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

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| CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG; and JOSÉ ZHAGÑAY on behalf of themselves and all similarly-situated persons,<br><br>Plaintiffs,<br><br>vs.<br>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<br><br>Defendants. | **Case No. 1:18-cv-00212**<br><br>**ORAL ARGUMENT REQUESTED** |

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**MEMORANDUM IN OPPOSITION TO COUNTY DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT**

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## BACKGROUND

This case involves Morton County's closure, for five months, of nine miles of the primary public road connecting the Standing Rock Reservation and the camps along its northern border to the state capital and region's largest city. The closure in question was implemented several days before any alleged damage was done to the Backwater Bridge, and the road remained closed for nearly a month after any alleged 'unrest' in the area had ceased. And, for the majority of the duration of the closure, no pipeline construction occurred—or legally could occur—in the area. Indeed, Defendants' purpose for closing the road was not to protect the integrity of the Backwater Bridge (which was never materially damaged) or to quell local unrest

(the NoDAPL movement was overwhelmingly peaceful), but to extort political concessions from the Standing Rock Sioux Tribe, a separate and independent sovereign, and to limit peaceful protest with which Defendants disagreed.

County Defendants have moved to dismiss Plaintiffs' First Amended Complaint ("Amended Complaint"). Throughout their Memorandum in Support, Defendants repeat and seek to reinforce a misleading factual counternarrative developed in 2016-2017 in the hopes that they might avoid having the true purpose of the road closure tested at trial. But after this Court excludes the voluminous body of extrinsic factual evidence relied on by Defendants—none of which may be considered on a motion to dismiss—it is plain that little legal argument remains.

The factual allegations in the Plaintiffs' Amended Complaint, accepted as true, are sufficient to state a claim to relief for violations of Plaintiffs' constitutional right to speech, religious exercise, travel, and commerce, as well as under Section 1985(3). County Defendants' Partial Motion to Dismiss must therefore be denied in full.[1]

## STANDARD OF REVIEW

Rule 8(a) requires a complaint to provide only a "short and plain statement of the claim" in question that "show[s] that the pleader is entitled to relief." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007) (quoting Federal Rule of Civil Procedure 8(a)). A motion to dismiss

[1] County Defendants ask this Court to dismiss "all of Plaintiffs' claims in this action." Doc. 51, Motion to Dismiss Plaintiffs' Amended Complaint at 1 (hereafter "Partial Motion to Dismiss"). But County Defendants do not discuss, in even the most cursory respect, Count II. County Defendants similarly do not address Plaintiffs' Section 1985(3), Fifth Amendment, or Fourteenth Amendment claims. *Compare* County Def. Memo *et seq.* (failing to even so much as reference these claims) *with* Amend. Compl. ¶¶ 136-144 (stating a claim to relief for "Count II, Violation of Right to Free Exercise") *and* Amend. Compl. ¶¶ 145-155 (stating a claim to relief for "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)**" (emphasis added)). Defendants' motion must therefore be construed as a partial motion to dismiss Counts I, III (in part), IV, V, VI, and VII. *See, e.g.*, Rule 12(b)(6) (requiring that "[e]very defense to *a claim for relief*"—as opposed to the complaint as a whole—"must be asserted in the responsive pleading" or "by motion"); *Omaha Cold Storage Terminals Inc. v. Preston Refrigeration Co.*, 2007 WL 1723474, at *1 (D. Neb. June 12, 2007) (holding that the defendant bears the burden on Rule 12(b)(6)).

brought under Rule 12(b)(6) challenges the complaint on this basis, testing whether the claims in question are well-pled. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Supreme Court has created a "two-pronged approach" to determine whether the complaint states a claim to relief for purposes of Rule 12(b)(6). *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 573 (2007)). First, the reviewing court must identify the legal "elements a plaintiff must plead" for each challenged claim. *Iqbal*, 556 U.S. at 675. Second, the court must consider all factual allegations contained within the complaint to determine whether they give rise to the "reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Because the purpose of this examination is to test the sufficiency of the complaint itself, the court "accepts as true" all factual allegations made within the complaint, *id.*: "Rule 12(b)(6) does not countenance dismissals based on a judge's disbelief of a complaint's factual allegations," *Twombly*, 550 U.S. at 555-56. This presumption of truth does not, however, apply to any legal elements also alleged. *Iqbal*, 556 U.S. at 675; *see also Twombly*, 550 U.S at 557 (noting that when "conspiracy" is a legal element of the claim in question, "[t]erms like 'conspiracy,' or even 'agreement,' are border-line [conclusory]: they might well be sufficient in conjunction with a more specific allegation—for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint"). Thus, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations . . . a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555.

## ARGUMENT

As County Defendants' Memorandum in Support of their Partial Motion to Dismiss makes plain, the substance of this litigation turns in large part around a factual dispute: whether

the NoDAPL movement at Standing Rock was overwhelmingly peaceful, as Plaintiffs allege, *e.g.*, Amend. Compl. ¶ 49-50, or whether it constituted an eleven-month-long violent riot, as Defendants assert. To support their factual counternarrative, Defendants rely on an extensive body of disputable or disputed extrinsic evidence, virtually all of which must be disregarded in considering this Partial Motion to Dismiss. *See, e.g.*, *Iqbal*, 556 U.S. at 675 (holding that the purpose of a Rule 12(b)(6) motion is to test the sufficiency of the *complaint* itself, and not to resolve underlying disputes of fact); *see also* Plaintiffs' Motion to Exclude.

