IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

VANESSA DUNDON, ET AL. on behalf of themselves and all similarly- situated persons, Plaintiffs and Appellants, v. KYLE KIRCHMEIER, ET AL., Defendants and Appellees.	No. 17-1306 N.D.D. Case No. 1:16-cv-406 **APPELLANT'S REPLY BRIEF**

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I. Introduction

The call by the Standing Rock Sioux Tribe to join them in nonviolent protest and prayer to stop the Dakota Access Pipeline (DAPL) from polluting their water and destroying their ancestral sacred sites captured hearts around the world. Representatives of more than 280 indigenous nations raised their flags at the spiritually based protest camps, the largest gathering of native peoples in a century.[1] Following the incident in this litigation, the U.S. Army Corps of Engineers announced that it would not issue the easement for the pipeline to cross Lake Oahe until there had been a full Environmental Impact Statement including detailed discussion of the impacts on the Tribe.[2] While this was soon reversed by the new administration, the District of Columbia federal court considering the Sioux Tribes' claims has recently ruled that the decision to grant the easement violated federal law.[3] At the same time, the "water protectors" have inspired a growing tide of activism for indigenous rights, environmental justice, and to end to reliance on fossil fuels.[4]

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[1] https://www.nytimes.com/interactive/2016/09/12/us/12tribes.html.
[2] https://www.army.mil/e2/c/downloads/459011.pdf
[3] D.D.C. No. 16-1534 JEB, Doc. 239, Filed 06/14/17.
[4] E.g., http://news.nationalgeographic.com/2017/01/tribes-standing-rock-dakota-access-pipeline-advancement/

Rather than presenting any substantive opposition to Appellants' legal arguments, much of Appellees' brief focuses on portraying the water protector movement as one single minded mass of criminals intent on attacking law enforcement and using violence to stop the pipeline. Appellees seek to defend their massive, indiscriminate assault on all those gathered on November 20, 2016, by demonizing the water protectors as a group, based on allegations that both lack factual support, and lack relation to Appellants.

II. An Evidentiary Hearing Is Required To Resolve Material Disputes Of Fact.

A. *Appellees' Inflammatory Assertions Are Unfounded.*

The record reveals that Appellees' factual assertions are at minimum, in dispute, and often, not supported by the record at all, or directly contradicted by evidence put forward by Appellants. The district court summarily accepted many of Appellees' assertions as true and as applicable to all water protectors based on assumed political affiliation with a supposedly monolithic group, regardless of the time and place of alleged events. In so doing, the district court overlooked the lack of evidentiary support for Appellees' allegations, while failing to address Appellants' contrary evidence. In short, the record as presented by Appellees is not reliable, and this matter must be remanded for an evidentiary hearing to determine the facts.

Appellants discuss some of the inaccuracies in Appellees' brief below.

1. "Known Threats to Law Enforcement"

Appellees claim but offer no proof that any genuine internet threats were known to law enforcement and should therefore somehow be considered by this Court in determining whether law enforcement's firing of weapons at protestors on November 20, 2016, was reasonable. There is no evidence that any of the Appellants or anyone present on November 20 had threatened any officer over the internet. Appellees rely on the conclusory allegations of a single state intelligence analyst that social media posts between August and December (subsequent to this incident), threatened the lives or physical safety of officers and family members. (Appellees' Brief at pp. 7-8; Apx 354-356.)

There is absolutely no evidence that any of the law enforcement officers using force on November 20 had received a credible internet threat from anyone. Appellees do not cite a single specific internet post, voicemail or text that is in any way threatening to law enforcement. The only other alleged support for their unsubstantiated claim is a county sheriff's press release claiming that on November 17, 2016, unnamed protestors released personal identifying information of a Bismarck Police Officer. (Apx 469.)

The claim of internet threats to law enforcement has no legitimate evidentiary support in the record.

Additionally, there is no lawful basis for law enforcement to use force on persons assembled for, or engaged in, free speech or religious expression on the basis of generalized unsubstantiated internet postings of unknown others over months prior or subsequent to the incident at issue.

2. "Deadly Weapons"

Appellees repeat their irrelevant, baseless claims against the water protectors as a group by asserting that law enforcement observed and received reports that protestors were in possession of various weapons. (Appellees Brief, p. 8.) Again, there is no evidence that any of the Appellants or any protestor on November 20 possessed and wielded any weapon at law enforcement. In fact, the three officer affidavits referenced do not identify any "knife, hatchet, firearm or bow and arrow" that was observed in the possession of any protestor on November 20. (Apx 271-278; 287-294; 301-313.) The only arguable "explosive device" was one of law enforcement's own gas canisters that was returned to them. (Apx 290.)

