UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
WESTERN DIVISION (BISMARCK)

CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG; and JOSÉ ZHAGÑAY on behalf of themselves and all similarly-situated persons, Plaintiffs, vs. COUNTY OF MORTON, NORTH DAKOTA; SHERIFF KYLE KIRCHMEIER; GOVERNOR DOUG BURGUM; FORMER GOVERNOR JACK DALRYMPLE; DIRECTOR GRANT LEVI; SUPERINTENDENT MICHAEL GERHART JR; TIGERSWAN LLC; and DOES 1 to 100 Defendants.	**Case No. 1:18-cv-00212**

PLAINTIFFS' SUPPLEMENTAL BRIEF ON QUALIFIED IMMUNITY

This case is about whether, when faced with a political movement with which they disagree, public officials can close nine miles of a public thoroughfare to those who participate in the political movement—and then lie about it. As alleged, the Defendants lied to the public about the nature of the NoDAPL movement and about their reasons for closing the road, and they did so pervasively, including in charging documents, press statements, and official declarations.

The Defendants do not and could not argue that such conduct is anything other than clearly unconstitutional. Instead, their argument has always been that this is not, as a factual matter, what they did. Defendants argue they closed the road for an entirely different set of purported reasons, reasons the Amended Complaint acknowledges and explicitly rejects as

pretextual. The Defendants contend that their version of what happened—in which the NoDAPL movement was overwhelmingly lawless and violent, the road was closed solely due to damage and not to suppress a disfavored viewpoint, and roads (including this road specifically) are inhospitable forums for speech with neither a history nor a tradition of expression—supports granting them qualified immunity. Which of these narratives is true is a question of fact.

The Federal Rules of Civil Procedure give the Defendants an opportunity to test the veracity of the Plaintiffs allegations, and to present counterevidence. This is not it. This matter is before this Court at the motion to dismiss stage. "If the defendant does not agree with the plaintiff's factual allegations, the defendant may challenge the accuracy of the plaintiff's version of events in a motion for summary judgment. A motion to dismiss based on qualified immunity limits the court to the allegations of the complaint, as opposed to a motion for summary judgment based on qualified immunity, which enables the court to review affidavits and other materials beyond the pleadings." *Benish v. Corbit,* No. 8:05CV282, 2006 WL 1401735, at *2, n.1 (D. Neb. 2006). "Numerous 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**.'" Order on Motions to Dismiss ("Order"), Doc. 88 at ¶ 227 (emphasis in original). "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. N.Y.*, 864 F.3d 200, 206 (2d Cir. 2017).

Establishing qualified immunity at the motion-to-dismiss stage is thus extremely rare; "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*, 984 F.3d 1166, 1175 (6th Cir. 2021); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) (reporting that just 0.6% of § 1983 claims were dismissed on qualified immunity grounds at the motion-to-dismiss stage).

This Court has already completed much of the qualified immunity analysis, which the Eighth Circuit left undisturbed. In a detailed order, this Court first correctly concluded that the copious extrinsic evidence introduced by the Defendants must be excluded at this stage. Order, Doc. 88 at ¶¶ 44-45; *see, e.g., N. Oil & Gas v. EOG Res.*, 970 F.3d 889, 895 n.6 (8th Cir. 2020) ("Judicial notice is inappropriate when documents are offered for the truth of the matters within them and inferences to be drawn from them and the opposing party disputes those matters."); *Kushner v. Beverly Enterprises, Inc.*, 317 F.3d 820, 830 (8th Cir. 2003) ("disputed papers should not be the subject of judicial notice on a motion to dismiss"). This Court then completed the first prong of the qualified immunity analysis by concluding that Plaintiffs *alleged* a plausible violation of their First Amendment right to speech (Count I), because this public road and its accompanying right of way of are traditional public forums and the *alleged* closure failed intermediate scrutiny, because the closure *as alleged* was impermissibly viewpoint-based, and because the closure *as alleged* operated as an unconstitutional prior restraint on speech. Order, Doc. 88 at ¶¶ 74-120, 223-25. Although the Defendants asked the Eighth Circuit to overrule each of these holdings, *see* State Def. Eighth Cir. Appellant Br. (Nov. 18, 2020) *et seq.*; Kirchmeier Eighth Cir. Appellant Br. (Nov. 18, 2020) *et seq.*, the Eighth Circuit did not.

Instead, the Eighth Circuit has remanded this matter to answer one limited question explicitly left open by this Court's Order: "to conduct the requisite clearly established analysis" under the second prong of qualified immunity. Doc. 155; *see United States v. Bartsh*, 69 F.3d

864, 866 (8th Cir. 1995) ("law of the case doctrine" precludes further litigation of already-decided issues outside of the scope of a limited remand).

Legal Argument

Several distinct questions, if answered in the affirmative, each require denial of qualified immunity:

- Is it clearly established that all public roads are traditional public forums?
- Even if it is not clearly established as to all public roads, is it clearly established that a thoroughfare held open to the public 24/7, which has historically been used for a range of speech and expression, and which may be safely so used, is a traditional public forum?
- Is it clearly established that closing a forum on the basis of viewpoint is unconstitutional whether or not the forum is public?
- Is it clearly established that prospectively limiting speech via undefined standards left to the discretion of officials is an impermissible prior restraint on speech?

The answer to each of these questions is yes, and this Court should deny qualified immunity if it agrees as to even one of these points. This Court could also simply recognize it is clearly established that suppressing a disfavored viewpoint and extorting political concessions from a neighboring sovereign tribe—the purposes alleged in the Amended Complaint—are not legitimate purposes, or that closing nine miles of a road for five months, thereby destroying the uses to which it has been dedicated, is not reasonable.[1] Those more specific points, too, are clearly established and require denial of qualified immunity at this stage, where it is the allegations, and not a defendant's competing version of events, that matters.

I. All Public Roads are Traditional Public Fora

A. Numerous Supreme Court Decisions Have Recognized that All Public Roads are Public Fora

[1] This Court should also deny qualified immunity because Plaintiffs' allegations are sufficient to allow a reasonable factfinder to infer that Sheriff Kirchmeier knowingly violated Plaintiffs' constitutional rights when he closed the road. *See* Amend. Compl. ¶¶ 53-54 (alleging that "Sheriff Kirchmeier publicly announced that blocking roads 'affects people's rights,'" exactly one week before he blocked this road); *Harlow v. Fitzgerald*, 457 U.S. 800, 821 (1982) (Brennan, J., concurring) (Qualified immunity does not "allow the official who *actually knows* that he was violating the law to escape liability for his actions" (emphasis in original).).

Whether big or small, urban or rural, designated as a boulevard or a highway, roads have been used as a forum for speech and expression throughout history.

