

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-DLH-CSM

**CIVIL RIGHTS CLASS ACTION**

**FIRST AMENDED COMPLAINT FOR  
DAMAGES**

**DEMAND FOR JURY TRIAL**

**INTRODUCTION**

1. From April 2016 to February 2017, tens of thousands of individuals, known as “Water Protectors,” united in support of the Standing Rock Sioux Tribe’s opposition to the

construction of the Dakota Access Pipeline (DAPL) at camps located near the intersection of Highway 1806 and the Cannonball River in south-central North Dakota.

2. Since the movement first began, Water Protectors relied heavily on Highway 1806. As the largest and most direct road connecting the Standing Rock Sioux Reservation and the various camps on its northern border to Bismarck and Mandan, Highway 1806—especially the stretch between Cannon Ball and Mandan—served as the primary route by which Water Protectors (and press) traveled to the camps, gathered supplies at Bismarck and Mandan, and sought medical treatment at the nearest major hospital. Moreover, because DAPL crosses Highway 1806 several miles north of the camps, in an area rich with sacred and ceremonial sites, Highway 1806 also served as the primary means by which Water Protectors traveled to assemble, speak, and pray in opposition to the construction of DAPL.

3. But Highway 1806 was not only important to Water Protectors. For thousands of local residents, Highway 1806 is their primary means of visiting family, shopping, seeking medical attention, and conducting other routine and necessary life activities. Highway 1806 is a key north-south public right-of-way for residents of south-central North Dakota, north-central South Dakota, the Standing Rock Reservation, and the Cheyenne River Reservation.

4. As the “NoDAPL” movement grew, so too did the divide between the predominantly Native American Water Protectors and the predominantly non-indigenous residents of Morton County. By late-summer, racial, religious, and political polarization had begun to infect the relationship between the Water Protectors and law enforcement Defendants, led by Defendant Morton County Sheriff Kyle Kirchmeier.

5. One of the ways through which this polarization was exhibited was state and local officials’ persistent mischaracterization of Water Protectors and the NoDAPL movement. Using selective, misleading, and false descriptions of Water Protector conduct, including in press statements, official declarations, and criminal charging documents, state and local officials

engaged in a concerted effort to portray the movement as a whole as far more dangerous or criminal or disruptive than was actually the case.

6. On October 24, 2016, Sheriff Kirchmeier and Morton County, operating with the assistance and approval of Governor Jack Dalrymple, NDDOT Director Grant Levi, and Highway Patrol Superintendent Michael Gerhart Jr., discriminatorily closed Highway 1806 from Fort Rice to Fort Yates. This road closure was directed only at the Tribe and its supporters: residents of Fort Rice were allowed to drive southbound on Highway 1806, as were employees of DAPL. In fact, DAPL employees were permitted to use the closed portion of the road for the duration of the discriminatory closure. The stretch of Highway 1806 from the Cannonball River to Fort Rice remained fully closed to travel by the Tribe and its supporters until March 17, 2017. And the road remained effectively closed to any expressive or religious activity by the Tribe and its supporters until March 21, 2017.

7. From October 28, 2016 until early March, Defendants maintained a reinforced concrete and concertina wire barricade on Highway 1806 immediately north of the Backwater Bridge. This barricade presented a physical boundary to any travel past the bridge *on or around* Highway 1806 (but it did not prevent travel onto the bridge itself). Defendants also enforced an absolute prohibition on travel for the Tribe and its supporters—including foot, horseback, and ATV travel—on Highway 1806, regularly arresting Water Protectors who approached the barricade on foot.

8. Defendants' five-month absolute prohibition of any travel by the Tribe and its supporters on an approximately nine-mile stretch of this public right-of-way infringed Plaintiffs' Fifth and Fourteenth Amendment right to interstate and intrastate travel and, as a consequence, substantially burdened Plaintiffs in seeking needed medical care, in purchasing supplies (and in other ways engaging in commerce), in meeting with, speaking to and being interviewed by media, in gathering and reporting the news, and in visiting family members.

9. The travel limitations also prevented Plaintiffs from exercising their First Amendment right to assemble, speak, and pray in the area in question, including but not limited to a nearly nine-mile stretch of a public road abutting numerous sacred and ceremonial sites, as well as portions of the public road near the pipeline's path. The discriminatory road closure also unnecessarily burdened the First Amendment rights of journalists or supporters who wished to join or visit the camps and thereby limited the camps' and Standing Rock Reservation's access to the press as well as the press's access to the camps and to the Standing Rock Reservation.

10. Plaintiffs suffered substantial and irreparable injury as a result of Defendants' actions.

### **JURISDICTION & VENUE**

11. This Court has jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1331 (in that they arise under the United States Constitution) and 28 U.S.C. § 1343(a)(3) (in that the action is brought to address deprivations, under color of state authority, of rights, privileges, and immunities secured by the United States Constitution). This Court has supplemental jurisdiction of state law claims pursuant to 28 U.S.C. § 1367.

12. Venue is properly placed in the United State District Court for the District of North Dakota pursuant to 28 U.S.C. § 1391(b) because the Defendants are located in the District of North Dakota and because many of the acts and/or omissions described herein occurred in the District of North Dakota.

13. Intradistrict venue is proper in the Western Division of the District of North Dakota pursuant to D.N.D. Civ. L.R. 3.1 and Gen. L.R. 1.1 because the claims asserted herein arise from acts and/or omissions that occurred in County of Morton, North Dakota.

### **PARTIES**

14. Plaintiff Cissy Thunderhawk is an enrolled member of the Standing Rock Sioux Tribe and was the owner and primary operator of My Auntie's Place, a business located in Fort

Yates, North Dakota, through the duration of the time in question. During this time period, Cissy Thunderhawk resided in Mandan, North Dakota and worked in Fort Yates, North Dakota.

15. Plaintiff Wašté Win Young is an enrolled member of the Standing Rock Sioux Tribe who, for the duration of the time in question, resided in Fort Yates North Dakota and at the camps alongside the Cannonball River.

16. Plaintiff Reverend John Floberg is the Priest for St. James' Episcopal Church in Cannon Ball, North Dakota, where he worked for the duration of the time in question. Over this same time period, Reverend John Floberg resided in Bismarck, North Dakota.

17. Plaintiff José Zhagñay is and was a resident of New York who, during the time in question, established legal residency in North Dakota due to his relocation to the camps alongside the Cannonball River in support of the NoDAPL movement. José Zhagñay is a U.S. citizen by birth and is indigenous Ecuadorian.

18. Defendant Kyle Kirchmeier is, and at all material times herein was, a law enforcement officer, the Sheriff of Defendant County of Morton, and an authorized policymaker for Defendant County of Morton. Defendant Kyle Kirchmeier is sued in his individual and official capacity.

19. Defendant County of Morton is a body corporate for civil purposes and subject to suit pursuant to N.D. Cent. Code § 11-10-01.

20. Defendant Grant Levi was at all material times herein the director of the North Dakota Department of Transportation and an authorized policymaker for the State of North Dakota. Defendant Levi is sued in his individual capacity.

21. Defendant Doug Burgum is the Governor of the State of North Dakota, is an authorized policymaker for the State, and was an authorized policymaker during much of the time in question. Defendant Burgum is sued in his individual capacity.

22. Defendant Michael Gerhart Jr. was, during the time period in question, the

Superintendent of the North Dakota Highway Patrol. Defendant Gerhart Jr. is sued in his individual capacity.

23. Defendant Jack Dalrymple was the Governor of the State of North Dakota throughout much of the time period in question, during which he was an authorized policymaker for the State. Defendant Dalrymple is sued in his individual capacity.

24. Defendant TigerSwan is a limited liability company organized under the laws of the State of North Carolina, and is registered as a foreign limited liability company with the State of North Dakota providing “security services.” Among other things, TigerSwan uses its own trademarked methodologies, “F3EAR” and “NIFE,” to provide consulting and security services to corporate interests. During the time period in question, TigerSwan acted under color of state law and in close cooperation with law enforcement Defendants to implement and enforce the discriminatory road closure. TigerSwan lent its investigatory, consulting, and security services to law enforcement officers and agencies, providing, among other things, situation reports to law enforcement and “static and mobile security operations in support of the pipeline construction throughout North Dakota.” TigerSwan’s services and cooperation with the law enforcement officers and agencies named herein specifically related to the speech, travel, assembly, and prayer of Plaintiffs on Highway 1806, as well as the discriminatory closure of Highway 1806.