The declaration of Martin Bates, a 62 year old veteran who volunteered at the water protector camp, explains the peaceful and utilitarian use of hatchets, axes, and knives at the camp as well as the presence of

decorative arrows, and the complete prohibition and thus lack of firearms. (Apx 572-575.) As police expert Thomas Frazier opined, the presence of knives, hatchets and other camping tools was not noteworthy and there is no evidence they were used in any assaultive fashion – "But even if this were so, it is clear that most of the crowd was not involved in any such behavior, and the police were well protected behind the barricade. The proper response to individual crimes is to arrest the perpetrators, not inflict physical punishment on the entire crowd." (Apx 548.)

3. "By Any Means Necessary"

Throughout appellees' brief is the unsubstantiated and incendiary claim that the water protestors wanted to stop the completion of the pipeline project "by any means necessary." (Appellees' brief, pp. ii, 3, 13 ["by any means possible"], 36.) This apparent reference to a famous 1965 speech by Malcolm X attempts to ascribe an intent to commit violence to all those present on November 20, but Appellees have not come up with any occasion on which any water protector ever used this phrase, despite offering it to the Court. The one time Appellees even purport to provide a citation for their repeated assertion, they instead identify factual paragraphs in Appellant's Complaint regarding Appellants Dundon, Wilson and Finan. (Appellees' brief, p. 36.) All three are concerned about environmental justice and went to

the location on November 20 to peacefully gather with others to demonstrate their opposition to the pipeline and road blockade and support for the rights of indigenous peoples. Ms. Dundon was trying to help a journalist get to safety when a burning teargas canister, which caused permanent damage to her eye, hit her. (Apx 49-50.) Ms. Wilson was trying to shield a native elder from the water spray when she was soaked with water and shot in the chest with a munition. (Apx 55.) Mr. Finan was taking photos of the events on the bridge when he was shot in the abdomen with an impact munition. (Apx 61.)

4. "October 27 Riot", "Violent actions" and "Mayhem"

Appellees defend the November 20 assault by presenting a litany of alleged unlawful activities by water protectors at incidents *prior* to November 20, based on anonymized law enforcement affidavits that are rife with conclusory statements, and self-serving press releases. Not a single incident is identified in which a law enforcement officer was injured in any way throughout this period of time. (*Id.*)[5]

It is undisputed that law enforcement made more than 800 arrests related to opposition to DAPL between August, 2016, and February, 2017.

[5] Appellees disingenuously claim an officer was attacked with a stake on another date, although the relevant press release states that a protestor "started to swing a stake," at an officer who responded by pepper spraying the protestor and placing him into custody. (Apx. 458.) As well, again, this is based upon a press release rather than admissible evidence.

Yet, to date there have only been a small handful of convictions, all for minor misdemeanor offenses. More than 200 cases have been dismissed for lack of evidence, with more than 500 still pending but expected to largely be dismissed because there is no evidence backing the charges. (See, e.g., http://bismarcktribune.com/news/local/crime-and-courts/practice-of-recharging-dapl-cases-dropped-in-june-july/article_a6a569ba-5db7-5523-923c-eed54a417965.html; http://hpr1.com/index.php/feature/news/dapl-cases-dropped-by-state-in-record-numbers/; http://bismarcktribune.com/mandannews/local-news/dapl-cases-dismissed-in-march/article_86cb2a7d-6a07-537b-86fe-f3b19cdafeec.html.)

Moreover, former employees of one of the private security companies hired by the pipeline consortium have come forward to reveal that security personnel were involved in at least some of the more serious illegal acts attributed to the water protectors, and public documents have exposed a massive campaign of infiltration of the water protector movement by private security operatives. (See http://hpr1.com/index.php/feature/news/former-dapl-security-speaks-out-damning-tigerswan-tactics/; http://hpr1.com/index.php/feature/news/second-dapl-whistleblower-to-testify/; http://bismarcktribune.com/news/local/crime-and-courts/judge-orders-prosecutor-to-turn-over-private-security-memos/article_8bcd095b-

4151-5953-bbc8-73b5facad021.html;

http://bismarcktribune.com/news/local/charges-against-man-accused-of-threatening-dapl-guard-may-be/article_ddb15a7f-35b2-5455-afe0-10804b11b710.html.)