The term "highway" dates to medieval England, where it referred to rights of way held open to the public by the King—as distinguished from "biways," which were not. *See, e.g.*, FREDERICK POLLACK & FREDERIC WILLIAM MAITLAND, HISTORY OF ENGLISH LAW I at 22 (1895). Highways have thus always been held open to the public, including for speech and expression. The first highway built in the U.S., the National Highway, travels almost exclusively through rural areas and was quickly nicknamed "America's Main Street" in recognition of the central role it played in these rural regions, including for hosting speech and expression. *See, e.g.*, GLENN HARPER & DOUG SMITH, A TRAVELER'S GUIDE TO THE HISTORIC NATIONAL ROAD IN OHIO; THE ROAD THAT HELPED BUILD AMERICA (2010)[2]; *National Highway Rededication Parade*, ULS DIGITAL COLLECTION (showing 1930 parade along the National Highway (U.S. Route 40) in Brownsville, PA (pop. 2,182)); *see also, e.g.*, DRAKE HOKANSON, THE LINCOLN HIGHWAY: MAIN STREET ACROSS AMERICA *et seq.* (Univ. Iowa Press, 1988) (describing same uses of the Lincoln Highway, another early and mainly rural highway).

Rural highways have long played host to not just speech, but famous and important speech. Some of the best-known marches in U.S. history have occurred along rural highways, including the 1965 Voting Rights March, the Meredith March Against Fear, the Longest Walk, the Trail of Broken Treaties, and Cesar Chavez's National Farm Workers March.[3] *See, e.g.*,

[2] http://www.ohionationalroad.org/TravelersGuide/TravelersGuide.pdf.

[3] Far from "involv[ing] permitting that was requested in advance to close the road," as State Defendants perplexingly speculate (at 8-9), these marches infamously prompted hostile law enforcement responses marked by similar false claims of protestor lawlessness to those made by the Defendants here. *See, e.g.*, *Civil Rights 'Bloody Sunday'*, NATIONAL GEOGRAPHIC, GRADES 5-11, https://education.nationalgeographic.org/resource/civil-rights-bloody-sunday (describing "Bloody Sunday," the infamous start to the 1965 Voting Rights March, when law enforcement officials attacked peaceful marchers on the Edmund Pettus Bridge (where Business Route 80 crosses the Alabama River), which law enforcement sought to justify with spurious claims of the marchers' violence).

Williams v. Wallace, 240 F. Supp. 100, 104–05, 107 (M.D. Ala. 1965) (recognizing that the 1965 marchers, who numbered in the thousands, had a "constitutional right to march along [the h]ighway," which was two lanes with a three-foot shoulder in some places and four lanes with a six-foot shoulder in others, and that Governor Wallace's efforts to "absolutely ban[] any march by any manner—regardless of how conducted" violated the First Amendment); *The Trail to Indigenous People's Day*, HUMANITIESTRUCK[4]; Brief of *Amicus Curiae* American Civil Liberties Union and American Civil Liberties Union of North Dakota (Feb. 1, 2021) (describing in detail these and other famous historical examples of speech along similar roads); *see also, e.g.*, *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 127 (1992) (describing a series of large civil rights marches in 1987 along rural roads and highways in Forsyth County, GA, and striking down a permitting requirement imposing a fee on such speech). In more recent history, right-to-life groups have regularly taken to roads—including rural highways—in marches to increase political pressure to pass legislation against abortion and to overturn *Roe v. Wade*. *See* Brief of *Amicus* ACLU at 16-17. Indeed, examples abound in this very region, including the Chief Bigfoot Band Memorial Ride (long held annually along rural highways in the Dakotas), the Dakota 30+8 Ride (same), the Crossroads Pro-Life Walk (same), a multi-day protest and march against anti-ballistic missiles with over a thousand people along Highway 26 near Nekoma, ND (pop. 31), a white supremacist protest and counterprotest drawing hundreds of people along the roads of Leith, ND (pop. 16), and a 400-person march against the Keystone KL pipeline along U.S. Route 14/83 in Fort Pierre (pop. 2,487). *See, e.g.*, Stephen Lee, *Pro-Life Youth on Cross-Country Crossroads Pilgrimage*, CROSSROADS PRO-LIFE (June 23, 2015)[5]; Clay Jenkinson, *Nekoma 40 Years On*, BISMARCK TRIBUNE, May 23, 2010; *White Supremacist Seeks Takeover of*

[4] http://humanitiestruck.com/allexhibits/indigenous-peoples-day/.
[5] https://www.crossroadswalk.org/2015/06/23/pro-life-youth-on-cross-country-crossroads-pilgrimage/.

North Dakota Town, AMARILLO GLOBE-NEWS, Sept. 13, 2013; Kat Smith, *Keystone Pipeline Opponents Protest*, WEST RIVER EAGLE, Jul. 30, 2015; Amend. Compl. ¶ 45.

Reflecting this history, the Supreme Court has long recognized the important role roads and their accompanying rights of way play as a forum for speech and expression. "[A]s we have said, the streets are natural and proper places for the dissemination of information and opinion." *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939). "Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Thus, "[w]herever 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. *Id.*; *see also Hudgens v. NLRB*, 424 U.S. 507, 515 (1976) ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.").

The Supreme Court formalized its special treatment of public roads in its creation of the contemporary public forum doctrine. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* describes three categories of public forums: "traditional" or "quintessential" public forums, "designated" public forums, and "nonpublic" or "limited" public forums. 460 U.S. 37, 45 (1983). In describing "traditional" or "quintessential" public forums, *Perry* states:

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which 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. In these quintessential public forums, the government may not prohibit all communicative activity.

Id. Just two months later, the Supreme Court affirmed this rule, recognizing that "'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also 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."); *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1129 (10th Cir. 2002) ("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."); *Hill v. Colorado*, 530 U.S. 703, 715 (2000) (describing as "clear and undisputed" that "the public sidewalks, streets, and ways affected by the statute are 'quintessential' public forums for free speech"). These cases clearly and explicitly establish the public road at issue here is a traditional public forum.

As discussed in Plaintiffs' original brief opposing the motions to dismiss, Doc. 62 at 7-8, *Frisby v. Schultz*, 487 U.S. 474 (1988) powerfully reinforces this rule in two ways: by firmly rejecting the same arguments Defendants rely on here; and by making explicit the rule's complete and categorical application to all public roads.

Frisby involved a residential road designated as a highway under applicable state law. The defendants in *Frisby*, like those here, urged the Court to disregard its numerous precedents recognizing roads as "the archetype of a traditional public forum" as mere "cliches" and instead conduct a particularized inquiry based on the physical characteristics and legislative purpose of the road in question. *Id.* at 480. They pointed to the physical characteristics of the road ("thirty feet wide; there are no sidewalks, curbs, gutters, or streetlights"; they are "physical[ly]

narrow[];" they are of a "residential character") to contend that such roads are ill-suited to hosting speech and that they "have not by tradition or designation been held open for public communication." *Schultz v. Frisby*, 807 F.2d 1339, 1340 (7th Cir. 1986), *rev'd*, 487 U.S. 474 (1988). They quoted from *Cox v. Louisiana*, 379 U.S. 536 (1965) to argue for "restriction[] of the use of highways" and "control of travel on the streets." *Id.* at 1361 (Coffee, J., dissenting). They also argued that the road served a purpose unrelated to speech or expression established by the state highway statute: it "was intended for vehicular traffic and not as a forum for public communication. Although 'highway' has a broad meaning (basically including any street, city or rural), the purposes of a highway, as used in the statutory definition, are limited." *Id.*

The Supreme Court flatly and fully rejected each of these arguments: "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.'" *Id.* at 480-81. As such, "[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." *Id.* at 481. *Frisby* leaves no doubt as to this question.[6]

B. *Frisby, Grace, Perry, Hudgens, Hague,* and *Schneider* are Still Good Law

As alleged, Highway 1806 is a public road. *See* Amend. Compl. ¶¶ 2-3, 44-46, 81 (describing the road); *see* 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

[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"). 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).

purposes of vehicular travel."); NDCC 40-48-1 ("'Street' includes . . . highways.").[7] No particularized inquiry is needed; this road is by definition a "quintessential public forum[]," *Perry*, 460 U.S. at 45, the "archetype of a traditional public forum," *Frisby*, 487 U.S. at 480, "considered, without more, to be [a] 'public forum[]." *Grace*, 461 U.S. at 177.