25. Plaintiffs do not know the true names and/or capacities of Defendants sued herein as Does 1 through 100, inclusive, and therefore sue said Defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. The Doe Defendants include other individuals or entities who supervised and/or participated in the conduct complained of herein. Plaintiffs are informed and believe and therefore allege that each of the Doe Defendants is legally responsible and liable for the incident, injuries, and damages hereinafter set forth, and that each of said Defendants proximately caused said incidents, injuries, and damages by reason of their negligence, breach of duty, negligent

supervision, management or control, violation of constitutional and legal rights, or by reason of other personal, vicarious or imputed negligence, fault, or breach of duty, whether severally or jointly, or whether based upon agency, employment, or control, or upon any other act or omission. Plaintiffs will ask leave to amend this complaint to insert further charging allegations when such facts are ascertained.

26. In doing the acts alleged herein, Defendants, and each of them, acted within the course and scope of their employment.

27. In doing the acts and/or omissions alleged herein, Defendants, and each of them, acted under color of authority and/or under color of law.

28. In doing the acts and/or omissions alleged herein, Defendants, and each of them, acted as the agent, servant, employee, and/or in concert with each of said other Defendants.

#### **GENERAL ALLEGATIONS**

29. At all times relevant herein, all wrongful acts described were performed under color of state law.

30. Plaintiffs [Thunderhawk, Young, Floberg, and Zhagñay] are at times herein referred to collectively as “Plaintiffs.”

31. Defendants [Levi, Kirchmeier, Burgum, County of Morton, Dalrymple, Gerhart, TigerSwan LLC, and DOES 1 to 100] are at times herein referred to collectively as “Defendants.”

32. Defendants [Levi, Kirchmeier, Burgum, Dalrymple, Gerhart, TigerSwan LLC, and DOES 1 to 75] are at times herein referred to collectively as “non-municipality Defendants.”

33. Defendants [Levi, Kirchmeier, Burgum, Dalrymple, Gerhart, and DOES 1 to 50] are at times herein referred to collectively as “State Defendants.”

34. Defendants [Kirchmeier, Morton County, and DOES 51-100] are at times herein referred to collectively as “Local Defendants.”

35. At all times relevant herein, Defendants were acting in concert with or as agents on behalf of one another.

### **BACKGROUND**

36. The Dakota Access Pipeline is a 30” pipeline designed to transport up to 570,000 barrels a day of crude, fracked oil from the Bakken shale fields in North Dakota to refineries in Pakota, Illinois. The pipeline was originally planned to cross the Missouri River north of Bismarck. But due to concern over the risk of contamination to the water supply, the pipeline company, Dakota Access LLC, rerouted the pipeline to cross the Missouri River less than one mile north of the Standing Rock Reservation boundary.

37. The area through which DAPL now runs includes a number of sites of significant cultural, historical, and spiritual value to the Lakota people. The Missouri River is also the sole water source for the two neighboring Lakota tribes, the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, and for many other indigenous and non-indigenous people throughout the region.

38. The tribes and their supporters opposed the construction of the pipeline through this area, expressing numerous concerns with the risks presented by the pipeline and with the process by which it was approved at its current route.

39. Moreover, DAPL’s route, including the entirety of the Lake Oahe crossing, traverses land over which the tribes still claim ownership. The tribes and their supporters opposed the construction of the pipeline for this reason as well: the 1851 and 1868 treaties both recognize the land in question as being part of the territory of the Oceti Šakowij (otherwise known as the Great Sioux Nation) and guarantee the territory against intrusions by the United States and outsiders. The tribes have alleged that the pipeline—approved by the Federal Government against the express wishes of the tribes of the Oceti Šakowij—therefore violates these treaties.



40. Starting in April 2016, representatives of more than 300 indigenous nations and numerous other supporters gathered in increasing numbers near the construction route in a spiritually based movement demanding that construction of the pipeline be halted. The locus of this movement was a group of camps located where Highway 1806 intersects the Cannonball River at the current border of the Standing Rock Sioux Reservation.

41. One of the primary functions served by the camps was symbolic, with the very act of staying at or visiting the camps representing the primary means by which numerous individuals expressed their support for the movement. Central to this symbolism was the resettlement of lands over which the Oceti Šakowiŋ continues to claim ownership, with hundreds of Water Protectors becoming legal residents of the camps located on federally and tribally owned land during the time period in question. These camps were only accessible via Highway 1806, which is also the principal route between the Standing Rock Sioux Reservation and Bismarck/Mandan—the closest major cities to Standing Rock.

42. Although, during the period in question, the majority of individuals at these camps were out-of-state visitors to the region, there remained at all times a strong contingent of North Dakota locals.

43. By September 2016, these camps reached a sustained population of approximately 7,000-10,000 individuals.

44. From April 2016 through October 2016, one of the primary locations of speech, assembly, and prayer for these individuals was Highway 1806's wide curtilage near where the pipeline was slated to cross the highway, an area that has long been open to the public for, among other things, use as a thoroughfare, and that could be (and routinely was) visited safely without impeding or disrupting traffic. Plaintiffs regularly engaged in a range of expressive and religious conduct on this land, including hanging prayer ties and signs within sight of passing drivers, as well as speaking and praying individually and in small, medium, and large groups.

45. This was in keeping with the longstanding use of this road and other similar roads in the region: the road and curtilage in question 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. 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). Most recently prior to the challenged road closure, for example, this specific right-of-way hosted a spiritual ride from Cannon Ball to Tioga, ND and a similarly expressive youth ‘run’ from Standing Rock to Washington D.C.

46. In addition to hosting expressive activity and travel, Highway 1806’s wide curtilage has historically been used for runoff control during the spring melt and for the occasional highway repair. The 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.

47. The importance of this specific stretch of road and curtilage for speech, assembly, and prayer increased dramatically in early-September after Tim Mentz Sr., the Standing Rock Historic Preservation Officer, identified ancient burial and ceremonial sites and other significant cultural artifacts in the area; after Dakota Access LLC immediately subsequently attempted to destroy these sites; and after a resulting confrontation between DAPL-employed security officers and Water Protectors led to the officers unleashing dogs against Water Protectors. These events drew local, national, and international attention to not only the NoDAPL movement but this specific stretch of highway; it is possible that no public right-of-way in North Dakota history has been the topic of international discourse to the extent that this several-hundred-yard tract of Highway 1806 has.

48. Additionally, in September, local spiritual leaders and tribal elders confirmed the appropriateness and desirability of praying in the public area immediately abutting Highway 1806 and these specific sites.

49. The vast majority of the speech, assembly, prayer, and travel in this area was completed in a peaceful and lawful manner.

50. 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.

51. Nevertheless, Defendants, and the agencies and individuals operating under their control, engaged in a determined and concerted campaign to suppress the speech, assembly, and prayer of the tens of thousands of individuals who traveled, or who intended to travel, through this area to oppose the construction of DAPL.

52. One of the primary methods used by Defendants to chill constitutionally protected conduct associated with the NoDAPL movement was by controlling the roads in a manner designed to discourage NoDAPL travel, speech, assembly, and prayer.

53. On October 17, 2016, Sheriff Kirchmeier publicly announced that blocking roads “affects people’s rights.”

54. Then, beginning on October 24, 2016—exactly one week later—Morton County and the NDDOT, in consultation with Governor Dalrymple and Superintendent Michael Gerhart Jr., closed a significant portion of Highway 1806 to the Tribe and its supporters—including the entire stretch of Highway 1806 abutting the specifically identified sacred and ceremonial sites as well as the DAPL construction that had been the primary center of Plaintiffs’ speech, prayer, and assembly for the past several months.

55. In the months leading up to the discriminatory road closure, this thoroughfare was overwhelmingly used by three distinct groups: (1) the Tribe and its supporters; (2) non-tribal

residents of the area; and (3) DAPL and its associates. These groups were clearly divided along racial, religious, and viewpoint-based lines: on the one hand, the Tribe and its supporters were predominantly indigenous, practitioners of indigenous religious beliefs, and anti-DAPL; on the other hand, the non-tribal residents of the area and DAPL and its associates were almost exclusively non-indigenous, not practitioners of indigenous religious beliefs, and supporters of DAPL.

56. This discriminatory closure immediately followed the Cheyenne River Sioux Tribe's declaration of eminent domain over a small portion of the land adjacent to Highway 1806 (and the resulting relocation of approximately 100 Water Protectors to this land). The effect of the closure was to freeze travel throughout much of the region for the Tribe and its supporters, and, therefore, to substantially and materially burden the Plaintiffs' speech, worship, travel, and associative rights.

