishable from the instant case. The *Payne* appeal came after the district court had converted a motion to dismiss to summary judgment and had denied summary judgment without reaching qualified immunity (denying also the defendant's subsequent motion for reconsideration). In *Payne*, it did not, therefore, appear that the court would reach the question of qualified immunity before trial. 749 F.3d at 702. Similarly, in *Craft v. Wipf* (on which *Payne* relied), the Eighth Circuit suggested that the court's denial of summary judgment

without mention of qualified immunity might still have been acceptable if it were clear that the court simply "intended to decide other issues, such as immunity, later." 810 F.2d 170, 173 (8th Cir. 1987).

Here, on the other hand, the district court directly considered and addressed the question of qualified immunity while deferring a more formal ruling until later. As the court recognized, "[n]umerous Eighth Circuit cases have held that defendants are entitled to dismissal under Rule 12(b)(6) if they show 'they are entitled to qualified immunity **on the face of the complaint**.'" State App. at 279-80 [Order ¶ 227] (emphasis added by the district court). "The burden is on the defendants to demonstrate that, . . . construing all reasonable inferences in the plaintiff's favor, 'the facts supporting the [qualified immunity] defense appear on the face of the complaint.'" *Kass v. City of New York*, 864 F.3d 200, 206 (2d Cir. 2017); State App. at 278 [Order ¶ 223]. By disregarding the pleadings in favor of their own extrinsic contentions, defendants have not shown that their entitlement to qualified immunity so appears. The district court recognized as much: "[n]one of the factual scenarios as articulated by the defendants [that might allow qualified immunity], however, appear on the face of the Amended Complaint." State App. at 279-80 [Order ¶ 227]. Under such circumstances, the district court's ultimate conclusion—that "this case is an example of why 'qualified immunity is often best decided on a motion for summary judgment when the details of the alleged

deprivations are more fully developed.' *Walker v. Schult*, 717 F.3d 119, 130 (2d Cir. 2013)," State App at 280 [Order ¶ 229]—is, if anything, more favorable to defendants than they deserve, and should not result in a remand.

This is particularly true given the very real cost of additional delay that will be caused by such remand. This case has been pending, without discovery, for over two years. With every passing day, memories fade, documents become more difficult to retrieve, and witnesses change their numbers or become otherwise unreachable. The risk that evidence pertinent to this case will be lost with the passage of time is, moreover, not merely theoretical: the novel coronavirus pandemic is taking a particularly heavy toll on the Standing Rock Sioux Tribe, and numerous members of the community who plaintiffs may have called to testify have tragically passed. Additionally, TigerSwan (a non-appealing defendant in this case) recently informed plaintiffs that it had, within the past several months, divested itself of any documents in its possession relating to this matter.

CONCLUSION

Plaintiffs respectfully request that this Court affirm the district court's denial of defendants' motions to dismiss Count I.

Dated: January 26, 2021

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