Apparently recognizing this, the Defendants attempt to argue that *Frisby*, which was 8-1 on this issue, was implicitly overruled just two years later by a mere plurality in *U.S. v. Kokinda*, 497 U.S. 720 (1990); *see* Doc. 160 at 6-8; Doc. 161 at 12. Because *Kokinda* does not purport to overrule *Frisby*—indeed, as a plurality opinion, it could not—the Defendants argue that Justice O'Connor, who authored both the *Frisby* majority and the *Kokinda* plurality, implicitly overruled *Frisby* by adopting inconsistent reasoning in *Kokinda*.[8] This argument fails for multiple independent reasons. *Frisby* and the long line of cases preceding it remain good law.

First, Defendants' very premise is flawed. If, counter to fact, *Kokinda* could and did implicitly undermine some aspect of *Frisby*, this Court would still be bound by the *Frisby* rule: "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, (1989); *see also*, *e.g.*, *United States v. Coonce*, 932 F.3d 623, 641 (8th Cir. 2019). This is exactly what the Defendants are attempting to argue here: that although *Frisby* "has direct application in [this] case," it may "rest on reasons rejected in some other line of decisions." *Rodriguez de Quijas*, 490

[7] The Amended Complaint does not separately describe the physical characteristics of Highway 1806 when it crosses Cantepeta Creek at the "Backwater Bridge" because there is little physically that sets this stretch of the road apart. As alleged and under North Dakota law, the status of a road is unchanged when it navigates a turn, crests a bluff, or crosses a small creek. *See* NDCC 39-01-01; NDCC 40-48-1 ("'Street' includes . . . bridges").

[8] Defendants also cite *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S 672 (1992) ("ISKCON") for this purpose. *Westlaw* does not recognize *Kokinda* or *ISKCON* as even slightly negative precedent for *Frisby*—let alone as overruling this crucial aspect of the *Frisby* decision.

U.S. at 484. Thus, even if the Defendants were correct in everything they argue about *Kokinda* (and *ISKCON*), they would still be wrong about the continuing applicability of *Frisby*.

But the Defendants are not correct about *Kokinda*—neither it nor *ISKCON* implicitly overrules this aspect of *Frisby*. *Kokinda* and *ISKCON* do not address roads, but rather a special-purpose walkway contained entirely on post office property, and the indoor areas of airport terminals, respectively. This is crucial, because *Frisby* rejects particularized inquiries only for public roads—not for all public spaces generally. *Kokinda* and *ISKCON* both make the importance of this factual distinction clear, referencing *Frisby* only to explain why its blanket rule does not control in these other fora. *See Kokinda*, 497 U.S. at 727; *ISKCON*, 505 U.S. at 679-80. In doing so, they reaffirm that *Frisby* endures; it just does not apply where the forum is not a road. These opinions are harmonious with one another in both letter and logic. *Cf. also ISKCON*, 505 U.S. at 686 (O'Connor, J., concurring) (repeating that "our First Amendment jurisprudence has identified [streets and parks] as 'traditional public fora'").

II. A Robust Consensus of Cases Establish that Roads and Rights of Way Remain Traditional Public Fora

Regardless of *Kokinda* or *ISKCON*, more than enough cases have subsequently affirmed this principle to constitute a "robust consensus of cases of persuasive authority." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

A. Hundreds of Cases Have Affirmed this Rule After *ISKCON*

Since *Kokinda* and *ISKCON*, hundreds of cases, including in the Supreme Court and Eighth Circuit, have cited *Frisby*, *Grace*, and *Perry* for the proposition that public roads are traditional public fora. Indeed, just two years after authoring the *ISKCON* majority opinion, Justice Rehnquist, against writing for the Court, cited *Frisby* to indicate that it is a "[g]iven that

the forum around the clinic," "the paved portion of the street—Dixie Way[9]—leading up to the clinic," "is a traditional public forum." *Madsen v. Women's Health*, 512 U.S. 753, 764 (1994).

This principle is now so firmly rooted as to be basic hornbook law. *See, e.g.*, GEOFFREY R. STONE, THE FIRST AMENDMENT at 299, 302 (6th ed., 2020) (Chapter 5.B.1 is titled "The Public Forum: Streets and Parks," and notes unequivocally that "the streets and parks are 'public fora'"). In total, undersigned counsel have identified 97 cases decided after *ISKCON* that cite *Frisby* for the proposition that public roads are traditional public forums. *See, e.g.*, *Madsen*, 512 U.S. at 764; *Kirkeby v. Furness*, 92 F.3d 655, 662 (8th Cir. 1996); *Thorburn v. Austin*, 231 F.3d 1114, 1117 (8th Cir. 2000); *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 974 (8th Cir. 2014). Counsel have identified 43 additional post-*ISKCON* cases citing *Grace* for the proposition that "streets . . . are considered, without more, to be 'public forums,'" *e.g.*, *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006), and an additional 254 post-*ISKCON* cases that cite *Perry* for the proposition that public roads are "quintessential" or "traditional" public forums, *e.g.*, *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Indeed, the Supreme Court itself has affirmed this principle in at least twelve majority decisions issued since *ISKCON*, as well as in many more dissents and concurrences (all dissenting or concurring on other grounds). *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 476 (2014) ("there is no doubt" that the act's regulation of "'public way[s]' and 'sidewalk[s]'" "restricts access to traditional public fora"); *Snyder*, 562 U.S. at 456 ("W]e have repeatedly referred to public streets as the archetype of a traditional public forum," noting that "'[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate" (citing *Frisby*).); *Hill*, 530 U.S. at 715

[9] The Dixie Way is one of the first north-south highways constructed in the U.S. *See* Carol Flynn, *Dixie Highway Celebrates 100th Anniversary*, RIDGE HISTORICAL SOCIETY, https://ridgehistory.org/part_1_dixie_hwy.html.

(describing as "clear and undisputed" that "the public sidewalks, streets, and ways affected by the statute are 'quintessential' public forums for free speech").[10]

Perhaps more than anything, these cases are a powerful indicator that *Frisby* was not overruled and remains good and controlling law. Regardless, hundreds of post-*ISKCON* cases repeating and relying on the principle that public roads are traditional public fora is more than sufficient to constitute a robust consensus of cases clearly establishing that public roads are traditional public fora for purposes of qualified immunity.