In fact, the North Dakota Private Investigative and Security Board has sued security company TigerSwan, LLC, for illegally providing security and investigative services in North Dakota to Energy Transfer Partners, the consortium operating the DAPL, in North Dakota South Central Judicial District Court, Burleigh County Case No. 08-2017-CV-01873. (https://www.documentcloud.org/documents/3879298-VOGEL-2936206-v1-Summons-and-Complaint.html [summons and complaint].)

5. Nov. 20: "The protestors' purpose was to penetrate the barricade"

Central to Appellees' argument is their claim that every person on the bridge on November 20th was intent on penetrating the law enforcement barricade. This conjecture is directly contradicted by the 50 declarations filed by Appellants and by the video evidence. Appellants have not disputed that approximately ten unknown other individuals tried to tow the burned out trucks away at the very beginning of the evening, prior to the arrival of the bulk of the crowd (Apx 647-649, Add. 44), and that a single individual tried to climb over the concertina wire and was the sole person arrested.

(Appellees' Brief, pp. 20-21.) It is clear that the vast majority of those present were simply standing on the bridge protesting, praying, documenting or tending to the injured, and that there was no mass incursion of the barricade, a line they were clearly prohibited from crossing.

Appellees fabricate a description of the protectors as "organized into" two groups: a "siege group" and "the larger group which remained further back on the Bridge." (Appellees' brief, p. 18, and see pp. 19 and 21.) There is no evidence that such an organization existed. The water protectors who moved to the front of those assembled wore raincoats, goggles and protective bandanas and shields, as Appellees admit, to protect against the force that was being applied by Law Enforcement. (*Id.*) And despite the fact that as Appellees describe, most of those present stayed well back from the barricade, they were equally subject to the onslaught of water, chemical agents, and munitions that was unleashed on those closer to the barricade.

A review of the video evidence shows that the one time that a small group of 50 or less water protectors took several steps closer to law enforcement, everyone in the group stopped short of the barricade. Their actions cannot reasonably be interpreted as an attempt to cross the police line. (Apx 93.4, 21:29-23:20.)

6. "800-1,000 protestors" "outflanking law enforcement" and "setting fires"

Appellees admit that in response to their calls for more officers, the number of law enforcement officers behind the barricade more than tripled. (Appellees' brief, pp. 17 [20 officers], 20 [70 officers].) Appellees overestimate the number of protectors present, basing this number on the unverified account of a single law enforcement officer. (Appellees' brief, p. 20.) The actual citation only refers to a "large group of rioters [approximately 150]". (Apx 307[6].) The Morton County Sheriff's Department estimated 400. (Apx 84.) The aerial video provided by law enforcement captures a somewhat increasing crowd, but certainly nowhere near 800-1,000 people. (Apx 93.4, 00:25:54; 00:47:48; 0055:55; 01:09:00.)

Appellees' claims of protesters "outflanking" the officers, starting fires in proximity to the police line, and throwing burning logs at officers are similarly unsupported. The video segments referenced by Appellees show a few, isolated individuals on hilltops far from the police line. There is no organized assault or even movement toward law enforcement. The video shows that fires cause the individuals to run, indicating they were most likely caused by law enforcement's flammable chemical agent projectiles. The fires that appear on the video are quite far from the barricade and police

[6] This same officer later gives his "estimate" of 800-1000. Apx 308, ¶68.

line with one exception, the fire shown at Apx 93.4, 3:03.24. It is impossible to tell whether this was one of the small warming fires the water protectors acknowledge creating, or whether this fire was caused by the police munitions. Numerous declarants have described law enforcement's explosive grenades and teargas projectiles starting grass fires, which the water protectors attempted to extinguish. (Apx 553-554, 594, 596, 612, 620-621, 632-633, 639, 648-649, 657, 669-670.)

Nor do any of the videos show a single protester throwing a burning log.

7. Appellants did not have notice that the bridge was closed to pedestrians.

Appellees erroneously claim that Appellants were on notice that the bridge and surrounding area was closed. (Appellees' Brief, p. 24.) It is undisputed that the only signage was north of the bridge, behind the concertina wire, as discussed in Appellant's Brief, pp. 8-9. Therefore, Appellees rely on a letter from a Corps of Engineers colonel to Sheriff Kirchmeier requesting law enforcement assistance, to keep trespassers out of an identified area *north of the bridge*. (Appellee's Brief, p. 24; Apx 537 [letter]; Apx 538 [map].) There is simply no evidence that any Appellant or class member was aware of this letter or had any reason to know that the bridge and the road area south of the barricade were off limits.