57. On October 27, following a violent police and private-security-led raid on a camp located on the land declared as eminent domain by the Cheyenne River Sioux Tribe, Defendants [except Burgum] used several trucks to block the Backwater Bridge, a small bridge on Highway 1806 crossing Cantapeta Creek less than a mile north of the northern boundary of the Standing Rock Sioux Tribe.

58. On October 28, Defendants [except Burgum] erected a heavily reinforced concrete barricade on and immediately north of the Backwater Bridge.

59. Defendants have given varying reasons for the need for this barricade but consistently acknowledged that its target was the Tribe and its supporters. For example, Maxine Herr, a spokesman with the Morton County Sheriff's Department, stated about this barricade: "We are trying to create a barrier between the protestors and that private property." On the other hand, two press releases on October 28 and October 31 gave a different reason for the barricade:

the bridge would remain closed “until all damage to the structure is evaluated by bridge engineers.”

60. Although such an evaluation would have been safe and feasible as early as October 28, 2016, the North Dakota Department of Transportation (NDDOT) delayed conducting a full investigation of the bridge until December 22, 2016—nearly two months after it was closed. Plaintiffs and the Standing Rock Sioux Tribe reached out to the State and Local Defendants on numerous occasions between October 28 and December 22 to arrange the safe inspection of the bridge (and in any other way necessary facilitate its reopening), but were rebuffed.

61. On January 12, the NDDOT revealed the results of its inspection: the bridge was and had been structurally sound. Nevertheless, Defendants [except Dalrymple] continued to maintain the closure of the nine-mile stretch of Highway 1806 in question for 68 additional days, stating that the bridge would remain closed “[u]nder the authority of the North Dakota Governor and the Morton County Sheriff’s Department” until there was an “assurance no criminal activity will take place and federal law enforcement has been introduced into the protest camp to restore law and order.”

62. On February 10 and 13, 2017, the NDDOT completed several non-structural repairs to the Backwater Bridge, declaring afterwards that its Backwater Bridge repairs had been completed.

63. On February 23, 2017, the last Water Protectors were removed from state or federal land in the area. On February 27, 2017, the last Water Protectors were removed from *any* of the camps in the area, including those located on the Standing Rock Reservation.

64. Highway 1806 was partially reopened to the Tribe and its supporters on March 17, 2017, with only pilot car-led travel allowed. The Tribe and its supporters continued to be

prohibited from speaking or worshipping on the curtilage of the road, however, until it was fully reopened on March 21, 2017.

65. The effect of Defendants' discriminatory closure of Highway 1806 was to prevent travel past the Backwater Bridge from the camps or Reservation, thereby requiring those traveling between the camps/Reservation and Bismarck/Mandan to take a detour on worse-maintained small roads that added significant time, stress, and danger to the trip and imposed additional costs on Plaintiffs in gas, car maintenance, etc. For instance, for a Plaintiff in the vicinity of Cannon Ball, ND hoping to visit the Huff Hills Ski Area, the detour not only more than doubled the length and time of the trip, but required travel on roads that were far more susceptible to winter closures or unsafe driving conditions. Likewise, for a reporter leaving the Bismarck Tribune's office to report on a fast-developing story at the Backwater Bridge, the detour added 17 miles and, in good weather conditions, approximately 20 minutes of driving time in each direction. In icy or snowy conditions (which persisted throughout most of the duration of the discriminatory closure), the detour added substantially more in travel time—often an hour or more—and, on numerous occasions, the detour was impassable even when Highway 1806 would not have been.

66. Ironically, given State and Local Defendants' justification regarding the need for the barricade to protect the potentially damaged bridge, the barricade did not actually prevent access onto the bridge from the various camps or the Reservation: it only prevented travel *past* the bridge.

67. Moreover, Defendants used the bridge itself to maintain its barricade, placing numerous concrete blocks that added substantial sustained concentrated weight to the bridge that they claimed might be damaged—imposing more stress than an occasional passing car or ambulance would.

68. Additionally, the barricade extended significantly to each side of Highway 1806, thereby preventing those traveling on foot, horseback, or ATV who safely circumvented the bridge from continuing north along Highway 1806.

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.

70. Plaintiffs' expressive and associational rights were not merely burdened because of Defendants' blockade-related restrictions on Highway 1806: at the same time as they closed Highway 1806 to the Tribe and its supporters, Defendants began implementing a de facto cordon of the construction area and of the nearby sacred and ceremonial sites. Defendants enforced this cordon not only with several checkpoints around Fort Rice and, on the southern-most end, with the heavily reinforced barricade immediately north of the Backwater Bridge, but by preventing any travel in the general vicinity. On November 2, hundreds of Water Protectors, including indigenous elders, held a prayer ceremony across a river located approximately one mile from the pipeline construction site and apparently on the edge of Defendants' unstated, but strictly enforced, cordon of the area. When a few Water Protectors entered the frigid river, Defendants [except Burgum] reacted with significant force. Such conduct not only chilled expressive and associational rights, but had the effect of barring the symbolic speech of entering the river and crossing on the opposite bank, while demonstrating Defendants' [except Burgum's] adherence to such a broad cordon. Defendants aggressively enforced this cordon, using significant force when necessary to prevent Water Protectors from so much as walking around their barricade by the Backwater Bridge.

71. The purpose and effect of Defendants' discriminatory road closure was to keep 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 focus of Plaintiffs' First

Amendment activity. This effectively left Plaintiffs without any other means of communicating with one of their principal desired audience (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).

72. For the vast majority of the duration of this discriminatory road closure, there was no active construction in the area. The construction of DAPL where it intersects with Highway 1806 was completed in early-November. On December 4, 2016, the Army Corps announced that it would not be granting DAPL the easement necessary for DAPL to drill under the Missouri River at the nearby Lake Oahe crossing. The decision (and therefore a legal prohibition on the only remaining construction in the area) remained in place until the Army Corps of Engineers reversed this determination on February 8, 2017 (and drilling was completed within two weeks of that date). Throughout this time, Plaintiffs, nevertheless, continued to desire to speak, assemble, and pray in public areas at or near the sacred and ceremonial sites and the site of DAPL's crossing that they were unable to access given Defendants' absolute prohibition on travel by the Tribe and its supporters on this stretch of highway.

73. Given that the decision on the Lake Oahe crossing (and, ultimately, the operation of the pipeline) had an uncertain outcome, Plaintiffs and the tribes had a compelling and vital First Amendment need to be able to speak and assemble on the curtilage of the closed portion of the highway near the site of completed construction to express their ongoing opposition to the potential construction and operation of the pipeline.

74. Access to the public land abutting the neighboring sacred sites was also vital to Plaintiffs' First Amendment right to physically pray at their traditional religious lands and to demonstrate by their physical presence both the sacredness of such lands to the Oceti Šakowin and their continuing claim to such lands.



75. This prohibition on travel on nine miles of Highway 1806 had the effect of preventing Plaintiffs from engaging in constitutionally protected conduct within the proximity of the construction site or the nearby sacred or ceremonial sites, and it deterred others from joining or supporting Plaintiffs.

76. On the other hand, during the time in question, State and Local Defendants permitted DAPL and its employees and its contractors, as well as others residing in the area not affiliated with the Tribe and its supporters, to use the road—including, if they wished, for purposes related to expression. This policy was either controlled by guidelines that were specifically tailored to exclude the Tribe and its supporters, while impacting as few others as possible; or, in the alternative, it was controlled by guidelines or a system of exemptions that were so vague as to give officers nearly unlimited discretion in determining who was permitted use of this forum.

77. Regardless, although the overwhelming majority of the impacted population (the Tribe and its supporters) had legitimate and lawful reasons to use the road—including, for many, business reasons—during the time in question, the effect of any guidelines or exemptions here was to only exclude those who Defendants associated with the Tribe and its supporters; any broader impacts were incidental and marginal.

78. As a result, the effect and intent of Defendants' conduct was to severely burden residents of the Reservation by limiting access to and from the Reservation. This region of North Dakota experienced severe winter weather for much of the period of the discriminatory road closure, including multiple major blizzards and prolonged periods of sub-zero temperatures. In conjunction with Defendants' closure of the quickest and safest route to the nearest major hospital in Bismarck and to the nearest source of many life-saving supplies, this weather greatly increased the risk of serious bodily injury and death to those gathered by the Cannonball River, as well as those who resided on the nearby Reservation. Altogether, the emotional and financial

costs of this discriminatory closure, measured in, among other things, additional gas, car wear and tear, time, stress, and lost business revenues, were substantial, and disproportionately impacted the Standing Rock Sioux Tribe and tribal members.