B. Dozens of Cases Have Applied This Rule to Similar Public Roads and Spaces

Although the blanket rule about public roads controls here, ample additional authority confirms that the particular type of road here (a rural highway) and its accompanying public right of way is a traditional public forum. A non-exhaustive list of such decisions includes:

- *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 124, 130 (1992) (ordinance governing public assemblies on "public . . . roads" in a "primarily rural . . . county" regulated speech "in the archetype of a traditional public forum" (quoting *Frisby*)).
- *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge, Mo.*, 914 F. Supp. 2d 1041, 1049 (E.D. Mo. 2012) (ordinance regulating solicitation "upon any public highway, thoroughfare or street within [a town of 5,000 in rural Missouri]" regulated speech in a traditional public forum).
- *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge*, 983 F. Supp. 2d 1137, 1144 (E.D. Mo. 2013) (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*, 775 F.3d 969 (8th Cir. 2014) (accepting "the public streets of Desloge [are] a traditional public forum").
- *Frye v. Police Dep't of Kansas City, Mo.*, 260 F. Supp. 2d 796, 797 (W.D. Mo. 2003) (treating "busy intersection" of two state highways as a public forum) *aff'd sub nom.*
- *Frye v. Kansas City Mo. Police Dep't*, 375 F.3d 785 (8th Cir. 2004) (same).
- *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]'").

[10] *See also Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009); *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 at n.11 (2010); *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 804 at n.9 (1995); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 215 (2015); *Madsen*, 512 U.S. at 766; *Forsyth County*, 505 U.S. at 130; *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 672 (1998); *City of Ladue v. Gilleo*, 512 U.S. 43, 50 (1994); *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

- *World Wide St. Preachers' Fellowship v. Town of Columbia*, 245 F. App'x 336, 347 (5th Cir. 2007) (unpublished) (accepting district court's holding that "paved portion of Highway 165"—a rural highway—"was the archetype of a traditional public forum").
- *World Wide St. Preachers' Fellowship v. Town of Columbia*, No. CV 05-0513, 2005 WL 8162284, at *5 (W.D. La. May 5, 2005) (considering speech along a highway in Columbia, Louisiana (pop. 545): "the paved portion of Highway 165 is a public street, 'the archetype of a traditional public forum.' *Frisby*, 487 U.S. at 480. No particularized inquiry . . . is necessary").
- *Houston Chron. Pub. Co. v. City of League City, Tex.*, 488 F.3d 613, 616 (5th Cir. 2007) (considering solicitation "at the intersection of State Highway FM 518 and Interstate 45," "a busy farm-to-market road" in League, Texas: "[t]he district court correctly stated the applicable law: streets are traditional public forums").
- *Trewhella v. City of Findlay*, 592 F. Supp. 2d 998, 1002 (N.D. Ohio 2008) (concluding that the intersection of Tiffin Avenue (U.S. Route 224) and Bright Road (County Highway 180/95), "an area of high volume vehicular traffic," with "five-lane thoroughfares . . . bordered by grassy areas," is a traditional public forum).
- *Brindley v. City of Memphis, Tennessee*, 934 F.3d 461, 469 (6th Cir. 2019) (holding that a two-lane roadway "which connects directly to a busy public thoroughfare" is a traditional public forum).
- *Tucker v. City of Fairfield, Ohio*, 398 F.3d 457, 463 (6th Cir. 2005) (accepting district court's conclusion that "the public right-of-way" between an auto dealership and highway—"a grassy area"—is a traditional public forum).
- *Ater v. Armstrong*, 961 F.2d 1224, 1226 (6th Cir. 1992) ("there can be no doubt" that a county's 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 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).
- *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," and also the highway shoulder is 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).
- *Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017) ("At the time of the citation, Reed was located on a public street [in rural Montana outside of Yellowstone], which is a quintessential public forum." (citing *Frisby*)).
- *Moss v. U.S. Secret Serv.*, 711 F.3d 941, 958 (9th Cir. 2013) (holding that a state highway—Route 238 in Jacksonville, Oregon, pop. 1,569—is "the archetype of a traditional public forum"), *reversed on other grounds* 572 U.S. 744 (2014).
- *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).
- *Maldonado v. Morales*, 556 F.3d 1037, 1041 (9th Cir. 2009) (applying prior restraint analysis to a limitation on speech along "landscaped freeway" area of Highway 101);

- *United States v. Griefen*, 200 F.3d 1256, 1259-60 (9th Cir. 2000) (treating a rural forest road as 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").
- *iMatter Utah v. Njord*, 980 F. Supp. 2d 1356, 1367 (D. Utah 2013) (examining Utah's permitting requirement for any "march on a state highway"—here, Utah Highway 89—as regulating speech in a traditional public forum).
- *iMatter Utah v. Njord*, 774 F.3d 1258, 1261 (10th Cir. 2014) (same, quoting *Frisby*);
- *Pahls v. Thomas*, 718 F.3d 1210, 1229 (10th Cir. 2013) (treating "two-lane road with wide shoulders" by an "open field" as a traditional public forum).
- *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)).
- *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").
- *Bischoff v. Fla.*, 242 F. Supp. 2d 1226, 1238–39 (M.D. Fla. 2003) ("the heavily-trafficked intersection of Irlo Bronson Memorial Highway and Old Vineland Road in unincorporated Osceola County, Florida" is 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, some of which occurred along U.S. and state highways: "there is no doubt" that a statute that "regulates access to 'public way[s]' and 'sidewalk[s]'" "restricts access to traditional public fora").

Indeed, courts have repeatedly held that it is clearly established for purposes of qualified immunity that highways and their accompanying rights-of-way are traditional public forums. A non-exhaustive list of such decisions includes:

- *Lewis v. McCracken*, 782 F. Supp. 2d 702, 713 (S.D. Ind. 2011) (it was "clearly established" that a "privately owned sidewalk adjacent to a public highway [running through rural Indiana is] a traditional public forum").
- *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 515 (D. Md. 2011) (protestors' First Amendment free speech rights in the "grassy shoulder along Route 24—a state

highway running through rural Harford County—were clearly established for qualified immunity);

- *Frye*, 260 F. Supp. 2d at 799 (W.D. Mo. 2003) (protestors had a "clearly established right to express their views about abortion in a public forum"—the "busy intersection" of two state highways).
- *Lytle v. Brewer*, 77 F. Supp. 2d 730 (E.D. Va. 1999) ("a person had a clearly established right to protest their individual beliefs on traditional public fora, such as sidewalks and pedestrian crosswalks," including the sidewalk abutting an interstate highway).
- *Redd v. City of Enter.*, 140 F.3d 1378, 1383 (11th Cir. 1998) ("the plaintiffs were clearly engaging in protected speech in a traditional public forum": the "street corner" of "busy intersection").
- *Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep't*, 807 F. Supp. 1427, 1435 (W.D. Ark. 1992) ("[I]t 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." "[H]ighway rights-of-way are traditional public forums.").
- *Cf. Corral v. Montgomery Cty.*, 4 F. Supp. 3d 739, 751 (D. Md. 2014) (it is clearly established that "where there is a thoroughfare, a traditional public forum exists," therefore denying qualified immunity to policing of sidewalk easement "integrated into the street grid").