This is particularly true in this case, where the Plaintiffs have explicitly challenged the veracity and reliability of the evidence on which Defendants now seek to rely: in their Amended Complaint, Plaintiffs have alleged that the "press statements, official declarations, and criminal charging documents" that Defendants' cite in support of their counternarrative "mischaracterize[e] [] Water Protectors and the NoDAPL movement" as part of "a concerted effort to portray the movement as a whole as far more dangerous or criminal or disruptive than was actually the case." Amend. Compl. ¶ 5. Considering this extrinsic evidence, thus, would not only require this Court to impermissibly look past the Amended Complaint in evaluating whether Plaintiffs have adequately pled claims to relief, but to reject numerous factual allegations that Plaintiffs have pled—including allegations showing that the NoDAPL movement was overwhelmingly peaceful and that Defendants' contemporaneous claims to the contrary were part of a persistent effort to mischaracterize the NoDAPL movement. This would not only thwart the purpose of Rule 12(b)(6), but would also provide future defendants with a convenient path to immunity from constitutional liability: so long as constitutional wrongdoers contemporaneously deny their misconduct with sufficient vigor, those self-serving denials (combined with press coverage relying on those denials) will ensure that constitutional liability never accrues.

Instead, long-established law and policy maintain that a Rule 12(b)(6) motion turns on what Plaintiffs have alleged. Here, Plaintiffs' allegations establish the numerous respects in which Defendants' discriminatory road closure violated Plaintiffs' constitutional rights, including their right to free speech, to free exercise, to travel, and to unimpeded commerce. As such, Defendants' Partial Motion to Dismiss must be denied.

## I. First Amendment Speech (Count I)

The First Amendment provides that state actors "shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. To state a First Amendment claim for relief, a plaintiff must first show that the challenged action infringed protected speech. Defendants do not contest that they are state actors or that by closing the road they curtailed a substantial amount of speech.[2] Instead, Defendants' primary point of contention is over whether the road closure impacted any speech occurring on traditional or designated public forums.[3] The allegations in the Amended Complaint plainly show that it did, and so the road closure is subject to *at least* intermediate scrutiny under a "time, place, or manner" analysis. *See* Part I.B (discussing how the road closure cannot survive intermediate scrutiny).

[2] In any event, Plaintiffs' allegations are sufficient to establish as much. *See, e.g.*, Amend. Compl. ¶¶ 44-45, 140; *see also id.* ¶¶ 51, 54, 130, 146. To the extent that Defendants argue that a prayer walk or ride is not protected by the First Amendment, they are incorrect. The First Amendment's protections do not "end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404 (1989): when "[a]n intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message would be understood by those who viewed it," conduct is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments. *Spence v. State of Wash.*, 418 U.S. 405, 410–11 (1974); *Texas v. Johnson*, 491 U.S. 397, 404 (1989). So, for example, in *Garner v. State of La.*, the U.S. Supreme Court held that "the act of sitting at a privately owned lunch counter with the consent of the owner, as a demonstration of opposition to enforced segregation," is protected conduct. 368 U.S. 157, 202 (1961). Similarly, in *Elli v. City of Ellisville, Mo.*, court held that one driver flashing his headlights at another driver on the road to warn him about police ahead constituted protected speech. *See Elli v. City of Ellisville, Mo.*, 997 F. Supp. 2d 980, 983 (E.D. Mo. 2014). The message conveyed through these prayer walks and rides—often involving indigenous rights or the remembrance of one of the many atrocities committed against Native Americans—was intended and, in the broader indigenous community at the very least, was widely understood.

[3] As a threshold matter, Plaintiffs wish to clarify that their allegations strictly involve the right to *public* property. *Compare* Amend. Compl. ¶¶ 8, 9, 44-48, 72, 74, 87, 129-30, 138, 141, 146, 167 *with* County Def. Memo at 37-39.

Because, however, the Amended Complaint establishes that the closure was a viewpoint-based restriction and a prior restraint on speech, strict scrutiny more properly applies to the road closure. *See* Part I.D (discussing how the road closure is a constitutionally impermissible prior restraint); Part I.E (discussing how the road closure cannot survive strict scrutiny).

For *each* of these three reasons, Plaintiffs have adequately pled a First Amendment Speech claim to relief (Count I).

**A. Forum Analysis**

By closing nine-miles of Highway 1806, Defendants abridged a significant amount of speech occurring on the road and its curtilage—each of which was a traditional public forum for the period in question—as well as in Sacred Stone Camp and Rosebud Camp.

"To ascertain what limits, if any, may be placed on protected speech," the Supreme Court has "focused on the 'place' of that speech, considering the nature of the forum the speaker seeks to employ. . . . [T]he standards by which limitations on speech must be evaluated 'differ depending on the character of the property at issue.'" *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (quoting *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 44 (1983)). This inquiry, the "forum analysis," has led the Supreme Court to delineate three categories of forums: traditional public forums; designated public forums; and limited or nonpublic forums. *See Perry v. Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

**1. Highway 1806 is a Traditional Public Forum**

Defendants center their argument around the unsubstantiated and unprecedented claim that a public road is not a traditional public forum. *See* County Def. Memo at 35. This is plainly incorrect.

As the Supreme Court has long recognized, streets are the "quintessential" example of public forums: "immemorially[, streets have] been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly." *Perry*, 460 U.S. at 45.[4] Crucially, "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988); *Jacobson v. United States Dep't of Homeland Sec.*, 882 F.3d 878, 882 (9th Cir. 2018) (applying traditional public forum doctrine to two-lane road running through rural Arizona); *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000) (applying traditional public forum doctrine to closure on road running through rural forest preserve); *Pineros Y Campesinos Unidos del Noroeste v. Goldschmidt*, 790 F. Supp. 216, 221 (D. Or. 1990) (recognizing that rural roads "running adjacent to farms, ranches or orchards belong to the category of roads and streets that may be used as public forums").