79. Indeed, these grave burdens reflect Defendants' true purpose for discriminatorily closing the road in question (in addition to hindering Plaintiffs' exercise of their constitutional rights): to extort political concessions from the Standing Rock Sioux Tribe. The concessions Defendants demanded of the Tribe include the Tribe changing its position vis-à-vis Water Protectors in North Dakota and the existence of the camps under its jurisdiction.

80. This is supported by the extent and duration of the discriminatory closure itself, which was substantially broader and longer than necessary to accomplish any other goals, and by Defendants' own statements.

81. First, in a formal report completed prior to the discriminatory road closure, the North Dakota State and Local Intelligence Center first concluded that this stretch of Highway 1806 "is the primary access for those traveling between the Bismarck/Mandan metro area and the SRR [(Standing Rock Reservation)]" and, therefore, that the Backwater Bridge specifically is "imperative to the flow of commerce and emergency responders to and from the Standing Rock Reservation." The report then contemplates "the potential for barricades to be setup on or near the [Backwater or Cannonball] bridges to prevent travel of . . . protestors (by law enforcement)."

82. Second, a strategic plan similarly circulated in the weeks before the discriminatory closure details closing Highway 1806 with a "[b]arricade." This "[t]raffic [c]ontrol," the plan notes, would be used to obtain political concessions from the Tribe. The plan lists several of these concessions explicitly: the Standing Rock Tribal Council would "[f]ormally request[] law enforcement assistance from the federal and state government to aid in restricting access to the camps" and "publicly decree[] that all camps must be vacated by January 31, 2017, and no new occupation can be attempted." The strategic plan in question was circulated to, at the

very least, the State Highway Patrol, and bears the official insignia of North Dakota, North Dakota Department of Emergency Services, North Dakota State Patrol, and Morton County.

83. Third, State and Local Defendants made public statements throughout the duration of the discriminatory road closure stating that the road's re-opening was conditioned on, among other things, Defendants achieving their political objective of dismantling the camps located on Army Corps and tribally owned land in the region (2/3 of which were under the jurisdiction of the Tribe). Sheriff Kirchmeier, for example, stated on January 12, 2017 that "the ND Highway 1806 roadway north of the bridge will remain closed until federal law enforcement is introduced into the protest camp to restore law and order." On January 30, 2017, a North Dakota Joint Information Center release describes "ongoing talks between the state, Morton County and the Standing Rock Sioux Tribe" for purposes of, among other things, "potentially re-opening State Highway 1806 in a conditions-based, phased approach. . . . The reestablishment of rule of law is the key condition." Sheriff Kirchmeier added, in the same document, "Highway 1806 will not be completely re-opened until rule of law in the area is restored." A January 31, 2017 press release from the Morton County Sheriff's Department notes that the NDDOT "removed the top layer of jersey barriers from the Backwater Bridge in a good faith effort in response to work done by the protest camp to clean up and clear out." In a February 2, 2017 statement, Sheriff Kirchmeier noted that because "[t]he actions of [a] rogue group of protestors have been condemned by the Standing Rock Sioux Tribe and cleanup efforts seem to be progressing in order to clear the main camp before spring flooding, [] I am willing to take the next steps to open the Backwater Bridge. . . . However, rule of law in the area must be restored prior to a full re-open." On March 15, 2017, Sheriff Kirchmeier stated that "[t]he conditions were met to continue our phased approach to reopening Highway 1806. . . . We understand that opening this road is important to facilitate the routine business and commutes that take place

along the 1806 corridor.” Governor Doug Burgum added: “With the camps and roadway cleared, we can now move toward re-establishing traffic on Highway 1806.”

84. Fourth, State and Local Defendants made these same demands in private meetings on numerous occasions: Morton County would only re-open the road if the Tribe complied with Defendants’ demands. A non-exclusive list of these meetings include a December 19, 2016 meeting between Governor Burgum and various tribal officials; a January 25, 2017 meeting between Governor Burgum, Michael Gerhart Jr, and various state and tribal officials (where, among other things, Governor Burgum explicitly made clear his, Michael Gerhart Jr.’s, Sheriff Kirchmeier’s, and Morton County’s responsibility for maintaining the discriminatory road closure); and a February 16, 2017 meeting between representatives from Governor Burgum’s office, including Scott Davis, a representative from Morton County, and several Water Protectors.

85. Throughout the time period in question, state and local law enforcement judged a number of alternative strategies effective for ensuring traffic and public safety with respect to the NoDAPL movement. This includes maintaining a non-militarized police presence near demonstrators in public areas, arresting and detaining lawbreakers (but not those peacefully and lawfully gathered), maintaining slower speed limits on the roadways, implementing cautionary road signage and traffic safety checkpoints, implementing speed bumps and other similar traffic mitigation measures, and even non-discriminatorily closing short—several-hundred feet—stretches of the road to traffic for only the minutes or hours during which a large demonstration was occurring. Had Defendants used such alternative strategies in a targeted and limited fashion in lieu of the discriminatory road closure in question, the result would have been to substantially improve public safety in the area while decreasing the cost of policing to State and Local Defendants. Such an approach, moreover, would have left open public forums in the area to substantially more speech and free exercise, to substantially more effective speech (as the Tribe

and its supporters could have reached one of their key audiences—DAPL employees) and meaningful exercise (as the Tribe and its supporters could pray along identified sacred sites), to substantially decreased burdens on interstate and intrastate travel, and on substantially decreased burdens on commerce.

**PLAINTIFFS**

**Cissy Thunderhawk**

86. Plaintiff Cissy Thunderhawk, aka Geraldine Dunn, was the owner of My Auntie's Place Restaurant in Fort Yates, and is a resident of Mandan, ND. Throughout the time period in question, she traveled back and forth between Fort Yates and Bismarck and Mandan regularly for business purposes as well as to shop. The discriminatory road closure impacted her personally and her business, adding time, additional car expenses, danger, and inconvenience to her commute. The discriminatory road closure also limited access to her business for her customers, and both Cissy and her business were financially injured as a result of the closure's severe limitation of travel to and from the Reservation. Cissy was forced to close My Auntie's place shortly after the events in question.

**Wašté Win Young**

87. Plaintiff Wašté Win Young is a member of the Standing Rock Sioux Tribe who resides in Fort Yates, North Dakota and, during the period in question, also resided at the camps alongside the Cannonball River. Wašté Win was a strong supporter of the efforts to oppose the construction of DAPL since before the events in question, and has prayed, assembled, traveled, and spoken in various public locations near where DAPL is or was intended to be constructed on numerous occasions. Wašté Win wished to pray, speak, travel, and assemble with others in public locations that she was unable to access because of Defendants' discriminatory closure of Highway 1806. The road closure therefore substantially impacted her speech, assembly, prayer, and travel, and she suffered significant and tangible emotional distress as a result.

88. Moreover, Wašté Win has a documented medical condition requiring routine and regular travel to Bismarck. Wašté Win has children and travels regularly to Bismarck to shop for her children, and she also had to fly out of the Bismarck airport during this time period. The discriminatory closure added substantially in time, gas, car wear, and stress to this necessary travel and, consequently, limited where and when Wašté Win could go.

**John Floberg**

89. Plaintiff Father John Floberg is the Episcopalian Priest for the St. James' Episcopal Church in Cannon Ball, North Dakota. Currently, and throughout the time period in question, Father Floberg resided in Bismarck, North Dakota and commuted between Bismarck and Cannon Ball multiple days each week. The discriminatory road closure personally impacted him in his work and in his ministry, adding time, gas money, danger, and inconvenience to his commute, and burdened his ability to minister to his congregation as well as his congregation's ability to worship.

90. Father John Floberg was also the primary organizer of a peaceful and lawful gathering of five hundred clergy who traveled to Standing Rock, mostly from out-of-state, to participate in peaceful prayers and demonstrations of solidarity with the Tribe and its supporters south of the Backwater Bridge. This religious and expressive exercise was also substantially burdened by the discriminatory road closure, which made attending materially more difficult for the vast majority of clergy who did or would have attended but for the closure—disproportionately so for those who sought to attend from out-of-state, due to its location. As a result of these burdens, Father John Floberg suffered significant and tangible emotional distress.