Appellees absurdly attempt to impute this knowledge to Appellants and class members by claiming that some of them had previously been removed from or prevented from accessing *other* areas. (Appellee Brief, pp. 24-25.) Appellants' previous experiences with law enforcement gave no notice that Backwater Bridge was closed to pedestrians. Appellees point to the prior experiences of three Appellants to support this outlandish argument: Mr. Dullknife was in a different area, two weeks before, and law enforcement officers capsized his canoe (Apx 128-129); Ms. Wilson described incidents at other locations where water protectors met law enforcement (Apx 139-140); and Mr. Demo described the October 27 events which similarly, gave no notice that Backwater Bridge was closed (Apx 144-145).

Moreover, none of this evidence supports the conclusion that Appellants had notice that their mere presence on or near the bridge would subject them to excessive force.

Finally, Appellees make a disingenuous factual leap in claiming "only two of the Appellants deny hearing particularly described warnings in their pleadings." Appellee Brief, p. 23. Specifically, Demo and Wilson emphatically deny receiving any orders to disperse from the area. (Apx 139-143 [Wilson did not hear any dispersal order the entire night ¶14, although

on a previous date she did hear a dispersal order and was allowed to disperse ¶5]; Apx 144-146 [Demo never heard an order to disperse ¶10 and received no warnings prior to being hosed with water and shot ¶7, he obeyed law enforcement commands to step back from the barricade ¶10)].) The other seven describe their experiences, including what they observed and heard on November 20, and did not hear dispersal announcements either. (Apx 100-103 (Wool); Apx 109-110 (Treanor); Apx 111-113 (Hoagland-Lynn); Apx 114-117 (Bruce); Apx 128-131 (Dullknife); Apx 136-138 (Finan); Apx 149-52 (Dundon).)

There is no evidence that dispersal orders were communicated to the entirety of the assemblage that was subjected to force, allegedly as a means of dispersal, as in fact, no amplified general dispersal orders were given after 6:23pm, when only a small number of people were present - other than the unamplified commands by certain officers to “step back”. Any such verbal orders, made in the midst of the water spray, loud bangs of explosive grenades, shotgun fired beanbags, and other munitions, could be and were only communicated to any person(s) directly adjacent, and such an individual directive is not an order to disperse an assemblage.

B. *These Unfounded Aspersions Grossly Mischaracterize the Water Protector Movement, Which is Nonviolent and Based in Law.*

The DAPL travels across part of the territory of the *Oceti Šakowiŋ* (Great Sioux Nation) known as the "Unceded Lands" immediately north of the Cannonball River, immediately west of the Missouri River, and south of the Heart River, recognized by the United States in the Ft. Laramie treaties. (1851 Treaty of Ft. Laramie, 11 Stats., p. 749; 1868 Fort Laramie Treaty, 15 Stat. 635.) By Article XVI of the 1868 Treaty, the United States stipulated that that this territory would be considered unceded Indian territory, and stipulated that no white person would be permitted to occupy or pass through it without the consent of the Indians. These lands became essentially a buffer zone of "Indian territory" between the Great Sioux Reservation and the United States. The Oceti Šakowiŋ have never relinquished the Unceded Lands. Under the terms of the 1868 Treaty, cession of further territory could only occur by treaty signed by at least three-fourths of all the adult male citizens of the Nation.

Subsequent unilateral alienations of parts of the Unceded Lands by the United States in the 1880s were not only in violation of the Treaties and international law, but also failed to diminish the territorial boundaries of the Oceti Šakowiŋ. (*Solem v. Bartlett*, 465 U.S. 463, 472 (1984).) But even in purporting to take large portions of treaty land and create the current

reservations, the Tribes were reserved water rights in the Missouri River for their self sufficiency. (See *Winters v. United States*, 207 U.S. 564 (1908).)

To this day, treaties such as those between the Great Sioux Nation and the United States, are recognized as valid, binding, and enforceable nation-to-nation agreements. (*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999).) Native nations are sovereigns, pre-existing and separate from the United States and its subdivisions. (*United States v. Bryant*, 136 S.Ct. 1954, 1962 (2016); *United States v. Wheeler*, 435 U.S. 313, 323 (1978).) Indigenous nations like the Oceti Šakowiŋ have the right of "free, prior, and informed consent" as to any legislative or administrative measures by a colonial power that may affect them. (United Nations Declaration on the Rights of Indigenous Peoples ("UN DRIP") (2007) (signed by the United State in December 2010); ILO Convention 169, art. 6, §2 and art. 26, §2 (1989).)