Having wrongly set aside the blanket rule, Defendants seek to distinguish some (but not all) of these on-point cases with a shifting set of unprincipled and often nonsensical distinctions—that the roads are not in sufficiently rural locations, or have not been designated as highways, or involve speech in grassy areas and sidewalks abutting roads (how that sets them apart from what happened here, they do not say), or the speech involved fewer prospective speakers. Some they attempt to cast aside because while applying *Frisby*'s rule, they do not explicitly address and dismiss Defendants' novel theory about the *Kokinda* plurality implicitly overruling *Frisby*. Sixteen of these cases, including *Forsyth*, Defendants do not discuss at all.

None of these are material points of distinction. That a road runs through a rural location doesn't render it less of an important forum for speech or expression—it makes it more, as these communities often lack town squares or city parks where expression might otherwise occur. *See, e.g.*, *Pineros Y Campesinos Unidos del Noroeste*, 790 F. Supp. at 220 (discussing the important

role that rural roads specifically have for speech).[11] Moreover, the rurality inquiry the Defendants would apparently have courts conduct—turning on some arbitrary judgment about the number of houses or stores within sight of a particular patch of road—has no basis in logic or law and would create an unmanageable standard for determining, piecemeal, the forum status for each stretch of this country's 4 million miles of roads (3 million of which are rural according to the Federal Highway Administration)[12]; *cf. Snyder*, 562 U.S. at 466 (Alito, J., dissenting) ("They could have selected [for their protest] any public road where pedestrians are allowed. (There are more than 4,000,000 miles of public roads in the United States.)").

Likewise, designating a road as a "highway" does not alter its forum status. *See Frisby*, 487 U.S. at 481 (holding that a highway is a traditional public forum); *Madsen*, 512 U.S. at 754 (same). Indeed, the Defendants themselves accept that State Street in Bismarck is a traditional public forum—and this road is also known as Highway 1804. Doc. 160 at 8. In any event, such an arbitrary rule would let state officials limit public speech simply by designating a road a "highway." *See* NDCC 24-01-02 (describing the process by which a road becomes part of the state highway system—by "designation"). 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 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.

[11] Even if there was some principled reason to treat rural roads less favorably than suburban or urban roads for purposes of a forum analysis, most of the roads distinguished by the Defendants on this basis *are* rural, comfortably meeting the widely used Office of Management and Budget Definition. *See* 75 F.R. 37245 (2010) (counties containing an urban core of under 10,000 people).

[12] https://www.fhwa.dot.gov/ohim/onh00/our_ntns_hwys.pdf.

Third, the size of a group seeking to use a public space has no bearing on whether that space is a traditional public forum. Such a rule would render the forum status of public spaces conditional on who sought to use that space, with the forum status of public areas (and the applicable legal standard) sometimes shifting mid-use. Moreover, Highway 1806 would be a public forum for most of this time under such a rule; as alleged, Plaintiffs regularly spoke along this road "individually and in small, medium, and large groups." Amend. Compl. ¶ 44.

Finally, the fact that there is a large body of cases considering the forum status of similar roads, and not one views *Kokinda* or *ISKCON* as relevant to this question, is powerful evidence that neither *Kokinda* nor *ISKCON* is relevant—not that this large body of cases doesn't apply here. Far from undermining these cases, this fact reinforces the conclusion that *Frisby* remains good law. And of course, Defendants do not even attempt to address sixteen of these cases.

C. Case Law Needn't Be Unanimous to Be Clearly Established

As Defendants point out, in the hundreds of cases to consider the forum status of public roads and their adjacent rights of way, several have contained dicta questioning whether certain spaces are traditional public forums. In all of their briefing on this subject (here and in the Eighth Circuit), the Defendants combined have cited to a total of seven cases they represent as suggesting that certain public spaces associated with roads are not traditional public forums.

None of the cases Defendants cite hold that roads or their accompanying public rights-of-way are nonpublic forums; these cases—like *Kokinda* and *ISKCON*—instead explicitly analyze forums materially distinct from roads: a Caltrains overpass, interstate rest areas, and Adopt-a-Highway Programs. *See Brown v. Cal. Dep't of Transp*, 321 F.3d 1217, 1222 (9th Cir. 2003) ("the forum at issue is the highway overpass fence"); *State of Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) ("The Program [(the Texas Adopt-A-Highway Program)] is not a traditional public forum, as are public streets and parks."); *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"); *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1203 (11th Cir. 1991) (considering whether "[safety] rest areas are 'traditional' public fora").

Indeed, Defendants cite only three cases, all from district courts, that even come close to considering a question similar to the one at issue here, all of which focus on the narrow question of programs providing for the placement of permanent signs along highway rights-of-way. All three conclude the forum question need not be resolved to handle the case at issue—and, as a result, they do not discuss the forum status of the roads or their accompanying rights-of-way in any detail; none so much as acknowledges, let alone discusses, *Frisby* or *Grace*. *See Bruce & Tanya & Assocs., Inc. v. Bd. of Supervisors of Fairfax Cty., Virginia*, 355 F. Supp. 3d 386, 408 (E.D. Va. 2018) (evaluating the state's "Highway Signs Statute"); *Robb v. Hungerbeeler*, 281 F. Supp. 2d 989, 1000 (E.D. Mo. 2003) (in creating the 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 a handful of lower court decisions did have contrary holdings, that would not be sufficient to render a matter as clearly established as this unclear for purposes of qualified immunity. In *Turner v. Arkansas Ins. Dep't*, 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,'" even

though two other circuits had questioned whether the legal claim could stand, and four district courts expressly held it could not. 297 F.3d 751, 759 (8th Cir. 2002). Unanimity is not required.

In the face of the large body of precedent presented above, including twelve Supreme Court majority opinions and dozens of cases from federal appeals courts, two, three, or even seven lower court cases suggesting otherwise would not upset the long-established and near-universally recognized rule that roads—including roads like this—are public forums.

III. A Particularized Inquiry Clearly Establishes that This Public Road and Right of Way is a Public Forum

Even if a particularized inquiry were necessary to determine whether this public road and its accompanying right of way are traditional public forums, Plaintiffs' allegations put this matter beyond dispute: as alleged, these particular public spaces are clearly traditional public forums.

A. Particularized Forum Analysis

There is a well-established set of criteria for conducting a forum analysis: "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." *ISKCON*, 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 the space in question was a public forum despite express governmental intent to the contrary); *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) (adding additional factor of whether the space has "historically and traditionally has been used for expressive conduct").