**José Zhagñay**

91. José Zhagñay is a New Yorker of indigenous Ecuadorian heritage who traveled to North Dakota in September and again in October to support the Standing Rock Sioux Tribe in its opposition to DAPL (and in affirmation of indigenous rights and environmental justice). When

he returned in October, José sought to and ultimately did establish legal residency in North Dakota, with his sole domicile in the camps. At the camps, José primarily volunteered with the Mní Wičhóni Nakičiziŋ Owáyawa, the camps' homeschool resource center, to ensure that families staying at the camps were able to provide their school-age children with the necessary education for their children to succeed, and to meet the applicable legal requirements for homeschooling. In this role, José regularly traveled to Bismarck to get food and other supplies for both himself and for the resource center. After Highway 1806 was discriminatorily closed, this travel—and, by virtue, his relocation to North Dakota—became substantially more difficult, and he ultimately left both the camps and North Dakota in December.

92. Moreover, José visited the curtilage alongside Highway 1806 to speak and to join in prayer before the relevant stretch of road was closed. But for the discriminatory closure, José would have returned to this area to speak, pray, and gather in solidarity, and he suffered significant and tangible emotional distress as a result.

### **TIGERSWAN ALLEGATIONS**

93. From September 2016 through the end of the period in question, TigerSwan coordinated and implemented all security and intelligence operations for their client, Energy Transfer Partners. As the lead security contractor, TigerSwan “conduct[ed] static and mobile security operations in support of the pipeline construction throughout North Dakota,” collected intelligence on Water Protectors who resided in the camps, and delegated out security tasks to at least four other security contractors also working for Energy Transfer Partners.

94. Immediately upon its arrival in North Dakota, TigerSwan initiated a course of joint participation with law enforcement officials in operations, including, eventually, as they respected the challenged discriminatory road closure.

95. TigerSwan's intertwining with North Dakota law enforcement officials began with the installation, in September 2016, of a TigerSwan Liaison Officer directly in the law

enforcement Joint Operations Center. Doing so permitted “coordination” between TigerSwan and law enforcement in planning operations. TigerSwan circulated Situation Reports indicating consistent coordination and “parallel planning” with law enforcement in the lead-up to, and over the course of, the discriminatory closure.

96. TigerSwan actively provided logistical support to law enforcement in the days prior to the highway closure by, at a minimum, purchasing and shipping a computer for law enforcement and preparing a building on private property for law enforcement use.

97. Prior to and during the closure, TigerSwan performed tasks in intelligence and evidence collection traditionally reserved for law enforcement officials. These actions included:

- a) Conducting flights over water protector camps with forward-looking infrared cameras to gather “[s]ignals intelligence;”
- b) Constructing “person of interest” folders on Water Protectors;
- c) Directing the infiltration of Water Protector camps by individuals using false names and identities;
- d) In at least once instance, connecting law enforcement’s intelligence unit to the live feed of a company’s helicopter video surveillance;
- e) Presenting video and photo evidence to the North Dakota Bureau of Criminal Investigation in support of prosecuting Water Protectors;
- f) Using “coding techniques” to surface Water Protector profiles and groups on social media;
- g) Supplying intelligence and surveillance information, upon request, to federal authorities.

98. Moreover, for much of the time period in question, starting on October 28, 2016, the FAA imposed a no-fly order in the region. Under that order: “Only relief aircraft ops under direction of North Dakota Tactical Operations Center [was] authorized in the



airspace.” Meanwhile, aircraft operated by private security under the direction of TigerSwan continued to fly over the area to conduct surveillance—which the FAA confirmed would have only been legal if the aircraft in question were participating in a law enforcement action. And indeed, in describing his team of officers assigned to clear Water Protectors from a bridge on October 27, 2016, Lt. Cody Trom included a “DAPL air asset.”

99. TigerSwan’s intelligence was accepted by and informed State and Local Defendants. For example, after TigerSwan highlighted the presence of “Islamic individuals” among the Water Protectors, the law enforcement intelligence unit exchanged emails regarding information provided by “company [i]ntel” about “Shia Islamic” individuals. Similarly, footage from TigerSwan-organized private security flights during the no-fly period were used by prosecutors in cases brought against Water Protectors. And as TigerSwan persistently and misleadingly labeled indigenous speech and prayer as riotous, State and Local Defendants increasingly adopted and misleadingly applied this label.

100. The intelligence, logistical support, personnel, and equipment that TigerSwan provided to State and Local Defendants made possible State and Local Defendants’ decision to discriminatorily close the road, as well as the implementation and maintenance of the discriminatory road closure.

101. Moreover, in the weeks preceding the closure, TigerSwan shared purported intelligence with law enforcement officials presenting the Water Protectors as dangerous individuals. Specifically, TigerSwan spread allegations that Water Protectors possessed weapons and that certain individuals were pushing the Water Protectors into violent action. TigerSwan’s persistent and selective mischaracterization of Water Protectors as potentially violent, dangerous, and criminal was intended to, and did, distort State and Local Defendants’ perception of the movement. This was also intended to, and did, encourage the implementation and continued maintenance of excessive measures against the Tribe and its supporters, primarily including the

road closure in question.

**MUNICIPAL & SUPERVISORY ALLEGATIONS**

102. Sheriff Kirchmeier is the policy-making authority for Morton County, as it relates to the maintenance of policies, customs, or practices, and training, supervision, or discipline of Sheriff Kirchmeier's and Morton County's law enforcement officers and employees.

103. Sheriff Kirchmeier, together with the assistance of state officials [including Jack Dalrymple, Grant Levi, and Michael Gerhart Jr.] made and implemented Morton County's policy decision to close off the road and bridge in whole and in part to the Tribe and its supporters. Morton County's policy was approved by Jack Dalrymple, Grant Levi, and Michael Gerhart Jr. in the final weeks of October, who respectively provided material support to Sheriff Kirchmeier in his implementation and maintenance of the discriminatory closure, including financial, logistical, and manpower support (such as designating state highway patrolmen and press officers from their respective offices to closure-related work). Similarly, Governor Burgum approved the continuation of this policy in his first weeks as governor of North Dakota, and Governor Burgum continued to work with Grant Levi and Michael Gerhart Jr. to provide material support to Sheriff Kirchmeier and Morton County, including financial, logistical, and manpower support (such as designating state highway patrolmen and press officers from their respective offices to closure-related work), in maintaining the discriminatory closure. Sheriff Kirchmeier, Grant Levi, Michael Gerhart Jr., Jack Dalrymple, and Doug Burgum are or were at the times in question authorized by law or vested with power under law to make such decisions and did so under color of law.

104. Sheriff Kirchmeier, working with the approval of and in coordination with Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials maintained policies, customs, or practices, including the following:

- a) Implemented [except Burgum] an absolute prohibition on all travel by the Tribe and its supporters on Highway 1806 over an approximately nine-mile stretch running from the Backwater Bridge to Fort Rice;
- b) Maintained this absolute prohibition on all travel by the Tribe and its supporters with a reinforced concrete and concertina wire barricade located immediately North of the Backwater Bridge;
- c) Defended this absolute prohibition on all travel by the Tribe and its supporters by arresting people who approached the closed portion of the road—even on foot—for trespassing;
- d) Defended this absolute travel prohibition with significant force on several occasions, including on November 20 [except Burgum on this date].

105. Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials] knew, or should have known, that employees under their command, including Defendant DOES 1 to 100, were inadequately trained, supervised, or disciplined resulting from their inadequate policies, customs, or practices carried out by Sheriff Kirchmeier's [and Doug Burgum, Jack Dalrymple, Grant Levi, and other such officials'] law enforcement officers and employees.

106. Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials] failed to implement or to maintain adequate policies, customs, or practices related to the training, supervision, and discipline of law enforcement officers and employees. Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., or other such officials] were either aware of the non-existence or inadequacy of such policies, customs, or practices, believing, mistakenly, that they were not necessary, or were deliberately indifferent to the non-existence or inadequacy of these policies, customs, or practices.

107. Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., or other such officials] were on notice of the inadequate policies, customs, or practices carried out by their law enforcement officers and employees through multiple sources, including, but not limited to: news/media reports, past incidents of misconduct to others, multiple harms that occurred to the Plaintiffs, misconduct that occurred in the open, the involvement of multiple officials in the misconduct, releases from the ACLU about the unconstitutionality of road closures of this nature in this context, and a notice sent from the Water Protector Legal Collective to state and local officials noting the existence of serious constitutional violations associated with the exact prohibitions on travel on this portion of Highway 1806 challenged in this lawsuit.

