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**

MEMORANDUM IN OPPOSITION TO STATE DEFENDANTS', COUNTY DEFENDANTS', AND TIGERSWAN LLC'S MOTIONS TO STAY DISCOVERY

Plaintiffs oppose the requests for a stay submitted by the state and county defendants, and TigerSwan LLC. The question is most straightforward for TigerSwan: as a private party that is not entitled to qualified immunity, TigerSwan is not entitled to a stay of discovery. The state and county defendants raise frivolous claims on appeal at such an early stage of the litigation, and accordingly should not receive a stay either. This case was filed over two years ago. Discovery has been stayed for that duration: two years. With every passing day, memories fade, documents become more difficult to retrieve, and witnesses move, change their phone numbers, and become

unreachable. United States courts regard unnecessary delay with great disfavor, and discovery stays are used judiciously as a result. This case does not warrant departure from these principles.

It is extraordinarily unusual for qualified immunity to be applied at the motion to dismiss stage, and for good reason. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 10 (2017) (observing that only 0.6% of cases are dismissed on qualified immunity grounds on a motion to dismiss). The purpose of a motion to dismiss is to test the sufficiency of the allegations in the *plaintiffs' complaint*, to ensure that the complaint states a claim "on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). State defendants now seek a stay of discovery associated with an interlocutory appeal that can result in little more than additional delay. Qualified immunity does not require such relief. To the contrary, "qualified immunity protects government officials from 'unnecessary and burdensome discovery or trial proceedings' only." *In re Flint Water Cases*, 960 F.3d 820, 826 (6th Cir. 2020) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)). Here, where defendants' frivolous appeal will serve only to delay this matter, refusing the defendants' various requests for a stay will impose no *unnecessary* discovery.

I. TigerSwan Is Not Entitled to a Stay of Discovery

Under existing law, as a *private* party, TigerSwan is not entitled to a stay of discovery springing from the interlocutory appeal filed by separate *public* defendants in this case.

Qualified immunity exists to protect "government officials": "*public officers* require this protection to shield them from undue interference with their duties and from potentially disabling threats of liability." *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982) (emphasis added). Unsurprisingly, the rationale employed by the Supreme Court for granting stays of discovery to defendants seeking an interlocutory appeal of qualified immunity is inapplicable to private

parties: "The basic thrust of the qualified-immunity doctrine is to free *officials* from the concerns of litigation, including avoidance of disruptive discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) (emphasis added). The *Iqbal* Court continued:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

Id. These concerns are obviously particular to *governmental* defendants.

That this Court should allow discovery to proceed against TigerSwan is made clear by looking to what will happen if the Eighth Circuit determines that some or all of the public officials in this case *are* entitled to the severe relief of qualified immunity: the case will move forward with TigerSwan as a defendant. In circumstances such as this, in which one or more defendants will remain even if a qualified immunity interlocutory appeal is granted in full, courts have permitted discovery to proceed against the 'remainder' parties, with discovery against those parties asserting qualified immunity limited to that which would be available from non-party witnesses (e.g., *exactly* the result if the public officials seeking immunity fully prevail). *See, e.g.*, *Mendia v. Garcia*, No. 10-cv-03910-MEJ, 2016 WL 3249485, at *5 (N.D. Cal. June 14, 2016) (permitting discovery against government officials asserting qualified immunity, as non-party fact witnesses, related to claims against other defendants); *Harris v. City of Balch Springs*, 33 F. Supp. 3d 730, 733 (N.D. Tex. 2014) (same: "Whether [he] is subjected to discovery on these counts now or after the resolution of qualified immunity is quite beside the point."); *In re Flint Water Cases*, 960 F.3d 820, 827 (6th Cir. 2020) (same: "If the state and MDEQ defendants are eventually dismissed as a result of their pending appeals, they will still be required to respond to discovery as a non-party. So in the interim, this litigation will go forward and the state and

MDEQ defendants are required to respond to discovery requests as if they were already dismissed from the case.").

TigerSwan does not cite any cases to the contrary. Indeed, TigerSwan does not cite to any cases, period. Instead, TigerSwan's request for a discovery stay appears largely premised on its unsupported claim that TigerSwan is "a minor and ancillary party." TigerSwan Memo at ¶¶ 2-3.