These are holistic factors, not multiple separate requirements, and a public space need not satisfy all three to be considered 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 factors support such a conclusion. Nevertheless, accepting the facts alleged in the Amended Complaint as true, *all* of these factors strongly indicate that this road and its curtilage 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; *see also Bowman*, 444 F.3d at 975 ("A traditional public forum is a type of property that 'has the physical characteristics of a public thoroughfare . . . .'"). This road, of course, shares characteristics with roads, because it is one.[13] 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." 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, 44-45 (alleging that this "an area that has long been open to the public for, among other things, use as a thoroughfare"); *see also* NDCC 39-10-33 (authorizing pedestrian travel on the road and curtilage); NDCC 39-10-02.1. This alone might be dispositive of the forum analysis. *See, e.g.*, *ACLU of Nevada*, 333 F.3d at 1102. These spaces also bear similarities to a city park: the road's expansive grassy curtilage can safely accommodate the wide

[13] This first factor in a particularized forum analysis shows the absurdity of conducting a forum analysis of a public road: it may be *dispositive* of the forum analysis if the forum in question resembles a public road.

range of expressive activity for which it has "historically been used." Amend. Compl. ¶¶ 44-46; *cf. Warren*, 196 F.3d at 190 (a pedestrian plaza "is a traditional public forum because it is merely a combination of the three prototypical examples of traditional public for a—streets, sidewalks, and parks"); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1067–68 (10th Cir. 2020) (medians on public roads are traditional public forums because "medians share fundamental characteristics with public streets, sidewalks, and parks, which are quintessential public fora").

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 statute, for cars and trucks, plus horseback and ATV riding, and for pedestrians. Amend. Compl. ¶¶ 44-45; NDCC 39-10-33, NDCC 39-10-02.1. These spaces are physically wide open: 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." *Grace*, 461 U.S. at 180. Moreover, these public spaces have historically been used for a range of expressive activity by the public, including for expressive activity similar to that extinguished by the challenged road closure. *See* Amend. Compl. ¶¶ 44-45. This near-universal degree of public access compares very favorably with that in other spaces adjudged public fora. *See, e.g., ACLU of Nevada*, 333 F.3d at 1102 (noting although the forum 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 (otherwise closed street sold to 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 . . . 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). The uses to which the spaces in question here have been dedicated, as a factual matter alleged in the Amended Complaint, include "travel by cars, trucks, horseback, ATVs, and pedestrians," but also, specifically, speech. Amend. Compl. ¶ 45; *Stodghill v. Wellston School Dist.*, 512 F.3d 472, 476 (8th Cir. 2008) ("[W]e must accept as true all of the complaint's factual allegations . . . ."). 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." Amend. Compl. ¶¶ 44-46. Just as a road is similar to a road, speech is fully compatible with speech. Finally, the surfeit of space in the combined road and curtilage area allows expressive activity to coexist with the spaces' only other alleged uses: for "for runoff control during the spring melt[,] and for the occasional highway repair." *Id.* ¶¶ 45-46. As alleged, 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 them. *Greer*, 424 U.S. at 843.

Fourth, there is a rich history and tradition in this country of speech and expressive conduct along roads like this. *See* Part I *supra.* That this *kind* of road has such a history and tradition is sufficient to satisfy this factor; otherwise, the lack of a specific history tied to newly constructed roads, parks, or town squares would always weigh against concluding that they are a

public forum. Regardless, as the Amended Complaint makes clear, *this* road 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." 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 Dakota history, and to promote reconciliation)." *Id.* These allegations put this factor, too, beyond reasonable dispute.

Under Supreme Court and Eighth Circuit precedent, the space at issue here clearly "is a public forum." *Id.* This is not a close question. Every forum analysis factor—the close resemblance of this public space with other public fora, the universal public access permitted, the compatibility of the property with speech and expression, and the historical use of the property for speech and expression—cuts decisively in favor of finding a traditional public forum here.

B. Defendants' Particularized Inquiry

The Defendants do not squarely conduct a forum analysis as directed by the Supreme Court, but they appear to contest the third *ISKCON* factor—whether speech would "interfere in a significant way with the uses to which the government has as a factual matter dedicated the propert[ies]"—and the Eighth Circuit's consideration of whether the space has "historically and traditionally" been used for speech. State Defendants also repeatedly reference (at 5-8)

Kokinda's "focus on purpose," albeit without discussing what this supposedly purpose-based analysis actually looks like.

In making these arguments, Defendants ignore or badly distort what Plaintiffs have actually pled about these spaces. Indeed, assuming they are acting in good faith, Defendants' counsel must be themselves unfamiliar with the actual public spaces in question, as they have made a number of representations about them that are inconsistent with the allegations of the Amended Complaint and simply not true—that the bridge *passes over* Highway 1806, State Def. Eighth Cir. Reply Br. (Mar. 2, 2021) at 21, that the road's football field-sized curtilage is just a "ditch," Doc. 160 at 5-9, that this country road where the speed of travel regularly moves only as fast as a trotting horse or walking pedestrian is a "high-speed" road, *id.* at 2, 8; Doc. 161 at 12-13, or that "10,000 people protesting the Dakota Access Pipeline" sought to simultaneously "gather at a single intersection," Doc. 160 at 2, 5, 13-14; Doc. 161 at 18.[14]

Defendants emphasize such purported characteristics of the road in an attempt to imply that these public spaces are not, as a matter of fact, conducive to safely hosting speech. *See, e.g.*, Doc. 161 at 18 ("[H]ow could protest activity and motor vehicle traffic have been safely continued in this vicinity[?]"). That, in turn, would weigh against concluding that the spaces are traditional public fora under a particularized inquiry. *See ISKCON*, 505 U.S. at 698-99. Putting aside the false character of these contentions or their extrinsic nature, Plaintiffs' allegations fully resolve this question: Plaintiffs allege that, as a matter of fact, the road and its curtilage "could be

[14] These are far from the only false contentions or misrepresentations in the Defendants' respective briefs. *See, e.g.*, Kirchmeier Br. at 5 (asserting that Plaintiffs sought access to private property); *id.* (asserting that "Plaintiffs admit force was *required* to remove protestors"); *id.* (asserting that Plaintiffs have "admitted unlawful conduct and [an] intent to reengage in such unlawful conduct in furtherance of a specious claim of ownership"). Plaintiffs could have easily devoted this entire response to describing why each such characterization or inference is incorrect. There are too many such contentions for Plaintiffs to correct each one, and disputing the facts is inappropriate on a motion to dismiss, so Plaintiffs request that this Court disregard Defendants' characterizations of factual matters—or, if it must, ask for additional briefing rather than simply relying on what Defendants claim.

(and routinely was) visited safely without impeding or disrupting traffic." Amend. Compl. ¶ 44. The question at the motion to dismiss stage is whether it is clearly established that a road *so pled* is a traditional public forum.

Defendants' next argument is even more perplexing. State Defendants argue (at 8): "significantly, people have not – from time immemorial – gathered in this rural, unpopulated area for the purpose of exchanging ideas on Highway 1806." But they are again just contradicting the well pled allegations of the Amended Complaint. The Defendants may well disagree with these allegations. But a motion to dismiss is not the appropriate time to resolve factual disagreements.[15] The question before this Court is whether what Plaintiffs have alleged establishes that the road is a traditional public forum—and here it does.