Here, Plaintiffs have alleged that the portion of Highway 1806 that Defendants closed is a "public road." *See, e.g.*, Amend. Compl. ¶¶ 2, 3, 9, 45. To hold that this stretch of road is not a public forum because it runs through a rural area, as Defendants argue, is to defy decades of well-established precedent. Indeed, the Supreme Court considered and rejected this exact line of reasoning in *Frisby*, where the defendants argued that "[a]lthough 'highway' has a broad meaning (basically including any street, city or rural)," the purposes of highways are not always compatible with speech. *Schultz v. Frisby*, 807 F.2d 1339, 1361 (7th Cir. 1986), *rev'd*, 487 U.S. 474 (1988). The Supreme Court rejected this argument: "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and

[4] Defendants misstate *Perry* as holding that "what makes a street or road a traditional public forum is *whether* it has 'immemorially been held in trust for the use of the public . . . ." County Def. Memo at 35 (emphasis added). But what *Perry* actually says is that roads are "quintessential public forums" *because* they have been so held in trust. *See Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 730 (8th Cir. 2017); *Perry*, 460 U.S. at 45.

are properly considered traditional public fora." *Frisby*, 487 U.S. at 481; *see also Jacobson*, 882 F.3d at 882 (holding that rural road was public forum); *Griefen*, 200 F.3d at 1260 (same); *Goldschmidt*, 790 F. Supp. at 221 (same). All public roads, "city or rural"—including the one at issue—are traditional public forums. *See Frisby*, 487 U.S. at 481. For this reason alone, Defendants' discriminatory road closure is subject to at least intermediate scrutiny.

**2. Highway 1806's Curtilage is a Traditional Public Forum**

Plaintiffs have also alleged that the closure in question curtailed speech occurring on the road curtilage. This, too, is a traditional public forum.

Traditional public forums are places that "by long tradition or by government fiat have been devoted to assembly and debate." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 470 U.S. 37, 45 (1983). Courts consider a range of factors in determining whether a forum is a traditional public forum, including whether the property "has the physical characteristics of a public thoroughfare [or] has the objective use and purpose of open public access," *Ball v. City of Lincoln, Nebraska*, 870 F.3d 722, 730 (8th Cir. 2017), "whether expressive activity would tend to interfere in a significant way with the uses to which the government has as a factual matter dedicated the property," *Lee*, 505 U.S. at 699 (Kennedy, J., concurring); *see Ball*, 870 F.3d at 730, whether the property provides a reasonable person with any indication that she has "entered some special type of enclave," *U.S. v. Grace*, 461 U.S. 171, 180 (1983), and the extent to which the property's "primary use" depends on "public access," *New England Regional Council of Carpenters v. Kinton*, 284 F.3d 9, 22 (1st Cir. 2002). Similar to public roads, "[p]ublic place[s] adjacent to a public street . . . occup[y] a special position in terms of First Amendment protection." *Snyder v. Phelps*, 562 U.S. 443, 456 (2011); *cf. Ball*, 870 F.3d at 730 (listing "sidewalks" among "'quintessential' examples of [] traditional public forums"). This includes the

shoulders of rural roads without a sidewalk; suggesting otherwise would deprive many rural residents of any available public forum for protest. *See, e.g.*, *Rappa v. New Castle Cty.*, 18 F.3d 1043, 1070-71 (3d Cir. 1994) (striking down, on this basis, a regulation on speech that applied to "property within 25 feet of the right of way"; "[R]ights of way" adjacent to public roads are public forums: "Once it is determined that the forum at issue is public roads, it is clear that [the adjacent right-of-way] is a public forum") (then-Judge Alito concurred with the judgment and the forum analysis); *Tucker v. City of Fairfield*, 398 F.3d 457, 463 (6th Cir. 2005) ("public right of way" between car dealership and road was public forum); *World Wide St. Preachers Fellowship v. Town of Columbia*, 245 F. App'x 336, 347 (5th Cir. 2007) (unpublished) (holding that the shoulder of a highway was a traditional public forum); *Swagler v. Sheridan*, 837 F. Supp. 2d 509, 524 (D. Md. 2011) (same); *Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep't*, 807 F. Supp. 1427, 1435 (W.D. Ark. 1992) (same); *Jackson v. City of Markham, Ill.*, 773 F. Supp. 105, 109 (N.D. Ill. 1991) (same).

Here, Plaintiffs have alleged facts giving rise to the inference that the curtilage in question is a traditional public forum. First, "by long tradition," this area has been "devoted to" a wide range of expressive activity, including "hanging prayer ties" and expressive "rides" and "run[s,]." Amend Compl. ¶ 45.[5] Moreover, Plaintiffs have alleged that the curtilage in question is a public thoroughfare with "the objective use and purpose of open public access," having been historically used "for travel by cars, trucks, horseback, ATVs, and pedestrians." *Id.* ¶ 45; *Ball*,

[5] County Defendants (at 36) mischaracterize Plaintiffs' pleading on this subject. Plaintiffs do not allege that the curtilage in question was used for the Bigfoot Ride or the Dakota 30+8 Ride, but that it has long been used for expressive conduct *like* the two rides listed. Amend. Compl. ¶ 45 (also detailing other longstanding expressive uses of this forum); *see also id.* ¶ 140. These factual allegations describing several distinct and specific types of expressive conduct that have long taken place in this forum are sufficient (albeit not necessary) to support the legal conclusion that the curtilage in question is a traditional public forum. Moreover, to the extent that Defendants argue that because these spiritual 'rides' and 'runs' constitute "travel" and cannot therefore also be expressive, that is plainly incorrect. *See* Note 2 (discussing how this constitutes protected expressive conduct).