The United States has accepted that treaties with Native nations secure not only territory and lands but also the traditional uses of those lands, including the right to hunt and fish, and that those rights may survive the loss of the nation's territory. (*Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).) This Court followed this rule in *Lower Brule Sioux Tribe v. State of South Dakota*, 711 F.2d 809 (1983), *cert. den.*, 464 U.S.

1042 (1984), holding that the taking of the lands of the Oceti Šakowiŋ under the Flood Control Act for the construction of the reservoirs along the Missouri River (such as Lake Oahe) did not disestablish the territorial boundaries of the Nation nor did it abrogate the rights reserved under the 1868 Treaty to hunt and fish within that territory free from state law. (*See also, Klamath Indian Tribe v. Oregon Dept. of Fish & Wildlife*, 729 F.2d 609, 612 (9th Cir. 1984), collecting cases.)

When the United States licensed the building of the DAPL across the Unceded Lands over the objections of the Oceti Šakowiŋ, the Standing Rock Sioux Nation formally invoked the right of consent and issued a call to all Sioux and their allies to peacefully stand in support of the Nation's sovereignty, treaty rights, territorial rights to the Unceded Lands, and to protect its people's essential water.

Simultaneously, Standing Rock, later joined by the Cheyenne River, and in separate actions, the Yankton Sioux and Oglala Sioux Tribes, sued the U.S. Army Corps of Engineers and other federal agencies challenging their decision to authorize construction of the DAPL and the plan for it to cross Lake Oahe, a dammed portion of the Missouri River. (D.D.C. 16-cv-01534 JEB, 16-cv-01796 JEB, and 17-cv-00267 JEB.) The indigenous nations variously alleged that the Missouri River is the primary source of

drinking and agricultural water for the Standing Rock, Cheyenne River, and Oglala Sioux Reservations; that it is sacred to them and central to their religion and traditions; that many sacred, cultural, and burial sites lie along the path of the pipeline; and that the pipeline approval violated multiple environmental and historic preservation statutes and multiple treaties, statutes and regulations governing the United States' relationship with those nations, and the UN DRIP.

Most recently, on June 14, 2017, the D.C. District Court ruled that the permit authorizing the pipeline to cross the Missouri River violated the National Environmental Policy Act in several key respects, including by not adequately considering the risk of an oil spill, and the impacts of an oil spill on the Sioux Nations and their treaty rights. As of this writing, the D.C. court has not yet decided the question of whether it will halt pipeline operation while the Corps conducts the further review.

C. *An Evidentiary Hearing is Required.*

The district court abused its discretion in failing to hold an evidentiary hearing in light of substantial disputes of fact. *Murata Machinery USA*, quoted by Appellees (Appellees' Brief p. 33) is unavailing. In that case, an appellate court reversed a preliminary injunction denial because the district court had not stated adequate reasons for its decision. The Court of Appeals

noted that a hearing was not required in that particular case, not that a hearing is never required. (*Murata Machinery USA v. Daifuku Co., Ltd.*, 830 F.3d 1357, 1364-1365 (Fed. Cir. 2016).)

No circuit has created a hard and fast rule that an evidentiary hearing is required in every case before ruling on a motion for preliminary injunction. Conversely, no circuit has excused the failure to hold an evidentiary hearing where there are genuine issues of fact in dispute or when the propriety of injunctive relief turns on credibility determinations-- as it does in this case. "If genuine issues of material fact are created by the response to a motion for a preliminary injunction, an evidentiary hearing is indeed required." (*Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997) and cases collected; accord, *Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334 (5th Cir. 1984) ["the notice contemplated by rule 65(a) mandates that where factual disputes *are* presented, the parties must be given a fair opportunity and a meaningful hearing to present their differing versions of those facts before a preliminary injunction may be granted"]; *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744–745 (8th Cir. 2002) [but no such issues existed].)

> While an evidentiary hearing is not always required before the issuance of a preliminary injunction, where facts are bitterly contested and credibility determinations must be made to decide whether injunctive relief should issue, an evidentiary hearing must be held.

> Where conflicting factual information places in serious dispute issues central to a party's claims and much depends upon the accurate presentation of numerous facts, the trial court errs in not holding an evidentiary hearing to resolve these hotly contested issues.

(*Four Seasons Hotels And Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1211 (11th Cir. 2003), internal citations and quotation marks omitted.)