Finally, contrary to what the Defendants suggest, under the *Kokinda* plurality's analysis, these public spaces are clearly public fora. *Kokinda*'s forum analysis is essentially a less-developed version of the more robust modern test applied above: the Court compares the postal walk to recognized traditional public forums, 497 U.S. at 727, considers whether the postal walk is a "thoroughfare" that is "continually open, often uncongested," *id.*, and asks whether there is any "separation, [] fence, [or] indication whatever to persons stepping from the street to the curb and sidewalks. . . that they have entered some special type of enclave," *id.* at 728. As already discussed, each of these factors weighs strongly in favor of concluding that Highway 1806 and its curtilage are traditional public forums. The only additional consideration in *Kokinda* is whether the walk was constructed "to facilitate the daily commerce and life" of the region where it is located, and is a "necessary conduit in the daily affairs of a locality's citizens." *Id.* But that,

[15] There is no "disputed question of fact" here at this stage of the litigation, because Plaintiffs allegations are accepted as true and Defendants' are excluded. But if there were, it would not entitle Defendants to qualified immunity, as the Defendants argue. *See* Doc. 160 at 9-10; Doc. 161 at 12-13. The existence of a dispute of material fact requires the case go to a jury, not be dismissed. *See, e.g.*, *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

too, weighs strongly in favor of concluding that these public spaces are traditional public forums. Unlike the walk in *Kokinda*, these spaces, as alleged, were constructed "to facilitate the daily commerce and life" of the region, and they are a "necessary conduit in the daily affairs" for those residing in the area. *See, e.g.*, Amend. Compl. ¶¶ 3, 159; *see also* NDCC 24-01-01.

IV. Viewpoint Discrimination

Although this Court must deny qualified immunity at this motion to dismiss stage because Highway 1806 and its curtilage are a traditional public forum, this Court has another basis for denying qualified immunity as to Count I: Plaintiffs have plausibly alleged viewpoint discrimination, which applies regardless of the nature of the forum.

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995). The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views," for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Order, Doc. 88 at ¶ 78 (quoting *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 913–14 (8th Cir. 2017)).

This prohibition on viewpoint discrimination applies to both facially discriminatory and facially neutral government policies, and applies even where the state provides a facially reasonable ground if it "is in reality a façade for viewpoint-based discrimination. *See, e.g.*, *Cornelius*, 473 U.S. at 811-12; *Cuffley v. Mickes*, 208 F.3d 702, 704-05, 709-11 (8th Cir. 2000)

(state's exclusion of the KKK from the Adopt-A-Highway based on "history of unlawfully violent and criminal behavior" was pretextual viewpoint discrimination, even though there was a regulation explicitly prohibiting applicants with such a history from participating in the program). "The government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Plaintiffs have alleged that the Defendants carefully tailored this closure to ensure that the road was left open to those whose views Defendants found acceptable, but closed to Water Protectors, who expressed less favored or more controversial views—and this Court held that this plausibly stated a claim to viewpoint discrimination. Order, Doc. 88 at ¶¶ 77-83; *see* Amend Compl. ¶¶ 55, 76. Worse, Plaintiffs plausibly alleged that the closure was motivated by discriminatory purpose. Order, Doc. 88 at ¶¶ 77-85; *see* Amend. Compl. ¶¶ 55, 56, 59, 76; *see also id*. ¶¶ 49-50, 61, 69, 79-84. It is clearly established that limiting access to any forum, public or nonpublic, in this manner is viewpoint discrimination, *see Mosley*, 408 U.S. at 96; *Cornelius*, 473 U.S. at 811-12; *Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa.*, 220 F.3d 193, 217 (3d Cir. 2000) (striking down such proxy discrimination); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (same); *cf. Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1163 (7th Cir. 1992) (noting the impermissibility of proxy discrimination as "clear"), and that "[t]he government's purpose is the controlling consideration," *Ward*, 491 U.S. at 791; *see Cuffley*, 208 F.3d at 704-05, 709-11 (regulation of speech along public highways was viewpoint discrimination because it was motivated by a discriminatory purpose).

The only argument by either Defendant for why qualified immunity should nevertheless apply to Plaintiffs' viewpoint discrimination claim appears in the State's brief, Doc. 160 at 18-19: "Public officials are entitled to have a court perform a qualified immunity objective inquiry

focusing on their conduct without regard to subjective intent, even where subjective intent is a necessary element of the merits." As an example, State Defendants claim that an official who selects a particular contractor for purposes of delaying repairs at the state capitol by four months, so as to negatively impact a planned protest, would be entitled to qualified immunity because his subjective intent in delaying the repairs could not be considered. That obviously cannot be; it would foreclose any plaintiff from ever bringing a claim that involved an official's intent.

This argument is premised on a misunderstanding of the two-step qualified immunity inquiry as it applies to a viewpoint-discrimination claim. After determining that the alleged facts (including the action *and* the motivation), if proven, would establish viewpoint discrimination, as this Court did, the Court must consider whether *a reasonable official* would know that taking that action for that reason was unconstitutional, *Malley v. Briggs*, 457 U.S. 335 (1986)—*not* whether these Defendants knew they were violating the Constitution, *cf. Gerlich v. Leath*, 861 F.3d 697, 708 (8th Cir. 2017) ("The first question is whether it was clearly established at the time of these events that [this] was a limited public forum;" "The next question is whether at that time it was clearly established that a university may not discriminate on the basis of viewpoint in a limited public forum."). The Defendants have confused these two steps.

In the case of the state capital repairman, the Court would ask whether a reasonable official (that is the part that makes it objective) would have understood it to be unconstitutional to delay repairs by four months for the purpose of impacting a planned protest (the purpose being a factual allegation from the complaint, taken as true at the motion to dismiss stage). And in the case at bar, we ask whether a reasonable official would have understood it to be unconstitutional to discriminatorily close nine miles of a public right-of-way for five months for purposes of

chilling speech with which he disagrees. The answer to both question is yes. *See id.*; *Ward*, 491 U.S. at 791; *Cornelius*, 473 U.S. at 811-12.

V. The Allegations Establish Clearly Unconstitutional Prior Restraint

This Court has yet another basis for denying Defendants qualified immunity as to Count I: prior restraint.

A prior restraint is a government action "*forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original). Any government conduct that "den[ies] access to a forum for expression before the expression occurs" constitutes a prior restraint. *U.S. v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000). Courts have applied a prior restraint analysis to prospective bars on speech along public roads, *see, e.g.*, *Forsyth Cnty., Ga.*, 505 U.S. 123, 127-28, including to checkpoints and roadblocks set up near protests and concerts, *see, e.g.*, *Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004) (a metal detector checkpoint outside of a large protest along a rural highway was an impermissible prior restraint even though "[e]ach year, [] a small number of protestors violate 18 U.S.C. § 1382 by entering onto Fort Benning"); *Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) (it was clearly established that driver's license checkpoints on a rural highway leading to a concert were an impermissible prior restraint); *Mia Luna, Inc. v. Hill*, 2008 WL 4002964, at *5 (N.D. Ga. Aug. 22, 2008) (same, on the "main access road" leading to an adult entertainment club).

Although all prior restraints are disfavored, some prior restraints are *per se* unconstitutional. "It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an

unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969) (striking down an ordinance that left "the members of the Commission [] to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'": "There can be no doubt that [this] ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways."); *see also Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 127-28 (involving a protest movement in which thousands of people sought to march and protest along rural roads; striking down a permitting requirement for such speech that charged fees of "not more than $1,000 for each day" at the discretion of a county administrator based on "the actual costs incurred investigating and processing the application").