870 F.3d at 730. Third, expressive activity would not interfere with the alleged "uses to which the government has as a factual matter dedicated the property": the aforementioned travel, "runoff control during the spring melt[,] and for the occasional highway repair." *See Id.* ¶ 45-46; *see also, e.g.*, NDCC 39-10-33 (authorizing pedestrian travel on the road and curtilage); NDCC 39-10-02.1 (authorizing travel by "Person riding animal or driving animal-drawn vehicle" on the road and curtilage); *Lee*, 505 U.S. at 699. Fourth, Plaintiffs have alleged that "[t]he wide shoulders in question slope gradually from the paved road surface," Amend. Compl. ¶ 46, providing little indication that by stepping off of the road, a person has "entered some special type of enclave," *Grace*, 461 U.S. at 180. Finally, the alleged "primary use" of this property—namely, travel, *see* Amend. Compl. ¶ 45—depends on "public access," *Kinton*, 284 F.3d at 22. Accepting Plaintiffs' factual allegations as true, every single one of these factors points strongly towards this curtilage being a traditional public forum—and that *at least* intermediate scrutiny therefore applies.[6] *See also Rappa*, 18 F.3d at 1070-71 ("[R]ights of way" adjacent to public roads are public forums: "Once it is determined that the forum at issue is public roads, it is clear that [the adjacent right-of-way] is a public forum."); *Tucker*, 398 F.3d at 463; *World Wide St. Preachers Fellowship*, 245 F. App'x at 347; *Swagler*, 837 F. Supp. 2d at 524; *Knights of Ku Klux Klan*, 807 F. Supp. at 1435; *Jackson*, 773 F. Supp. at 109.

**3. The Closure's Infringement of Speech in Sacred Stone and Rosebud Camps also Triggers at Least Intermediate Scrutiny.**

Finally, Plaintiffs have alleged that the purpose and effect of the road closure was to limit a significant amount of speech and expressive conduct in Sacred Stone Camp and Rosebud Camp, which were both located on the Standing Rock Reservation. *See, e.g.*, Amend. Compl. ¶¶

[6] Although no forum analysis is necessary to determine that the road is a traditional public forum, these allegations are independently sufficient to establish that the road is likewise a traditional public forum.

150, 40-41 (noting the central expressive purpose of these camps); *id.* ¶¶ 79-84 (describing the central purpose of the closure in halting any expression done in or through the camps); *id.* ¶¶ 8-9, 41, 65, 78, 131-32 (describing the severe and significant chilling effect of the road closure on speech in and through the camps, as well as press coverage of the camps).

This analysis is straightforward: because Sacred Stone Camp was located on tribally and privately owned land and operated as a permitted forum for speech through most of the time in question, at least intermediate scrutiny applies to the challenged road closure. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566 (1991) (applying "time, place or manner" intermediate scrutiny test to activity on private property). The road closure's infringement on speech in and through Rosebud Camp, which was located on Army Corps of Engineers land that was "expressly held out as a 'free speech zone' for most of the time in question," *see* Amend. Compl. ¶ 150, is likewise subject to intermediate scrutiny at a minimum. *See Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (noting that a "designated public forum" is created when the government "intentionally open[s] a nontraditional public forum for public discourse," and that speech regulations of designated public forums are subject to at least intermediate scrutiny).

**B. Intermediate Scrutiny**

Intermediate scrutiny applies to content-neutral regulations of speech in traditional or designated public forums. As Part I.C discusses *infra*, the road closure was not content neutral. This Part explains why, even if it were, it would not pass constitutional muster.[7]

Under intermediate scrutiny, a content-neutral regulation must (1) serve a significant government interest, (2) be narrowly tailored to that interest, *and* (3) leave open ample alternative channels of communication. *See Clark v. Cmty. For Creative Non-Violence*, 468 U.S.

[7] Because Defendants incorrectly conclude that no speech in a public forum was impacted by the closure, they do not reach this question in their memorandum.

288. 293 (1984); *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); *Ladue v. Gilleo*, 512 U.S. 43 (1994). Accepting Plaintiffs' allegations as true, the closure in question does none of these, and therefore fails intermediate scrutiny.

**1. Defendants' Purpose for Closing the Road was not "Significant"**

First, as Plaintiffs' factual allegations establish, Defendants' purpose for closing the road was not "significant."

This threshold question for intermediate scrutiny requires the Court to first determine *what* is the significant interest the state actors in question seek to advance. *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985). This is a factual inquiry, and the interest in question must be the government's actual purpose, rather than an after-the-fact justification invented by government attorneys or judges. *Erznoznik*, 422 U.S. at 205; *Cornelius*, 473 U.S. at 811; *Regan v. Time, Inc.*, 468 U.S. 641, 688 n.27 (1984). The reviewing court then considers whether this interest is sufficiently "significant." *Erznoznik*, 422 U.S. at 205; *Cornelius*, 473 U.S. at 811; *Regan*, 468 U.S. at 688 n.27.

Plaintiffs have alleged that "Defendants' true purpose for discriminatorily closing the road in question (in addition to hindering Plaintiffs' exercise of their constitutional rights)" was "to extort political concessions from the Standing Rock Sioux Tribe."[8] Amend. Compl. ¶ 79. As

[8] This allegation is plainly factual. The legal element at issue is whether the Defendants' motivating interest was "significant." Here, Plaintiffs allege *what*, as a matter of fact, Defendants' interest was. This allegation can and will be established through depositions, courtroom testimony, and documents; indeed, Plaintiffs provide significant support for this contention in the Amended Complaint itself, describing how Defendants' purpose is shown through the "extent and duration" of the closure, Amend. Compl. ¶ 80, through "a formal report completed prior to the discriminatory road closure," *id.* ¶ 81, through "a strategic plan similarly circulated in the weeks before the discriminatory closure," *id.* ¶ 82, and through numerous public and private statements made by the Defendants, *id.* ¶¶ 83-84; *see also id.* ¶¶ 159-61, 168.

