

Standing Rock *Thunderhawk* Litigation Advances in Appeals Court and in Discovery Toward Trial

Columbia Students Provide Critical Assistance in Civil Rights Lawsuit

Thunderhawk v. County of Morton, North Dakota

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New York, January 25, 2021 — Advancing yet another step toward trial set for August 2021, the Standing Rock *Thunderhawk* litigation is now in discovery against Morton County and TigerSwan, LLC, and briefed on qualified immunity at the U.S. Court of Appeals for the Eighth Circuit.

On Friday, January 22, 2021, counsel for the *Thunderhawk* plaintiffs filed their 76-page brief in the appeals court in support of the district court’s denial of qualified immunity. The same day, *Thunderhawk* counsel filed their first set of interrogatories and requests for production to TigerSwan, LLC, a private security company and co-defendant, that worked closely with law enforcement, facilitating the constitutional violations at the heart of the case.

The *Thunderhawk* litigation grows out of the #NoDAPL movement in 2016-2017 when tens of thousands of Water Protectors gathered on the northern border of the Standing Rock Reservation to support the Standing Rock Sioux Tribe’s resistance to the Dakota Access Pipeline. The lawsuit centers around law enforcement’s months-long closure of a nine-mile stretch of the region’s primary public right of way, which effectively severed the Tribe and its supporters from Bismarck, the state capital and the location of the nearest airport, shopping, population center, and major hospital.

Following the district court’s denial of their motions to dismiss, the state defendants and Sheriff Kirchmeier appealed to the U.S. Court of Appeals for the Eighth Circuit. In their appeal, the defendants argue that their actions may have violated the U.S. Constitution, but that the constitutional rights in question were not clearly established—and so the defendants should escape liability through the much-criticized doctrine of “qualified immunity.” Specifically, the defendants argue that it is unclear whether public roads are public forums for speech.

But as the *Thunderhawk* counsel point out in response, there are few constitutional tenets more clearly established than this: for well over 100 years, courts have repeatedly recognized public roads as the quintessential *example* of a public forum for speech. Indeed, the Supreme Court has considered and rejected the exact argument raised by the defendants here, holding that “all public streets are held in the public trust and are properly considered traditional public fora.”

The *Thunderhawk* plaintiffs are represented by [Noah Smith-Drelich](#) (Assistant Professor of Law at Chicago-Kent), and Professor [Bernard E. Harcourt](#) of Columbia Law School. Prior to joining Chicago-Kent, Smith-Drelich was a Lecturer in Law at Columbia

Law School, and before that the ACLU's Staff Attorney for their North Dakota, South Dakota, and Wyoming affiliates.

Thunderhawk counsel were assisted in drafting the appellate brief by Columbia Law and Columbia College students Arabella Colombier (LAW '22), Riley Collins (LAW '21), Bastian Shah (LAW '21), Allyson Chavez (CC '19), and Ilina Logani (CC '22).

In addition, students from Columbia Law, Columbia College, and Barnard College Alex Vasques (LAW '23), Julia Rigal (LAW '21), Kim Mejía-Cuéllar (LAW '21), Nina Halberstadter (CC '22), and Rachel Barkin (BC '22) provided crucial support in the discovery process.

Thunderhawk counsel, assisted by Columbia College student Cassidy Gabriel (CC'21), are also reaching out to potential witnesses in preparation for trial.

“The students have been amazing,” said lead counsel Noah Smith-Drelich. “We’ve been operating on the model of a public interest law firm here, and our students—acting as associate counsel and paralegals—have excelled under the pressure. This is a complex case with numerous moving parts, which has meant that students have lots of opportunities to step into roles that they might not have in practice for years, and everyone has really shined.”



The plaintiffs in this case, Cissy Thunderhawk, Wašté Win Young, the Reverend John Floberg, and José Zhagñay are, respectively, a small-business owner, a former Historic Preservation Officer of the Standing Rock Sioux Tribe, Standing Rock’s Episcopalian Minister, and a school volunteer. The plaintiffs, and the class they seek to represent, allege violations of their constitutional rights. Through the suit, the plaintiffs hope to

recover damages for the substantial harms inflicted on the community and movement by this unnecessary and overbroad road closure.

The litigation forms part of the [Practical Engagements](#) of the [Initiative for a Just Society](#) at the [Columbia Center for Contemporary Critical Thought](#). In 2018, the Center organized a [seminar on Standing Rock](#) that explored many of the legal issues and civil rights violations associated with the Standing Rock protest movement.

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More information and documents here:

<https://cccct.law.columbia.edu/content/standing-rock-litigation>

Amended Complaint, *Thunderhawk v. County of Morton*, filed February 1, 2019, here:

<https://cccct.law.columbia.edu/sites/default/files/content/Pleading%2044%20-%20Amended%20Complaint.pdf>

Horn, Steve. "[TigerSwan, County Sheriff Sued Over Road Blockade During Dakota Access Pipeline Protests.](#)" *DeSmog*, October 26, 2018.

Gosztola, Kevin. "[Counterinsurgency on Steroids: Interview with Bernard Harcourt on Trump, Cesar Sayoc, and the Counterrevolution.](#)" *Shadowproof*, October 29, 2018.

["Standing Rock defendants move to dismiss on basis of factual disputes."](#) *Indian Country Today*, February 17, 2019.