But TigerSwan is *not* a minor or an ancillary party in this matter.[1] Plaintiffs' allegations describe a coordinated effort between state officials, county officials, *and TigerSwan* to create a false counternarrative of the events at Standing Rock, to use that counternarrative as pretext for burdening the constitutional rights and liberties of the Water Protectors, with whom they disagreed, and then to actually enforce the burden in question—a discriminatory closure of nine miles of a public road—for five months. Plaintiffs have detailed well over one hundred allegations against TigerSwan, including two and a half pages dedicated to TigerSwan alone. The taint of TigerSwan's influence may be felt throughout Plaintiffs' allegations, and if Plaintiffs voluntarily dismissed their suit against all of the public defendants, the case that remained against TigerSwan would be both detailed and damning.[2]

TigerSwan's memorandum points to one additional reason why this Court should not grant TigerSwan a stay of discovery: TigerSwan intends to file in short order a motion for summary judgment. This would be TigerSwan's *second* motion for summary judgment in this case, and, like its first, would precede the institution of any discovery. TigerSwan is therefore asking this Court to indefinitely save it from discovery while informing this Court that it will soon demand relief that *requires* discovery. *See, e.g.*, Plaintiffs' Response to TigerSwan's

[1] It should be noted: it would be of no legal import if TigerSwan were a minor and ancillary party.
[2] This last point also highlights why discovery should proceed against TigerSwan: if Plaintiffs voluntarily dismissed their claims against the officials seeking qualified immunity, discovery would obviously proceed against TigerSwan.

Motion for Summary Judgment, [doc. 84] at 2-5; Declaration of Noah Smith-Drelich in Support of Discovery, [doc. 84, attachment 1] *et seq.*

II. Neither State Nor County Defendants Are Entitled to a Stay of Discovery

As public officials pursuing a qualified immunity interlocutory appeal, the state defendants and Kyle Kirchmeier have a significantly stronger claim to a limited stay of discovery than does TigerSwan. Nevertheless, neither the doctrine of qualified immunity itself nor its underlying policy goals support staying discovery in these circumstances.

A. Courts do not grant stays for qualified immunity appeals that are frivolous or for purpose of delay.

A District Court should not issue a stay of discovery for a defendant who has filed an interlocutory appeal asserting a qualified immunity defense where the appeal is either "frivolous" or "for purposes of delay." *Johnson v. Hay*, 931 F.2d 456, 463 (8th Cir. 1991); *see Behrens v. Pelletier*, 516 U.S. 299, 311 (1996). Instead, in such circumstances, the District Court may retain jurisdiction of the case "pending summary disposition of the appeal, and thereby minimize[] disruption of the ongoing proceedings." *Behrens*, 516 U.S. at 311. State defendants' memorandum, adopted by all of the defendants, sets forth several bases for their appeals, each of which is either frivolous, for purposes of delay, or cannot stand as an independent basis for an interlocutory appeal.

1. Issues raised on appeal for purposes of delay

The first and third issues that the state defendants anticipate raising on appeal serve no purpose other than delay: that "the Court disregarded Eighth Circuit precedent that requires a qualified immunity defense to be addressed at the motion to dismiss stage." State Memo at 3; *see also* State Memo at 5-6 (same). According to defendants, "[f]ailure to address a properly raised defense at the motion to dismiss stage will result in a remand requiring the defense to be

addressed." State Memo at 3. The relief that defendants seek, therefore, is for *this Court* to issue a more formal declaration regarding the applicability of qualified immunity at the motion to dismiss stage. That could have been raised in a motion to clarify or reconsider before this Court. Notably, defendants did not ask *this Court* to clarify or reconsider its order to more explicitly reach the question of qualified immunity.

If state defendants are correct about the rule in question, the *only* consequence of defendants appealing this issue to the Eighth Circuit rather than seeking relief from this Court directly is delay—and likely a lengthy one, given the pace of federal appellate court review. Accepting for purposes of this motion that defendants are correct on this question, six or twelve months from now, this Court will be in the *exact* position that it would have been had defendants instead requested clarification of this Court's order. Defendants may well be entitled to attempt such an appeal, but because the sole import of taking an appeal rather than seeking relief from this Court directly is delay, defendants are not, under *Behrens* and *Johnson*, entitled to a stay of discovery while the appeal is pending.

2. Frivolous issues

The only substantive legal issue that the state defendants anticipate appealing—they claim that the public road in question is *not* a traditional public forum—is frivolous.

An appeal is frivolous for these purposes when it challenges "clear and long-standing case law." *United States v. LaMere*, 951 F.2d 1106, 1109 (9th Cir. 1991); *see Behrens v. Pelletier*, 516 U.S. 299, 311 (1996) (incorporating, for qualified immunity appeals, the standard from interlocutory appeals on double jeopardy). As an example of this, the *LaMere* court considered an appeal asserting that the double jeopardy clause is violated when a defendant is prosecuted for the same act in both state and federal court (having violated both state and federal

narcotics law). *Id.* The defendant in *LaMere* had claimed that the double jeopardy issue was "unique in this particular case," involving different laws in a different state than what had been previously considered, as well as a joint operation that included local police, FBI agents, and tribal police. *See USA, Plaintiff/Appellee, v. Billy Leon LaMere, Defendant/Appellant*, 1991 WL 11260214 (C.A.9), 2. Nevertheless, the District Court adjudged the appeal frivolous, refusing to stay discovery, and the Ninth Circuit affirmed: in-circuit case law held that "[the double jeopardy clause] is not violated when the defendant has violated the narcotics laws of the state and of the nation and is prosecuted for the same acts by both state and nation." *LaMere*, 951 F.2d at 1109. It did not matter that *LaMere* involved a number of unique circumstances, because the circuit had a clear rule that *encompassed* such distinctions, rendering them immaterial.