Moreover, although this affirmative factual allegation would be sufficient for purposes of Rule 12(b)(6), Plaintiffs have also alleged numerous facts that illustrate that other purported 'interests' that Defendants now

over a century of Supreme Court precedent makes clear, this is not a legitimate government interest, let alone a significant one. The Supreme Court has long recognized that "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). "Because of their sovereign status, tribes and their reservation lands are insulated in some respects by an 'historic immunity from state and local control.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). This principle of tribal sovereignty has "given rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). "First, the exercise of [attempted state or local regulatory authority] may be preempted by federal law. Second, it may unlawfully infringe on the right of reservation Indians to make their own laws and be ruled by them." *Id.* (internal quotations and citations omitted).

Here, Defendants sought through this road closure to control the Standing Rock Sioux Tribe's sovereign government in, among other things, the Tribe's regulation of tribal members on sovereign Reservation land. *See, e.g.*, Amend. Compl. ¶¶ 79-84. In short, this purpose is soundly at odds with long-settled Supreme Court doctrine limiting state and local control over tribes and tribal governments. *See, e.g.*, *Williams v. Lee*, 358 U.S. 217, 220 (1959) (To allow states to exercise jurisdiction on the Reservation without express authorization from Congress "would infringe on the right of the Indians to govern themselves."); *id.* ("The cases in this Court have consistently guarded the authority of Indian governments over their reservations."); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 806 (2014) (Sotomayor, J., concurring) (recognizing, also, the crucial interest of "[c]omity—'that is, a proper respect for a sovereign's

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claim—such as the need to protect the bridge, to prevent 'mayhem' in the area, or to allow the pipeline to be constructed across the road—were pretextual. *See, e.g.*, Amend. Compl. ¶¶ 7, 49-50, 54, 57-69, 72, 77, 85, 146, 157.

functions'"—implicated in this context (internal quotations and modifications omitted)). Therefore, as pled, Defendants' interest in closing the road was not significant for purposes of intermediate scrutiny.

**2. The Road Closure is Not Narrowly Tailored**

Second, even if Defendants' claims regarding their purpose for closing the road are taken at face value—which, given that they contradict Plaintiffs' factual allegations, they cannot be, *see* Amend. Compl. ¶ 79[9]—the road closure was not narrowly tailored to these interests.

This second requirement of intermediate scrutiny requires any regulation of speech in a public forum to substantially further and be narrowly tailored to the governmental interest in question. *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981); *Jacobsen v. Petersen*, 728 F. Supp. 1415, 1420 (D.S.D. 1990). Although the regulation need not be the least restrictive way of satisfying the interest, "the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *McCullen v. Coakley*, 573 U.S. 464, 486 (2014). To determine if a provision regulating speech is narrowly tailored, the court considers "whether the scope of the restriction on [the plaintiffs'] expressive activity is substantially broader than necessary to protect the [] interest." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984).

The Supreme Court has considered the question of narrow tailoring on numerous occasions in the context of regulations designed to create a 'buffer zone' around an unruly demonstration. Through the repeated application of this doctrine, the Court has time and again

[9] Even had Plaintiffs not pled a contradictory purpose, Plaintiffs' pleadings establish that Defendants did not have a "significant interest" in protecting a bridge that was not damaged, *see* Amend. Compl. ¶ 61, ensuring the completion of construction that had already been finished, *see id.* ¶ 72, or in quelling mayhem where there was none, *see id.* ¶¶ 49-50.

emphasized its commitment to ensuring that no more speech is regulated through these buffer zones than is necessary. As a consequence, buffer zones broader than several-hundred (and usually several-dozen) feet have uniformly been struck down. In *Madsen*, for example, the Court struck down an injunction that established a 36-foot buffer zone on private property, banned observable images, established a 300-foot no-approach zone around clinic, and established a 300-foot buffer zone around staff residences: these restrictions burdened more speech than necessary to serve the interests in question. *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding, however, a 36-foot buffer zone *just* around clinic entrances and driveways, as well as limited noise restrictions); *see also Schenck v. Pro-Choice Network Of W. New York*, 519 U.S. 357, 377 (1997) (upholding a 15' buffer zone around clinic entrances/exits while striking down floating 15' buffer zone); *Kirkeby v. Furness*, 92 F.3d 655, 662 (8th Cir. 1996) (stating that an ordinance banning targeted picking within 200 feet of the homes of abortion providers would likely restrict "more speech than necessary"); *cf. Boos v. Barry*, 485 U.S. 312, 329-32 (1988) (striking down a regulation prohibiting the display of certain signs within 500 feet of a foreign embassy on narrow tailoring grounds while upholding the removal of gatherings within 500' of the embassy that "turn violent" and therefore "pose[] a security threat" to the embassy—because, in large part, "peaceful congregations . . . are not prohibited [by the ordinance]").

Whether viewed as a buffer zone or in any other light, the road closure was not narrowly tailored to Defendants' interests related to the Backwater Bridge or DAPL construction (including Defendants' purported need to prevent 'mayhem' in either area, *see* County Def. Memorandum at 56. *Contra, e.g.*, Amend. Compl. ¶¶ 5, 49-50 (alleging that the NoDAPL movement was overwhelmingly peaceful)).