It is clear that there is a material factual controversy in the instant case, as the district court itself acknowledged. The factual disputes are central to the parties' claims. Accordingly, the district court erred in not holding an evidentiary hearing.

III. Law Enforcement Should Be Enjoined From Using Dangerous Weapons Indiscriminately Against A Crowd, Without Particularized Cause.

Appellees' hyperbole is intended to portray the water protectors as a monolithic group bent on violence, and thus justify Appellees' actions. This goes to the heart of the issue on appeal -- the government's indiscriminate use of force against all protesters collectively, and without the particularized cause required by *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979). The fact that Appellees, throughout their brief, feel it necessary to reference all water protectors as one group, melding together asserted incidents that are alleged to have occurred over several months and involved disparate individuals, and then attributing these allegations to completely different persons at different times and places based solely on shared political views, shows that

they concede that the indiscriminate force on November 20 is not justified or countenanced by fact or law.

Even when acts of violence occur in the context of constitutionally protected activity, "precision of regulation" is demanded. (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982).)

> A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity.

(*Id.* at pp. 933–934.)

Appellees repeatedly mischaracterize the injunctive relief Appellants seek. Appellants did not ask the court to prohibit law enforcement from using "less lethal" weapons under any circumstances. Rather, Appellants requested a preliminary injunction prohibiting Appellees from the *indiscriminate* use of direct impact munitions and explosive grenades including *for crowd dispersal*, and the use of water hoses *in freezing weather*. (Apx 547, Add 39.) Indiscriminate force, including for crowd dispersal in the context of First Amendment activity, means firing munitions into an entire assemblage of people, as opposed to targeting individuals or

unified groups who are identified as acting unlawfully as a unit, and for whom there is particularized cause to justify such a high level of force. The so-called "less lethal" weapons employed by Appellees are extremely dangerous and can maim or kill when they are not used precisely and properly. This risk is even greater when impact munitions are used in crowds in conjunction with chemical agents, smoke, explosives, and in darkness, as occurred here. (See Appellants' Brief at pp. 35-38.) Appellees do not even attempt to argue that the weapons are safe when fired indiscriminately, as they do not dispute occurred here.

Appellees misleadingly cite to *Bernini v. St. Paul* as upholding indiscriminate force, but this Court was careful to distinguish the arrest it upheld in *Bernini* from an unlawful indiscriminate mass arrest. "[U]nlike the officer in *Barham v. Ramsey*, 434 F.3d 565 (D.C.Cir.2006), who directed an indiscriminate mass arrest of about 400 persons in a park based on the unlawful acts of a small group of protestors, the police in this case attempted to discern who had been part of the unit at the intersection and released approximately 200 people, including seven of the plaintiffs, at the park." The Court found that "[i]t was reasonable for the officers to believe they could arrest those who were acting as a unit with the protestors who attempted to break through the police barrier at the Shepard–Jackson

intersection." (*Bernini v. City of St. Paul*, 665 F.3d 997, 1005 (8th Cir. 2012).)

In contrast here, it is undisputed that the crowd included hundreds of people coming and going at different times over a period of approximately ten hours, and that most stayed back from the police barricade. Nonetheless, the barrage of freezing water and munitions was directed at the entire crowd continuously throughout the night, including water protectors who were stationary in the middle of the bridge, praying and singing, and those on the sides and even medics south of the bridge tending the injured. (E.g., Apx 9, 16, 36, 122, 392-397, 555, 593-594, 639-640, 654, 677-678; Add 7, 9, 11-12, 33.)

Significantly, law enforcement did not use issue amplified orders to disperse after the majority of the water protectors had assembled. Law enforcement had the means and capacity at its disposal to communicate an audible order to disperse throughout the night. Opening fire on an assembled group of people, and continuing to do so for a ten hour period, served as an effort to extinguish First Amendment activity, rather than a lawful means of dispersal.

Accordingly, not only are Appellants likely to prevail on their claims, but the balance of harms discussed by Appellees, which they recite from the

district court's order, does not balance the actual harms at issue here. The requested injunction would not allow persons to break the law or prevent officers from maintaining law and order or protecting themselves. (Appellees' Brief, p. 49; Apx 38; Add 35.) Appellees' and the district court's discussion of the public interest is also based on this incorrect premise that Appellants seek to enjoin Appellees from enforcing the law. Appellants have simply asked the district court to prohibit weapons which contemporary law enforcement standards recognize are too dangerous to be used indiscriminately in a crowd for the sole purpose of crowd dispersal, from being so used. (See Add. 39-42, Apx 548-551.)