Defendants' argument here is frivolous for the same essential reasons as in *LaMere*. 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. 474, 481 (1988) (considering and rejecting the argument that "[a]lthough 'highway' has a broad meaning (basically including any street, city or rural)," the purposes of highways are not always compatible with speech). Public roads are, in fact, the *example* of a traditional public forum used most commonly by the Supreme Court: "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." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) (citation omitted); *see also, e.g.*, *United States v. Grace*, 461 U.S. 171, 177 (1983); *Ball v.*

City of Lincoln, Nebraska, 870 F.3d 722, 730 (8th Cir. 2017). Indeed, even state defendants themselves acknowledged that the primary case they rely on in their motion to dismiss treated the road in question as a traditional public forum. *See, e.g.*, State Def. Memo in Support of Mot. to Dismiss, [doc. 49] at 35 (noting that "Griefen applied the higher level of scrutiny reserved for traditional public forums [to a] road closure").[3]

Qualified immunity does not change the standard applicable on a motion to dismiss; the Court must still accept the Plaintiffs' alleged facts as true to test if the complaint states a claim on its face.[4] Here, that means asking whether a *public road*—open to the public 24/7, including pedestrians, for use as a thoroughfare, with no indication that it is some sort of special private enclave, with a range of physical characteristics conducive to expressive conduct, that has long been used for a range of expressive conduct, *see, e.g.* Amend. Compl. ¶¶ 44-46[5]—is a traditional public forum. The affirmative answer to this question falls *well* beyond any reasonable dispute; there are few constitutional rules more clearly established.

3. Issues that are not independently appealable

[3] Plaintiffs have alleged numerous facts about the road in question that independently render this question beyond reasonable dispute. Even were the forum status of roads as a whole less clear, the facts alleged in the Amended Complaint therefore establish that *this* road is clearly a public forum. *See, e.g.*, Plaintiffs Opposition, [doc. 62] at 9-11.

[4] Defendants' argument to the contrary relies on a blatant misrepresentation of a case that held the exact opposite of what defendants claim. *Compare* State Defendants Memo at 3 ("This obligation [for a court to address a defense] may require a district court to analyze evidence outside the four corners of the complaint" (citing to *Payne v. Britten*, 749 F.3d 697, 702 (8th Cir. 2014)) *with Payne v. Britten*, 749 F.3d at 702 (holding that a district court *may not* analyze evidence outside the four corners of the complaint, even if it might appear necessary to do so in order to address a defense: "Courts may only ask whether the facts as alleged plausibly state a claim and whether that claim asserts a violation of a clearly established right").

[5] Defendants, now for a second time, blatantly misrepresent what Plaintiffs have alleged on this subject. *Compare* Defendants' Memorandum at 6 ("The complaint does not set forth any true 'traditional' expressive uses of Highway 1806 that preceded the DAPL protest.") *with* Amended Complaint, [doc. 44] ¶¶ 44-45 (alleging that "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," which "have *historically* been used . . ., as the only public space throughout much of this area, for a range of expressive activity. This 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)" (emphasis added)); *see also* Plaintiffs Opposition to State Defendants' Motion to Dismiss, [doc. 62] at 10, n.6, (specifically noting, and correcting, state defendants' *exact same misrepresentation*).

All of the remaining "issues" that defendants intend to assert on appeal relate to or rely on defendants' counternarrative, which is contradicted by the facts alleged in the Amended Complaint, and which this Court has already properly excluded from consideration at this stage in the proceedings. *See* Order Denying in Part and Granting in Part Motions to Dismiss and for Summary Judgment, [doc. 88] at 18-20. Such claims cannot serve as an independent basis for an interlocutory appeal of qualified immunity. *See, e.g.*, *Johnson v. Jones*, 515 U.S. 304 (1995); *see also Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985) (Qualified immunity "is [] a legal issue that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case.").

B. The policy underlying qualified immunity does not support granting a stay to the public official defendants in this case.