**a. Backwater Bridge Damage**

Closing nearly *nine miles* of Highway 1806 to protect a possibly damaged ~100' bridge is plainly not narrowly tailored to the interest in question. Even if Defendants had some interest in limiting traffic on or in the immediate vicinity of a sufficiently damaged bridge, *see id.* ¶ 61 ("the bridge was and had been structurally sound"), that interest cannot justify closing nine miles of highway. It also cannot justify preventing travel—including travel on "foot, horseback, or ATV"—that "safely circumvented the bridge." *Id.* ¶ 68. One unnecessarily closed portion of this public forum was the "public area immediately abutting Highway 1806" and the specific identified sacred and ceremonial sites, which was located several miles north of the Backwater Bridge and had served as a "primary location[] of speech, assembly, and prayer" in the months prior to the closure. *Id.* ¶¶ 44, 47-50. Thus, from a strictly geographical perspective, "a substantial portion of the burden on speech"—over eight of the nine miles of public forum closed—"[did] not serve to advance its goals.'" *McCullen*, 134 S. Ct. at 2535.

Moreover, the road closure in question began on October 24, 2016—three days before any damage to the bridge was allegedly done, and it continued for over two months after the NDDOT publicly acknowledged that the bridge had not been structurally damaged. *See* Amend. Compl. ¶¶ 54, 61; *see also id.* ¶ 62. Indeed, the bridge could and should have been "safe[ly] and feasibl[y]" fully inspected "as early as October 28, 2016," which would have revealed then that it "was and had been structurally sound"—and that it could therefore have been immediately reopened. *See* Amend. Compl. ¶¶ 60-61. Thus, any interest that Defendants had in closing the road related to the safety of the bridge extended, at most, from October 27, 2016 to October 28, 2016. From a strictly temporal standpoint, Plaintiffs' alleged facts thus establish that "a substantial portion of the burden on speech"—roughly 147 out of the 148 days of the closure—

"[did] not serve to advance its goals." *McCullen*, 134 S. Ct. at 2535; *see also see* Amend. Compl. ¶¶ 8-9, 41, 65, 78, 131-32 (describing the significant amount of speech chilled at Sacred Stone and Rosebud Camps as a result of this unnecessarily long closure).

Whether measured by its duration or by its physical reach, the "scope of the restriction on [Plaintiffs'] expressive activity [was] substantially broader than necessary to protect" any purported interest related to the Backwater Bridge. *Taxpayers*, 466 U.S. at 808; *see also Madsen*, 512 U.S. at 753 (striking down as overbroad a buffer zone that was more narrowly tailored by order of *several magnitudes*); *Schenck*, 519 U.S. at 377 (same); *Kirkeby*, 92 F.3d at 662 (same); *Boos*, 485 U.S. at 329-32 (same); *cf.* Amend. Compl. ¶ 85 (describing numerous "alternative strategies" that Defendants could have used that would have been more effective, less costly, and less burdensome on speech).

**b. DAPL Construction**

Defendants' road closure was similarly not narrowly tailored to any purported construction-related interests of Defendants. *See Erznoznik*, 422 U.S. at 214. *But cf.* Amend. Compl. ¶ 79 (alleging that this was not Defendants' purpose).

Again, geographically, there was no need for Defendants to close nine miles of a public thoroughfare to protect a construction site no more than several-hundred feet in breadth. Nor was there a need to close the road when, "[f]or the vast majority of the duration of this discriminatory road closure, there was no active construction in the area." *Id.* ¶ 72. Yet "[t]hroughout this time, Plaintiffs, nevertheless, continued to desire to speak, assemble, and pray in public areas" that were unnecessarily closed by Defendants. *Id.* ¶ 72; *see also id.* ¶ 73 (noting that "the decision on the Lake Oahe crossing (and, ultimately, the operation of the pipeline) had an uncertain outcome" for the duration of the time in question). Thus, 8+ out of the nine miles of public forum

closed by Defendants here, and *at least* 130 out of 148 of the days that the road was closed "[did] not serve to advance" any construction-related goals of the closure. *See also id.* ¶¶ 8-9, 41, 65, 78, 131-32 (describing the significant amount of speech chilled at Sacred Stone and Rosebud Camps as a result of this unnecessarily long closure).[10]

Defendants go to great lengths in their memorandum to analogize this case to *Greifen*, a Ninth Circuit case applying a time, place, or manner analysis to a restriction on a traditional public forum—a road in rural Idaho—that was closed for construction. *See* County Def. Memo at 41-46; *see also Griefen*, 200 F.3d at 1256. Applying *Griefen* and the line of cases from which its analysis springs, however, does not help Defendants. The *Griefen* Court concluded that the closure order in question was narrowly tailored because it "was limited to the immediate construction area, and 150 feet on each side of the zone." 200 F.3d at 1260. Moreover, it "was not imposed until work was ready to begin, and it lasted for only 45 days, or until the project was completed." *Id.* at 1260-61. Most crucially, "given the spatial and temporal scope of the closure, it is clear that the protestors could continue their protest, but at a distance of 150 feet from the construction site. This tailoring left them with ample opportunities . . . to express their views." *Id.* at 1261. Even so, the Court noted that the breadth of the closure—150 feet—was potentially only justified because the Forest Service was "[f]aced with a clear and present threat to health and safety and property," and that the closure represented "a limited security zone around the danger area." *Id. Compare, e.g.*, Amend. Compl. ¶¶ 49-50 (alleging that the conduct at Standing Rock was overwhelmingly peaceful and lawful); *id.* ¶ 5 (describing how the public narrative to

[10] Defendants did not have any interest in closing Highway 1806 related to construction happening over a mile away on private land. *See also* Amend. Compl. ¶ 79 (alleging that this was not Defendants' purpose in closing the road). But even when this construction is accounted for, Defendants had no interest whatsoever in closing the road for more than one month out of its five-month duration. *See, e.g.*, Amend. Compl. ¶ 72 (alleging that no "active construction [occurred] in the area" except through "early November" and for "two weeks" following the Army Corps' reversal of its "legal prohibition on the only remaining construction in the area" on February 8).

the contrary was rooted in state and local officials' "persistent mischaracterization[,] . . . including in press statements, official declarations, and criminal charging documents").