IV. Appellants Have Shown A Likelihood Of Success On The Merits Of Their Fourteenth Amendment, As Well As Fourth Amendment Claims.

Although it is clear that Appellants were seized within the meaning of the Fourth Amendment and Appellants maintain that the use of force here is properly analyzed under the Fourth Amendment as discussed in the opening brief, firing on peaceful protestors is so egregious and outrageous that it may also be fairly said to shock the contemporary conscience in violation of the Fourteenth Amendment.

Arbitrary conduct shocking to the conscience, including a showing that law enforcement's only purpose was to cause harm unrelated to the legitimate object of arrest, may violate the Fourteenth Amendment's

guarantee of substantive due process. (*Cty. of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998) [high-speed chases with no intent to harm suspects physically do not give rise to liability under the Fourteenth Amendment].) In *Lewis*, the Supreme Court recognized the necessity of law enforcement to make split second decisions in certain circumstances and that an officer's "instant judgment in unforeseen circumstances" will not rise to the level of violating substantive due process. This is in stark contrast to the circumstances here, where Law Enforcement knew about protest activities over the course of months and the incident in question occurred over a span of ten hours.

Here, Appellees admit that law enforcement did not attempt to effectuate any arrests or detentions other than the one person who breached the concertina wire. (Appellees' Brief, p. 38.) Instead, law enforcement officers arbitrarily and indiscriminately targeted protectors, shooting them with tear gas canisters, explosive grenades, lead-filled "beanbags", rubber bullets and blasts of water in freezing cold temperatures. (See, e.g., Apx 564 ["officers deliberately sprayed people on the bridge and in the field, spraying the water back and forth, pausing on various water protectors and then back again...The fire on the bridge was on the far side, much too far for the water cannons to reach. There was no reason to spray water other than to harm and

harass the water protectors"]; Apx 570 [force used against people heading away from the area]; Apx 594 [medic marked with cross shot, sprayed and impacted by explosive grenade as he tried to render medical aid].)

The Court below acknowledged that it was "fully aware of the indiscriminate use of water and other forms of non-lethal force that were used that evening in the midst of the darkened chaos." (Add 33, Apx 36.) It is precisely in "darkened chaos" that supposed "non-lethal" weapons kill innocent people and we see the tragic and needless injuries that occurred here. (E.g., Apx 98-99 [fractured rib]; Apx 101-102 [hypothermia, head and facial injury, burns and bruises requiring hospitalization]; Apx 109-110 [shot in head requiring staples, multiple bruises]; Apx 112 [shot in head with large laceration requiring 17 staples, chest wall contusion]; Apx 115-116 [genital and abdominal injury requiring hospitalization]; Apx 118-119 [hypothermia, welts and bruising]; Apx 126-127 [shot in knee]; Apx 134-135 [shot multiple times in chest as he tried to leave, loss of consciousness, coughing up blood]; Apx 137-138 [shot in stomach while taking photographs]; Apx 145-146 [multiple fractures to hand, requiring reconstructive surgery]; Apx 147 [severe arm injury requiring multiple surgeries, permanent disability]; Apx 150-151 [severe eye injury requiring surgery, permanent vision loss]; Apx 594 [shot in chest and with explosive grenade while acting as a medic,

ongoing tinnitus]; Apx 613 [shot in eye, long term vision loss]; Apx 643 [shot in genital].)

Commissioner Frazier observed that,

> Even assuming that there were persons on the front line who were throwing objects or otherwise posing a physical threat to the police, the reach of law enforcement's shoulder fired weapons and the water cannon were from 25 to 100 yards, an expansive area which encompassed and reached protestors who had no intention of challenging the line of law enforcement. The reach of these weapons ensured that individuals outside any zone or area that even could be considered to be directly confronting law enforcement could be and was subject to serious bodily injury. This is contrary to modern law enforcement standards for use of force.

(Apx 548, Add 39.)

This indiscriminate use of impact munitions, explosives, and fire hoses over many hours in freezing weather, the likes of which has not been seen in the last 50 years, if ever, was not only unnecessary, but punitive in nature. (Add. 39-42, Apx 548-551.)

Thus, a reasonable jury could certainly find that this conduct was egregious, extraordinary and shocks the conscience of the community.

V. Appellants Are Chilled From Expressing Their Opposition To DAPL In North Dakota And Thus Establish Irreparable Injury.