Qualified immunity has recently come under enormous amounts of criticism from judges, academics, and policymakers from the political left, right, and center. Qualified immunity "'undermine[s] Congress's intent to provide remedies to those whose rights have been violated.'" Michael Martz, *Federal Appellate Judge Chides Supreme Court Over Qualified Immunity Doctrine*, RICH. TIMES DISPATCH, Jun. 19, 2020 (quoting Judge James A. Wynn Jr. of the Fourth Circuit Court of Appeals). Qualified immunity compromises a crucial tool for "ensuring accountability and professionalism in law enforcement." *Qualified Immunity: The Supreme Court's Unlawful Assault on Civil Rights and Police Accountability*, CATO INSTITUTE, https://www.cato.org/events/qualified-immunity-supreme-courts-unlawful-assault-civil-rights-police-accountability (Mar. 1, 2018). Qualified immunity is "unlawful," and is "inconsistent with conventional principles of statutory interpretation." William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45 (2018); *see also Goffin v. Ashcraft*, No. 18-1430, 2020 WL 6072839, at *5, n.5 (8th Cir. Oct. 15, 2020) (Smith, J., concurring) (describing the recent and

broad-based scrutiny of qualified immunity as "warranted"). Even Justice Thomas has enthusiastically joined the chorus against qualified immunity, writing that qualified immunity is guided by "precisely the sort of 'freewheeling policy choice[s]' that we have previously disclaimed the power to make." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

So what, exactly, are those policy choices that Justice Thomas (and Judge Wynn and Judge Smith and Judge Ho and Judge Willett and Professor Will Baude and the CATO Institute and the ACLU and so many others) condemn? The Supreme Court has described the "'driving force' behind [its] creation of the qualified immunity doctrine" to be resolving "'insubstantial claims' against government officials" at "the earliest possible stage of litigation." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This is because "[p]ermitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

The prototypical qualified immunity case is, therefore, defined by two key characteristics. First, because qualified immunity seeks to prevent officials from being "unduly inhibit[ed] in the discharge of their duties," the nature of the official decision in question matters greatly. Qualified immunity is most commonly applied to claims of excessive force, in which "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Sok Kong Tr. for Map Kong v. City of Burnsville*, 960 F.3d 985, 991 (8th Cir. 2020); *see, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (describing the particular importance of qualified immunity in the Fourth Amendment context). The potential for reasonable mistakes of law in

such circumstances is significant: officers may not have the opportunity to meaningfully reflect before acting, let alone to consult with a supervisor or government lawyer.

The second key characteristic of successful assertions of qualified immunity is that a Section 1983 suit must impose a *personal* financial burden on the defendant in question. Indeed, according to the Supreme Court, the rationales that motivate the doctrine of qualified immunity are "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury." *Owen v. City of Indep., Mo.*, 445 U.S. 622, 654 (1980). For an official to be "unduly inhibit[ed] in the discharge of their duties," there must be a "threat of *personal* monetary liability." *Id.* (emphasis in original).

The present case does not significantly implicate *either* of these driving policy concerns. The wrong at the center of Plaintiffs' Amended Complaint was not a single bad decision made in the heat of the moment, but a policy or practice coordinated across multiple offices, involving numerous state, local, and private parties, lasting for five months. Defendants in this case not only had an opportunity to consider the legality of what they were doing, but they had ample time to consult with their lawyers at a relative leisure. Indeed, defendants here had the somewhat unusual advantage of being *specifically warned* about the unconstitutionality of the road closure in question, by multiple legal organizations no less, including the ACLU (a credible and knowledgeable party in these matters). *See, e.g.*, Amend. Compl. ¶ 107. This is not a circumstance in which the law should protect a well-meaning police officer from a bad, but reasonable, split-second decision; the officials in question had countless opportunities to check and double-check the constitutionality of their operations. Public policy weighs strongly in favor of official *prudence* in these circumstances, not in favor of justifying carelessness.

Moreover, there is no concern here that the damage awards will come from the pockets of any individual public officials. It has long been the universal practice of states and localities to indemnify officials held individually liable under Section 1983, including in North Dakota—although this has only recently come to public light. *See, e.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (2014) (observing that governments pay "approximately 99.98% of the dollars that plaintiffs recovered in lawsuits alleging civil rights violations by law enforcement"). Indeed, North Dakota state law *requires* indemnification in these circumstances. NDCC 32-12.2-03. The officials seeking qualified immunity here thus do not face any reasonable "threat of *personal* monetary liability." *Owen*, 445 U.S. at 654.

CONCLUSION

This Court should not further extend the doctrine of qualified immunity by halting discovery for the parties in this case—leading to another delay of potentially a year or more—pending the resolution of the frivolous interlocutory appeal filed by just the state defendants and Kyle Kirchmeier. Neither the law of qualified immunity nor its underlying policy aims support such severe and universal relief; qualified immunity's dual rationales are "simply not implicated" in these circumstances.

Plaintiffs therefore request that this Court deny the motions for stay submitted by the state defendants, Kyle Kirchmeier, Morton County, and TigerSwan—and permit this case to proceed.

Dated: October 23, 2019

Respectfully Submitted

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