Plaintiffs alleged that the closure denied them "access to [several] forum[s] for expression before the expression occurs," *Frandsen*, 212 F.3d at 1236—nine miles of Highway 1806 and its curtilage, and camps "located entirely on privately and tribally owned land on the Standing Rock Reservation" and on public land "expressly held out as a 'free speech zone'." Amend. Compl. ¶ 150. This Court held that Plaintiffs stated a plausible claim to a prior restraint. Order, Doc. 88 at ¶¶ 109-120. This alleged constitutional violation is clearly established. Numerous courts have held that substantially less onerous restrictions on speech in similar forums constitute an impermissible prior restraint. *See, e.g.*, *Forsyth Cnty., Ga.*, 505 U.S. 123, 127-28 ($100 permit fee to speak along rural roads); *Bourgeois*, 387 F.3d at 1319 (metal detector checkpoint to enter protest along U.S. 185 in rural Georgia); *Collins*, 382 F.3d at 545 (driver's license checkpoint on rural highway to enter concert); *Mia Luna, Inc.*, 2008 WL 4002964, at *5 (driver's license checkpoint on "main access road" to enter club).

Indeed, it is clearly established that prior restraints like this are per se unconstitutional. If there is "no doubt" that an ordinance that left "the members of the Commission [] to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'" afforded too much discretion, *Shuttlesworth*, 394 U.S. at 151, then Defendants' even-more amorphous purported "legitimate business" standard for allowing passage on this road certainly fails. *See* Order, Doc. 88 at ¶¶ 115, 119-20; *cf.* Amend. Compl. ¶¶ 76-77. Likewise, if a requirement that Plaintiffs pay $100 before marching along a state highway in rural Georgia is a per se unconstitutional prior restraint, *Forsyth Cnty., Ga.*, 505 U.S. at 127-28, then the Defendants' complete bar of Plaintiffs from nine miles of Highway 1806 certainly is.

VI. The Alleged Road Closure Clearly Fails Even Rational Basis Review

There is one final reason why this Court should deny qualified immunity: the alleged closure clearly fails even rational basis review.

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*, 473 U.S. at 808. 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 [the 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 purpose 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 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.* For each of these reasons, it is therefore clear that the challenged road closure cannot survive under a nonpublic forum analysis (and it likewise cannot survive intermediate or strict scrutiny, *see generally also* Doc. 62 at 11-24, 32-34).

As alleged, the discriminatory closure was not reasonable in light of the road's purposes, namely hosting travel and expressive conduct. *See, e.g.*, Amend. Compl. ¶¶ 44-45. Rather than aiding these purposes, closing the road severely disrupted travel throughout the region, Amend. Compl. ¶¶ 65, 78, 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, ¶¶ 44, 47-48; *see also* ¶ 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 alleged 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)."[16] Amend. Compl. ¶ 71.

Finally, the pleadings establish that Defendants' purpose 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," Amend. Compl. ¶ 79; *see also* ¶ 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); ¶¶ 159-61, 168; *Crawford-El*, 523 U.S. at 589 (Intent is "a pure issue of fact.").

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).

[16] Defendants seek to rebut this by arguing that the Plaintiffs have alleged that "there was no active construction in the area" "[f]or the vast majority for the duration of this discriminatory road closure." Kirchmeier Br. at 14-15 (noting, also, that Plaintiffs were able to "continue their protest from other locations" for *some* of this period). The problem with this argument is that the factual inference that Defendants would have this Court draw from these allegations—that Plaintiffs were not, as a matter of fact, deprived of any means of communicating with one of their principal desired audiences, *see id.*—is directly contradicted by the Amended Complaint. Accepting Plaintiffs' allegations as true, Plaintiffs *were* so deprived. Amend. Compl. ¶ 71.

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.*, 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. *But see Collins v. Jordan*, 110 F.3d 1363, 1372-73 (9th Cir. 1997) (The "law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence. . . . The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure."). 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* Amend. Compl. ¶ 66-69, 79. Far from "acknowledging" "that the bridge was damaged and needed repair," as State Defendants claim (at 2 and 4), 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.* ¶ 61[17]; *see also* ¶¶ 54, 64 (the road was closed days before the bridge was purportedly damaged, and it remained closed for months after the Defendants publicly announced there was no damage); ¶¶ 7, 67 (the road closure was only enforced starting after the bridge); ¶ 69.

Second, Plaintiffs have also alleged that Defendants' claims regarding the supposedly "criminal and violent behavior" associated with the NoDAPL movement were similarly pretextual. *Id.* ¶¶ 5, 79, 143. Accepting Plaintiffs' allegations as true, the NoDAPL movement was overwhelmingly peaceful. ¶¶ 49-50. Plaintiffs are not asserting that violent protest is speech, or that they had a First Amendment right to trespass, contrary to what Defendants misleadingly claim: Plaintiffs allege that they sought to use public spaces for political speech, which "is entitled to the fullest possible measure of constitutional protection." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 816 (1984). Defendants' arguments to the contrary border on the absurd—Defendants argue that Plaintiffs' allegation that the "vast majority of speech, assembly, prayer, and travel in this area was completed in a peaceful and lawful manner" constitutes an "admission that the DAPL protest were not entirely peaceful." Doc. 160 at 13. State Defendants, of course, ignore Plaintiffs' very next allegation, that

[17] Defendants support their bridge damage contention by citing to a passage in the Amended Complaint that explicitly describes the pretextual reasons given by the Defendants for the closure. *Compare* State Br. at 4 (citing ¶¶ 59-62) *with* ¶ 59 ("Defendants have given varying reasons for the need for this barricade . . . ."); ¶ 69 ("Given these circumstances, State and Local Defendants' expressed concerns about the need to maintain the discriminatory road closure to protect the structural integrity of the bridge appear to have at all times been a pretext.").

"Thousands of Water Protectors prayed, marched, sang, waved placards, and chanted on thousands of occasions over the course of a nearly year-long period without any incident." Amend. Compl. ¶ 50. And State Defendants ignore the many other allegations in the Amended Complaint detailing the essential peaceful and lawful nature of the movement, the inherent dishonesty of Defendants' own public statements to the contrary, and the pretextual nature of this given reason for the closure. *See, e.g.*, Amend. Compl. ¶¶ 5, 49-50, 59, 71-72, 76, 79-85, 143. 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 the essentially peaceful and lawful nature of the NoDAPL movement. And regardless, Plaintiffs have alleged that "responding to criminal activity" was not, as a matter of fact, the reason for the closure. *See, e.g.*, Amend. Compl. ¶ 79; *cf. Crawford-El*, 523 U.S. at 589 (Intent is "a pure issue of fact").

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.

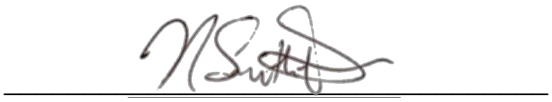
Conclusion

For the forgoing reasons, this Court should deny Defendants qualified immunity at the motion to dismiss stage.

Dated: October 5, 2022

Respectfully Submitted

By:



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