With no support in the record, appellees continue to assert that appellants have all left North Dakota[7], and that appellants will suffer no irreparable injury from the denial of the injunction. At the same time, Appellees continue to assert that their use of force was reasonable and that it is necessary that they maintain the option to use such massive, brutal and indiscriminate force, demonstrating an intent to continue to use impact munitions, fire hoses and explosive grenades in an indiscriminate manner to disperse crowds, as indeed they did during January, 2017. (Apx 582.)

The facts that the camps where protestors resided were cleared, the unlawful barricade at the bridge was removed, or that the pipeline construction is now complete, does not change the reality that First Amendment rights were and are currently chilled by the law enforcement excessive force. Appellees only speculate that these events make protests less likely to take place in the future. Appellees apparently assume that because the pipeline is completed, the Appellants have no reason to exercise

[7] This is conjecture. Most of Appellants' and class members' declarations were signed in North Dakota, at least four state that their primary residence is North Dakota (Apx 100, 144, 642, 564); five of the declarants live on the Cheyenne River Sioux reservation immediately south of Standing Rock or otherwise in South Dakota (Apx 128, 132, 572, 599, 611); and others grew up in North Dakota and/or have Sioux/ Lakota heritage (Apx 125, 605, 681).

their First Amendment rights. Appellants have stated their concrete intentions to exercise these rights in the future. Appellants are opposed to construction and *operation* of the DAPL, which threatens ongoing environmental harm from leaks and other damage to the environment and sacred lands. Completion of the construction does not change the fact that law enforcement actions chilled First Amendment rights not only from the time such actions were taken up to and including the present time but also into the future. Moreover, the controversy concerning the DAPL is far from over, as mentioned.

Appellants have established that the challenged practices have caused and are causing "injury in fact" that is concrete and particularized, that the harm is actual and not hypothetical and that they would benefit from an injunction curtailing Appellees' excessive and indiscriminate use of weapons and force. Appellants suffer a direct injury in fact that is traceable to the challenged policy, custom and/or practice, including a chilling of their exercise of free speech and association. (See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984).)

Appellants have averred that they intend to engage in lawful First Amendment protected activity in protest of the construction and use of the

Dakota Access Pipeline in and near Morton County, but are chilled from the full expression of their rights by threat of indiscriminate and excessive use of highly dangerous munitions -- a custom, policy or practice that Appellees ratify in their filings as appropriate. The chilling effect works an abridgment of Plaintiffs' rights that is ongoing and persistent. This is no less the case today than at the time the injunction was sought.

This Court has recognized that when First Amendment rights are threatened, the gravity of the rights at stake weighs towards a finding of standing. "[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts dramatically toward a finding of standing." (*Missourians for Fiscal Accountability v. Klahr*, 830 F.3d 789, 794 (8th Cir. 2016), citing *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003).) Self-censorship, such as Appellants are currently practicing by desisting from protesting, may confer Article III standing to seek prospective relief. (*Ibid*.) Appellants have alleged this immediate threat of injury in terms of the immediate and ongoing chilling of their First Amendment rights by law enforcement's indiscriminate use of munitions to disperse crowds.

Appellants have specifically alleged that it is the ongoing policy, custom and/or practice of the Appellees to use the munitions at issue

against peaceful protesters in an indiscriminate and excessive manner. Appellants have asserted that these dangerous and maiming weapons have been used indiscriminately and excessively against peaceful, nonviolent protestors who were engaging in no threatening or illegal activity and as retaliation for exercising their First Amendment rights.

Appellants assert an intention to protest in the future, and thus a likelihood that they will be subjected to Appellees' custom, policy and/or practice of targeting and inflicting injury upon peaceful and nonviolent protestors. Appellants have shown a likelihood of future harm because of this policy, custom and/or practice.

Conclusion

For the foregoing reasons and those discussed in Appellants' Opening Brief and the brief of Amicus Curiae, this Court should vacate the district court order and remand this matter to the district court with instructions to grant the preliminary injunction; alternatively, this Court should order the district court to hold an evidentiary hearing to resolve the factual disputes at the heart of its order.

Dated: Aug. 15, 2017 Respectfully submitted,

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Counsel hereby certifies that she has scanned this brief and the addendum for viruses and found them virus-free before E-filing.

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7) because this brief contains 6,428 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Liberation Serif 14 point.

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Certificate of Service

Undersigned counsel hereby certifies that on this August 16, 2017, pursuant to F.R.A.P. 25 and 8th Cir. R. 25A(d), Appellants are serving this corrected brief on Appellees by the CM/ECF system.

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