Contrary to *Griefen*—or any of the numerous Supreme Court or Eighth Circuit cases applying a narrow tailoring analysis in similar circumstances—the physical and temporal "scope" of the road closure's restriction on speech was "substantially broader than necessary to protect" DAPL construction in the area. *See* Taxpayers, 466 U.S. at 808; *see also* Amend. Compl. ¶ 85 (describing numerous "alternative strategies" that Defendants could have used that would have been more effective, less costly, and less burdensome on speech). The size of the buffer zone at issue here, about 47,000 feet, vastly exceeds the 150-foot zone upheld in *Griefen*; and closing a road for *five months* that was under construction for no longer than *two weeks* is a far cry from *Griefen*'s closure that "expire[d] when the construction was completed." *Griefen*, 200 F.3d at 1258; *see also Madsen*, 512 U.S. at 753 (striking down as overbroad a buffer zone that was narrower by several magnitudes); *Schenck*, 519 U.S. at 377 (same); *Kirkeby*, 92 F.3d at 662 (same); *Boos*, 485 U.S. at 329-32 (same).

Defendants' mischaracterization (*et seq.*) of the NoDAPL movement as neither peaceful nor lawful does not change this analysis—and is not admissible at this juncture on a motion to dismiss. Even if it was appropriate to consider at this stage a factual counternarrative based on disputed extrinsic evidence that directly contradicts numerous factual allegations made in the Amended Complaint—it is not, and Defendants' claims regarding the 'violence' and 'mayhem' at Standing Rock must accordingly be disregarded—*Griefen* and *Boos* considered what sort of buffer zones were appropriate when protestors presented "a clear and present threat to health and safety and property." *Griefen*, 200 F.3d at 1261; *see Boos*, 485 U.S. at 329-32. In *Griefen*, the answer was a 150' buffer zone limited to the duration of the construction in question. In *Boos*,

the answer was a 500' buffer zone that only applied to gatherings that "turn violent." The discussion of narrow tailoring in both cases—and throughout the Court's analysis of buffer zones more generally—makes clear that a *nine-mile* buffer zone that persisted for numerous days and nights when there was no construction of any sort (or need for construction), when there was no disorder or threat of disorder in the area, and that applied predominantly to entirely lawful and peaceful speech, is not remotely narrowly tailored.

**3. The Road Closure Did Not Leave Open Ample Alternative Avenues for Communication**

Finally, Plaintiffs' allegations establish that the road closure failed to leave open ample alternative channels of communication, which provides yet another independent basis for striking down the closure on intermediate scrutiny.

The question of "ample alternative avenues" turns, in part, on what Plaintiffs have alleged regarding both the importance of a particular place of protest and their intended audience of speech: "'In some situations, the place represents the object of protest, the seat of authority against which the protest is directed. In other situations, the place is where the relevant audience may be found.'" *Galvin v. Hay*, 374 F.3d 739, 747 (9th Cir. 2004) (quoting and relying on *Wolin v. Port of N.Y. Auth.,* 392 F.2d 83, 90 (2d Cir. 1968)); *see also White House Vigil for ERA Comm. v. Clark*, 746 F.2d 1518, 1533 (D.C. Cir. 1984) (noting that "the White House area is a 'unique situs' for first amendment activity"); *cf. Brown v. State of La.*, 383 U.S. 131 (1966) (upholding speech rights attaching to speech directed at particular situs); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (same); *cf. also Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 790–91 (U.S. 1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it.").

Where the place of protest is symbolically important to the speech in question, fully removing the speaker from the vicinity of that place can therefore represent an impermissible restriction on speech. *See, e.g.*, *Galvin*, 374 F.3d at 750-51 (citing *Million Youth March, Inc. v. Safir,* 18 F. Supp. 2d 334, 348 (S.D.N.Y. 1998) (relying on *City of Ladue* for the proposition that plaintiff's choice of Harlem as the location of a protest march is of significance in First Amendment analysis because 'Harlem enjoys a unique place in the African–American experience,' such that '[h]olding the event in that location will infuse substantial and unique additional meaning to the message of the event'); *Nationalist Movement v. City of Boston*, 12 F. Supp. 2d 182, 192 (D. Mass. 1998) (relying on *City of Ladue* as 'recogniz[ing] that the specific place where a message is communicated may be important to the message and, consequently, of constitutional significance,' because 'the location [may] be an essential part of the message sought to be conveyed'); *cf. S. Boston Allied War Veterans Council v. City of Boston,* 297 F. Supp. 2d 388, 397 (D. Mass. 2003) ('[T]he location of speech is often vitally important to its message.')).

Plaintiffs here have alleged facts indicating the unique geographical importance of the specific location of their speech. *See, e.g.*, Amend. Compl. ¶ 47 (describing "[t]he importance of this specific stretch of road and curtilage," noting that "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."); *id.* ¶ 48 (describing the religious importance of speaking in this specific public forum); *id.* ¶ 44 (describing the resulting "range of expressive conduct" that Plaintiffs "regularly engaged in" on this land, which "could be (and routinely was) visited safely without impeding or disrupting traffic"). As such, under *Galvin*, *Wolin*, *Clark*, *Brown*, and *Edwards* (and the numerous additional described cases), the road closure's extended

displacement of Plaintiffs to *different* and non-fungible forums *miles* away fails intermediate scrutiny. *See Galvin*, 374 F.3d at 747; *Wolin*, 392 F.2d at 90; *cf. Clark*, 746 F.2d at 1533; *Brown*, 383 U.S. at 131; *Edwards*, 372 U.S. at 229.