108. Despite knowing that employees operating under their direction were maintaining this unconstitutional closure, State and Local Defendants took no steps to ameliorate the situation for months on end, let alone adequate steps. To the contrary, Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials] continued to maintain the policies, customs, or practices carried out by their law enforcement officers and employees that were the source of these violations.

109. In fact, on numerous occasions, many of which are detailed elsewhere in this Complaint, Sheriff Kirchmeier [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials] publicly acknowledged their approval and authorization of the acts in question.

110. Sheriff Kirchmeier's [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael Gerhart Jr., and other such officials'] acquiescence in or deliberate indifference to the policies, customs, or practices carried out by Morton County and Sheriff Kirchmeier's law enforcement officers and employees contributed to and was the moving force behind Plaintiffs' injuries, described herein. Sheriff Kirchmeier's [and Doug Burgum, Jack Dalrymple, Grant Levi, Michael

Gerhart Jr., and other such officials’] law enforcement officers and employees, including Defendant DOES 1 to 100, were not adequately trained, supervised, or disciplined in a manner that made them aware that the policies, customs, and practices were unauthorized, improper, and not tolerated.

111. That the discriminatory road closure was a Morton County policy implemented and/or maintained by Defendants is reflected in the fact that each non-Doe individual defendant, at various times, either made or authorized statements expressly claiming or implying a personal role in the implementation or maintenance of the road closure. For example, one Morton County press release noted that Morton County “along with” NDDOT and the North Dakota Highway Patrol “has changed the closure point on ND Highway 1806 south of Mandan to County Road 135.” (This change still left the highway discriminatorily closed for “approximately ten miles.”) Moreover, non-Doe State and Local Defendants personally corresponded with or personally directed correspondence to the Standing Rock Sioux Tribe or its supporters as part of negotiations to re-open the road to the Tribe and its supporters and similarly claimed a role in supporting the continued road closure, as well as influence in re-opening the road. Finally, the implementation and maintenance of the road closure was conducted predominantly by Doe Defendants reporting directly to Sheriff Kirchmeier, Doug Burgum, Jack Dalrymple, Grant Levi, and Michael Gerhart Jr.

### **CLASS ALLEGATIONS**

112. The treatments to which Plaintiffs and the class they represent have been subjected—namely, the restrictions on non-DAPL travel, speech, prayer, and assembly, including foot travel, on a multiple-mile stretch of Highway 1806—were all performed pursuant to policies, customs, or practices of Local Defendants with the assistance and approval of State Defendants and TigerSwan.

113. Defendants intentionally made travel to and from the Standing Rock Sioux

Reservation and the camps near the Cannonball River as unnecessarily unpleasant and dangerous as possible so as to deter Water Protectors, with whom they disagree, from lawfully pursuing their constitutional rights to travel, assemble, pray, and express their viewpoints.

114. That this was the impermissible purpose of the discriminatory road closure is highlighted not only by statements to that effect made by State and Local Defendants, described herein, but by the Defendants' conduct, which was inconsistent with any of the reasons that have been publicly offered by State and Local Defendants.

115. Plaintiffs, on behalf of themselves and of a class of similarly situated persons, seek damages related to Defendants' absolute prohibition on their travel on an approximately nine-mile portion of Highway 1806, including the Backwater Bridge, pursuant to unlawful blanket policies, customs, or practices.

116. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated, pursuant to Federal Rule of Civil Procedure 23. Plaintiffs seek certification of a class defined as follows:

All those persons who resided or visited, or who intended to reside or visit, in Morton or Sioux Counties, or in any other areas, and who therefore would have traveled on the closed portion of Highway 1806 but were prohibited by the Defendants, including but not limited to any of those persons who wished to speak, assemble, and pray along the closed portions of Highway 1806. In addition, the following are excluded from the class: (a) Defendants; (b) Dakota Access LLC and its affiliates for all relevant times; (c) any officers or employees of Dakota Access LLC and its affiliates for all relevant times; (d) any of the lawyers for Plaintiffs or Defendants; (e) any judge who is, or potentially may be, assigned to this matter; (f) members of the immediate

family of any excluded person; or (g) any entity in which any excluded person or entity has, or had for the relevant times, a controlling interest.

117. The members of the class are so numerous that joinder of all members is impractical. Plaintiffs do not know the exact number of class members. Plaintiffs are informed and believe, and thereupon allege, that there are more than 10,000 persons in the class defined hereinabove.

118. The following questions are common to the class and predominate over any individual question:

- a. whether Defendants' prolonged and absolute prohibition on Plaintiffs' travel on a nine-mile portion of Highway 1806 from October through March violated Plaintiffs' First Amendment rights;
- b. whether Defendants' prolonged and absolute prohibition on Plaintiffs' travel from October through March violated Plaintiffs' Fifth and Fourteenth Amendment rights to travel, as well as Plaintiffs' right to travel protected under the Privileges and Immunities Clause of the U.S. Constitution;
- c. whether Defendants' restriction on travel, assembly, speech, and religious exercise, enforced with militarized barricades and extreme demonstrations of force, was narrowly tailored to a significant or compelling government interest, or represented a narrowly tailored or the least restrictive means of satisfying that interest;
- d. whether Defendants' restriction of travel on this major and public thoroughfare connecting numerous business interests on the Standing Rock Reservation to the nearest major off-Reservation city improperly burdened commerce among the Standing Rock Sioux Tribe, Cheyenne

River Sioux Tribe, and various states in violation of the Commerce Clause of the United States Constitution; and

- e. whether the restriction on travel, assembly, speech, commerce, and religious exercise described herein was intended to punish, inconvenience, or endanger the Tribe and its supporters.

119. Plaintiffs' claims are typical of the class they seek to represent. Plaintiffs all resided in or visited the area during the time period in question and all travel or would have traveled regularly on Highway 1806 for business and pleasure, as did class members—and have all been injured in a like manner by the prohibition on travel on Highway 1806 as a result. Moreover, Plaintiffs have the same interests and suffered the same type of injuries as the proposed class. Plaintiffs' claims arose because of Defendants' policies, customs, or practices. Plaintiffs' claims are based on the same legal theories as the claims of the proposed class members. Each proposed class member suffered actual damages resulting from the treatment to which they were subjected and from the circumstances surrounding the discriminatorily closed and blockaded right-of-way. The actual damages suffered by Plaintiffs are similar in type and amount to the actual damages suffered by each proposed class member.

120. Plaintiffs will fairly and adequately protect the class's interests. Plaintiffs' interests are consistent with and not antagonistic to the interests of the class.

121. Prosecutions of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications, with respect to incompatible standards of conduct for the parties opposing the class.

122. Prosecutions of separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would, as a practical matter, substantially impair or impede the interests of the other members of the class to protect their interests.



123. Defendants have acted on grounds generally applicable to the proposed class, thereby making appropriate the final injunctive or declaratory relief sought, with respect to the proposed class as a whole.

124. This class action is superior to other available methods for the fair and equitable adjudication of the controversy between the parties. The interests of members of the class in individually controlling the prosecution of a separate action is low, in that most class members would be unable individually to prosecute any action at all. Moreover, the amounts at stake for individuals are sufficiently small that separate suits would be impracticable. Most members of the proposed class will not be able to find counsel to represent them. And, it is desirable to concentrate all litigation in one forum because all of the claims arise in the same location; e.g., the closed portion of Highway 1806. It will promote judicial efficiency to resolve the common questions of law and fact in one forum, rather than in multiple courts.

125. In violation of State and Federal Constitutional and Statutory provisions, Defendants, and their agents and employees, including Defendant DOES 1 to 100, have, unnecessarily and illegally, subjected Plaintiffs, and the class of those similarly situated whom they seek to represent, to the unjust and improper closure of Highway 1806 associated with Plaintiffs' opposition to DAPL.

126. As a result of the discriminatory road closure, named Plaintiffs and class Plaintiffs have experienced economic damages, including increased fuel costs, increased car maintenance, and loss of business, and physical and emotional symptoms including nervousness, anxiety, recurring nightmares, and fear and apprehension of Defendants' conduct, and have been chilled, inhibited or interfered with in the exercise of their constitutional rights as described in these allegations.

## **CAUSES OF ACTION**

### **COUNT I**

33

**VIOLATION OF RIGHT TO SPEAK AND ASSEMBLE (FIRST AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION; 42 U.S.C. § 1983)  
(AGAINST ALL DEFENDANTS)**

127. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

128. Plaintiffs were prevented, chilled, or inhibited in engaging in constitutionally protected First Amendment activity when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers, or in any other capacities such as Sheriff or similar office as set forth above, or under color of law, completely closed an approximately nine-mile portion of Highway 1806 to Plaintiffs' travel starting on October 24, 2016.

129. One of the effects of this discriminatory closure was to deny Plaintiffs access to this public nine-mile stretch of Highway 1806 and its curtilage for purposes of speaking, assembling, or otherwise exercising their First Amendment expressive rights. Part of the closed road and curtilage included a symbolically crucial and previously active forum for such expression.

130. Defendants' indefinite and absolute restriction of Plaintiffs' travel on nine miles of this public right-of-way, lasting ultimately five months, was not a reasonable time, place, or manner restriction on speech, nor did it fulfill an important government interest.

131. This discriminatory road closure also severely hampered the ability of the press—both local and national—in covering this movement, which was of great local and national interest. The detour added substantial time and stress to the drive from Bismarck/Mandan, where the majority of local and national press were based, to the camps, where a majority of the events being covered related to the NoDAPL movement took place. Given the unpredictable and fast-developing nature of press-worthy circumstances throughout this time period, the road closure

represented a serious impediment on the press's ability to cover the events in question, resulting in materially less and materially worse coverage.

132. By making it substantially more difficult for local press in particular to independently obtain first-hand evidence of what was happening in or around the camps (unlike national and independent press, who more often stayed on the Reservation, local press almost exclusively resided in the Bismarck/Mandan area), the road closure led the local press to rely more significantly on statements made by state and local officials in their reporting. This, in turn, further amplified, especially throughout North Dakota, state and local officials' exaggerated and often false portrayal of Water Protectors as violent and criminal, and of the NoDAPL movement as defined by mayhem.

133. Defendants' determination of who could speak, assemble, pray, or travel on this road or its curtilage was impermissibly based on the purported viewpoint of those who wished to speak, assemble, pray, or travel, or of the content of their expressive activities. This is most clearly revealed through Defendants' restrictions on who was permitted use of this forum: Water Protectors, but not DAPL workers, were prohibited from accessing the forum in question; expressions of opposition to the pipeline were excluded from the forum while expressions of support were not.

134. Defendants' actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First and Fourteenth Amendment rights secured by the U.S. Constitution, or were wantonly or oppressively done.

135. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against all Defendants, and punitive damages against non-municipality Defendants.

## **COUNT II**

### **VIOLATION OF RIGHT TO FREE EXERCISE (FIRST AND FOURTEENTH**

35

**FIRST AMENDED COMPLAINT; DEMAND FOR JURY TRIAL**

**AMENDMENTS TO THE U.S. CONSTITUTION; 42 U.S.C. § 1983)  
(AGAINST ALL DEFENDANTS)**

136. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

137. Plaintiffs' free exercise of religious practices, especially as they relate to sincerely held and meaningful indigenous religious beliefs, were substantially burdened when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers, or in any other capacities such as Governor or Sheriff, or under color of law, completely and indefinitely closed an approximately nine-mile portion of Highway 1806 to Plaintiffs' travel starting on October 24, 2016. Defendants prevented Plaintiffs from praying at, worshiping by, or even visiting identified sacred and ceremonial areas located alongside this public nine-mile stretch of Highway 1806. Indigenous religious practices do not treat places of worship as fungible, and so the intent and effect of Defendants actions, therefore, was to severely penalize—fully halting some—conduct prescribed by Plaintiffs' religious beliefs.

138. Moreover, despite granting numerous exemptions to this road closure—including to employees and associates of DAPL and its affiliates and to certain non-indigenous local residents—Defendants refused to extend any exemptions to Plaintiffs who sought to exercise their religious beliefs in the public areas that had previously been serving as a significant local place of worship.

139. For the reasons described throughout these allegations, the discriminatory road closure impacting Plaintiffs was neither neutral nor generally applicable.

140. Much of the religious exercise that was substantially burdened by the discriminatory road closure also had an accompanying significant expressive purpose or assembly component, as described in Count I and elsewhere in these allegations. Prayer flags or prayer ties, for example, are inherently symbolic and expressive in addition to playing a central

role in indigenous land-based religious exercise. Similarly, much of the religious exercise that was substantially burdened, like prayer ‘rides’ and prayer ‘runs,’ also had an accompanying travel interest.

141. The effect and intent of Defendants’ actions was to fully prevent Plaintiffs from in any manner exercising their religious beliefs at these public sites, which had been the location of daily prayer in the months leading up to their closure.

142. Defendants’ actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs’ First and Fourteenth Amendment rights secured by the U.S. Constitution, or were wantonly or oppressively done.

143. This evil motive or intent was demonstrated through, among other things, Defendants’ persistent mischaracterization of public indigenous religious observances in this area as riotous, violent, and/or dangerous. This mischaracterization, fueled by TigerSwan’s intentionally misleading intelligence regarding Water Protector conduct, then served as pretext for state and local officials to publicly misrepresent the effect of and to persecute the practice of indigenous religious beliefs in the area.

144. As a direct and proximate result of Defendants’ actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against all Defendants, and punitive damages against non-municipality Defendants.

### **COUNT III**

#### **VIOLATION OF RIGHT TO TRAVEL (FIFTH AND FOURTEENTH AMENDMENTS TO THE, AND PRIVILEGES AND IMMUNITIES CLAUSE OF THE, U.S. CONSTITUTION; 42 U.S.C. § 1983; 42 U.S.C. § 1985(3)) (AGAINST ALL DEFENDANTS)**

145. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

146. Plaintiffs’ fundamental right to travel was significantly and discriminatorily

burdened when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers, and as state officials, or in cooperation with law enforcement officers and state officials, completely closed a nine-mile portion of Highway 1806 to the Tribe and its supporters. In this closure, Defendants prevented Plaintiffs from traveling—whether by car, by bike, by foot, by horse, or by any other means—on a public right-of-way during all hours of the day and all days of the week, for approximately five months straight. Defendants did not have a compelling interest in limiting travel in this manner on this public right-of-way and Defendants’ approximately five-month duration, nine-mile long absolute prohibition of travel by the Tribe and its supporters is not narrowly tailored. Plaintiffs also have a right to travel along said highway for the purpose of reaching places of religious sanctity for prayer and to engage in speech or expressive conduct along the highway near the site of continuing or completed construction of the pipeline.

147. Given the location of this discriminatory closure, travel was substantially burdened within North Dakota, between North Dakota and the Standing Rock Reservation, and between North Dakota and South Dakota.

148. Indeed, the thoroughfare in question is, as state and local officials recognized just weeks prior to the discriminatory closure, “imperative to the flow of commerce and emergency responders to and from [the] Standing Rock Indian Reservation.” Consequently, given the lack of other roads in the area, poor condition of the other roads in the area, and economic hardship experienced by many people in this area, the discriminatory road closure regularly rendered traveling for cultural, political, and social activities, to obtain needed medical services or treatment, to shop, to get gas, to go to restaurants, or for other such reasons, prohibitively difficult for Plaintiffs.

149. The effect and purpose of this closure was to render substantial portions of Morton County, which were served only by Highway 1806, entirely inaccessible to Plaintiffs.

150. Moreover, one of the effects and one of the purposes of this discriminatory road closure was to burden Plaintiffs in their attempts to relocate to and become permanent residents of the camps located alongside Highway 1806, including Sacred Stone Camp (which was located entirely on privately and tribally owned land on the Standing Rock Reservation), and Rosebud Camp, which the Army Corps of Engineers expressly held out as a “free speech zone” for most of the time in question.

151. This effect of the discriminatory closure was substantial: by making it more difficult to, for example, travel to, resupply, or seek medical care from these camps, the road closure deterred numerous Plaintiffs from making such an interstate or intrastate relocation.

152. This purpose of the closure is revealed through the statements and actions of Defendants described throughout these allegations and by a number of other tactics used or threatened by Defendants—such as when State and Local Defendants, in the midst of harsh winter conditions, threatened to fine any individuals bringing food, building materials, or portable bathrooms to the main camp.

153. Given the location of the camps in relation to the road closure and to the nearest major shopping centers, hospital, airport, etc., the burdens of this road closure were intended by Defendants to and, in fact, did disproportionately and discriminatorily fall on residents of these camps.

154. Defendants’ actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs’ Fifth and Fourteenth Amendment and Privileges and Immunities Clause rights secured by the U.S. Constitution, or were wantonly or oppressively done.

155. As a direct and proximate result of Defendants’ actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against all Defendants, and punitive damages against non-municipality Defendants.

**COUNT IV**

**IMPROPER RESTRICTION ON COMMERCE (COMMERCE CLAUSE OF THE U.S. CONSTITUTION; 42 U.S.C. § 1983)  
(AGAINST ALL DEFENDANTS)**

156. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

157. Defendants' five-month absolute prohibition on any Plaintiff travel on Highway 1806 was not rationally related to any purported interest in protecting the integrity of the bridge (or any other reasonable state interests).

158. The intent and effect of Defendants' restriction on travel was to sanction and substantially burden travel and therefore commerce to/from the Standing Rock Reservation: as state and local officials themselves recognized just weeks before implementing the discriminatory closure, the thoroughfare in question is "imperative to the flow of commerce and emergency responders to and from [the] Standing Rock Indian Reservation."

159. Defendants sought, through the road closure's disproportionate economic impact on Standing Rock-related commerce, to punish the Standing Rock Sioux Tribe for its support of the NoDAPL movement and to improve the State's negotiating position with tribal leaders and elders vis-à-vis this movement. Moreover, the economic force of the road closure was intended to, and did, have a substantial and material impact on the Standing Rock Sioux Tribe's ultimate decisions around the NoDAPL movement, in part due to the significant economic losses experienced by businesses on the Reservation, including the Tribe's casino and Plaintiff Cissy Thunderhawk's restaurant, as a direct result of this closure.

160. Moreover, because the Standing Rock Reservation straddles North Dakota and South Dakota, any commerce restriction directed at the Reservation was also necessarily directed at South Dakota; the Tribe's economic resources, consisting in large part of income derived from its casino, are distributed to each of its members, including widely throughout its South Dakota



communities. Defendants' efforts to economically injure the Tribe, therefore, were intended to and did extend beyond North Dakota's borders and into South Dakota.

161. Additionally, by design, the impact of this closure on purely North Dakota businesses, including the Morton County hospitality industry, was relatively minimal. This was ensured through not only the placement of the closure, but in the disparate way in which it treated customers of on-Reservation and off-Reservation businesses: Defendants made efforts to focus the closure's impacts on the Tribe and its supporters (who, although regular customers of on-Reservation businesses, were relatively less likely to engage in commerce off of the Reservation); more frequent customers of Mandan- and Bismarck-area businesses, like residents of Fort Rice, were permitted to use most of the road—at least for traveling to and from these Mandan and Bismarck businesses.

162. The closure also directly and disproportionately impacted non-Reservation-related commerce between North Dakota and South Dakota. Because Highway 1806 is a key thoroughfare connecting North Dakota to South Dakota, and with the South Dakota border located just 35-miles south of the closure on the road in question, the effect of this discriminatory closure was to burden travel and therefore commerce to/from South Dakota.

163. For the reasons detailed throughout this Complaint, the public benefits of the discriminatory road closure were slight at best. On the other hand, its burden on commerce between North Dakota, South Dakota, and the Standing Rock Reservation totaled in the millions of dollars. Indeed, even only considering its direct burdens on South Dakota (and other state) commerce unrelated to the Standing Rock Reservation's South Dakota communities, its minimal local benefits were nevertheless exceeded by the costs that it imposed on interstate commerce.

164. Defendants' actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' Commerce Clause rights secured by the U.S. Constitution, or were wantonly or oppressively done.

165. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against all Defendants, and punitive damages against non-municipality Defendants.

**COUNT V**

**RETALIATION (FIRST, FIFTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION, PRIVILEGES AND IMMUNITIES CLAUSE, COMMERCE CLAUSE; 42 U.S.C. § 1983)  
(AGAINST ALL DEFENDANTS)**

166. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

167. Plaintiffs were prevented from engaging in constitutionally protected activity, including First, Fifth, and Fourteenth Amendment activity, and Commerce between the states and tribes, when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers and state officials, or under color of law, completely closed a nine-mile portion of Highway 1806 to Plaintiffs. Defendants prevented Plaintiffs from speaking, assembling, praying, or traveling anywhere on this public nine-mile stretch of Highway 1806—an area that includes known and identified sites sacred and ceremonial to Plaintiffs, and which serves as an important thoroughfare for business and safety. Defendants' adverse actions were substantially motivated as a response to Plaintiffs' exercise of constitutionally protected conduct.

168. Indeed, in meetings with the Tribe and its supporters and in public statements Governor Burgum and Sheriff Kirchmeier conditioned the re-opening of the road on the cessation of constitutionally protected conduct in the area, such as speech occurring on tribally owned land, directing, among others, Grant Levi and Michael Gerhart Jr. to ensuring this.

169. Defendants' retaliation was motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment rights, as well as Plaintiffs' rights under the Commerce Clause, secured by the U.S. Constitution, or was wantonly

or oppressively done.

170. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages against all Defendants, and punitive damages against non-municipality Defendants.

**COUNT VI**

**UNCONSTITUTIONAL POLICIES, CUSTOMS, OR PRACTICES (FIRST, FIFTH, & FOURTEENTH AMENDMENTS TO AND THE COMMERCE CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S. CONSTITUTION; 42 U.S.C. § 1983; 42 U.S.C. § 1985(3))  
(AGAINST ALL DEFENDANTS)**

171. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

172. Defendants, acting under color of state law, promulgated and/or maintained policies, customs, or practices permitting, implementing, carrying out or deliberately indifferent to, and the moving force behind, the violation of, Plaintiffs' First, Fifth, and Fourteenth Amendment, and Commerce and Privileges and Immunities Clause rights, secured by the U.S. Constitution.

173. Defendants, acting under color of state law, promulgated and/or maintained inadequate policies, customs, or practices, in reckless disregard or deliberate indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment, and Commerce and Privileges and Immunities Clause rights, secured by the U.S. Constitution. The inadequacy of the policies, customs, or practices, and the need for such policies, customs, or practices to be adequate, is patently obvious—and has been repeatedly brought to Defendants' attention.

174. The actions and inactions of Defendants were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment and Commerce and Privileges and Immunities Clause rights, or were wantonly or oppressively done.

175. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages against all Defendants, and punitive damages against non-municipality Defendants.

**COUNT VII**

**VIOLATIONS RESULTING FROM TRAINING, SUPERVISION, OR DISCIPLINE  
(FIRST, FIFTH, & FOURTEENTH AMENDMENTS TO AND THE COMMERCE  
CLAUSE AND PRIVILEGES AND IMMUNITIES CLAUSE OF THE U.S.  
CONSTITUTION; 42 U.S.C. § 1983)  
(AGAINST ALL DEFENDANTS)**

176. Plaintiffs restate each and every allegation in the foregoing paragraphs as if fully set forth herein.

177. Defendants, acting under color of state law, maintain inadequate training, supervision, or discipline permitting or deliberately indifferent to the policies, practices, or customs and were the moving force behind the violation of Plaintiffs' First, Fifth, and Fourteenth Amendment, and Commerce Clause rights, secured by the U.S. Constitution.

178. Defendants, acting under color of state law, maintain inadequate training, supervision, or discipline permitting or acquiescing to the policies, practices, or customs in reckless disregard or deliberate indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment, and Commerce Clause rights, secured by the U.S. Constitution. The inadequacy of the training, supervision, or discipline, and the need for such adequate training, supervision, or discipline, was patently obvious and likely to result in the violation of persons' First, Fifth, and Fourteenth Amendment, and Commerce and Privileges and Immunities Clause rights, secured by the U.S. Constitution.

179. Defendants' actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fifth, and Fourteenth Amendment, and Commerce and Privileges and Immunities Clause rights, secured by the U.S. Constitution, or were wantonly or oppressively done.

180. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against Defendants, and punitive damages against non-municipality Defendants.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, on behalf of themselves, those they represent, and all others similarly situated, seek Judgment as follows:

1. For compensatory, general, and special damages for Plaintiffs, and for each proposed member of the class, according to proof at trial;
2. For an award of exemplary/punitive damages against non-municipality Defendants in an amount sufficient to deter and to make an example, because their actions and/or inactions, as alleged, were motivated by evil motive or intent, involved reckless or callous indifference to the federally protected rights, or were wantonly or oppressively done;
3. For an award of reasonable attorneys' fees and costs, pursuant to 42 U.S.C. § 1988, and any other statute as may be applicable; and
4. For an award of any other further relief, as the Court deems fair, just, and equitable.

Dated: January 31, 2019

Respectfully Submitted



By:

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**JURY TRIAL DEMAND**

A JURY TRIAL IS DEMANDED on behalf of Plaintiffs.

Dated: January 31, 2019

Respectfully Submitted,

By:



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