Moreover, the Supreme Court and Eighth Circuit's repeated examination of buffer zones has given rise to a clear guideline for evaluating Plaintiffs' ability to reach a specific audience: any buffer zone on speech must allow protestors to be "seen and heard" by their intended audience. *See, e.g.*, *Madsen*, 512 U.S. at 770; *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678, 694 (8th Cir. 2012) (concluding that an ordinance on picketing within 300 feet of funerals was narrowly tailored because "Picketers can still reasonably communicate their message to funeral attendees and others"); *cf. McCullen v. Coakley*, 573 U.S. 464, 489 (2014) (holding a speech regulation may sometimes have to do more than merely allow protestors to be "seen and heard"). *See generally Phelps-Roper*, 697 F.3d at 694 (noting also that Manchester's ordinance is also distinct from most buffer zone cases in that it protects events, not locations. . . . A law barring picketing within 300 feet of a clinic closes an area of the city from protest activities without limitation in time. By contrast, Manchester's ordinance only restricts protests for a relatively short period, tailored to encompass a mourner's time of highest emotional vulnerability and no longer. Protesters are free to picket throughout the area for most of the day. Where the restriction on speech is relatively brief in time, it is not unreasonable to increase the range of a buffer zone without significantly burdening protesters' opportunity to convey their message.").

The road closure plainly fails on this ground as well: Plaintiffs have alleged facts showing that the closure impermissibly removed Plaintiffs from a principal desired audience for their speech. The road closure in question operated as a *nine-mile* buffer zone around the area in which the bridge was located or that construction occurred. As Plaintiffs allege (and common

sense dictates), this kept "Plaintiffs *miles* away (well out of line-of-sight or earshot) from the construction workers, security guards, and sites that had for months prior been a primary locus of Plaintiffs' First Amendment activity. This effectively left Plaintiffs without any means of communicating with one of their principal desired audience[s] (construction workers and security officers) or in one of their most symbolically important forums (Highway 1806's curtilage abutting the identified sacred and ceremonial sites near to where the pipeline would and eventually did cross)." Amend. Compl. ¶ 71. Accepted as true, Plaintiffs allegations show that the road closure prevented them from being "seen and heard" by "one of their principal desired audience[s]." *E.g.*, *Madsen*, 512 U.S. at 770.

Because the road closure unnecessarily and extensively removed Plaintiffs from even the remotest contact with a symbolically important geographical situs for speech, and *independently* because it fully prevented Plaintiffs from being "seen or heard" by one of their primary intended audiences, the road closure fails intermediate scrutiny.

**C. Viewpoint-Based Restriction**

Because Plaintiffs have alleged that the road closure was discriminatorily viewpoint-based—e.g., not content neutral—strict, rather than intermediate, scrutiny applies. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985) (""The existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination.").

The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views . . . . [T]he government must afford all points of view an equal opportunity to be heard." *Police Dept. v. Mosley*, 408 U.S. 92, 96 (1972). A facially neutral policy that has the effect of

discriminating based on viewpoint may, in some cases, suffice to allege a claim of viewpoint discrimination. *See*, *e.g.*, *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 544 (1982) ("[A] law neutral on its face still may be unconstitutional if motivated by a discriminatory purpose."); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 811-12 (1985) (noting that facially neutral and reasonable-seeming "justifications cannot save an exclusion that is in fact based on the desire to suppress a particular point of view").

In determining whether a speech regulation unconstitutionally discriminates based on viewpoint, the principal question "is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward*, 491 U.S. at 791. "The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content [or viewpoint] of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Viewpoint-based speech regulations are subject to strict scrutiny. *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

First, Plaintiffs have alleged that the closure in question discriminates by direct proxy for viewpoint. *See* Amend Compl. ¶ 55 (alleging that the closure was carefully tailored to ensure that those with NoDAPL viewpoints *could not* use the road for expression—or for travel or for legitimate business reasons); *id.* ¶¶ 55, 76 (alleging that the closure was carefully tailored to ensure that those with pro-DAPL viewpoints *could* use the road for expression); *see, e.g.*, *Erie Cty. Retirees Ass'n v. Cty. of Erie, Pa.*, 220 F.3d 193, 217 (3d Cir. 2000) (striking down such proxy discrimination); *McWright v. Alexander*, 982 F.2d 222, 228 (7th Cir. 1992) (same). This discriminatory design and effect illustrates the closure's viewpoint-based purpose. *See, e.g.*, Amend. Compl., ¶¶ 55, 56, 59, 76; *see also id.* ¶ 77. This is further supported by Defendants' own statements: "Defendants have given varying reasons for the need for this barricade but

consistently acknowledged that its target was the Tribe and its supporters"—a group largely defined by its NoDAPL viewpoint. *See, e.g.*, *id.* ¶¶ 59; 55. Finally, Plaintiffs' allegations show that these discriminatory effects were not incidental: as alleged, the road closure did not serve any unrelated purposes. *See, e.g.*, *id.* ¶¶ 49-50, 55, 61, 69, 79-84; *see also Ward*, 491 U.S. at 791. Thus, accepted as true, Plaintiffs' allegations are sufficient to give rise to the reasonable inference that this discriminatory road closure was based on the presumed NoDAPL viewpoint of the Tribe and its supporters—and strict scrutiny therefore applies. *See supra* Part I.E (applying strict scrutiny).

**D. Prior Restraint**

Moreover, Plaintiffs' pleadings establish that Morton County's closure of Highway 1806 constituted a prior restraint on speech.

A prior restraint is a government action "*forbidding* certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993) (emphasis in original). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). As a consequence, "prior restraints are subject to the highest degree of scrutiny and are the form of regulation most difficult to sustain under the First Amendment." *Henerey v. City of St. Charles, School Dist.*, 200 F.3d 1128 (8th Cir. 1999). Any "prior restraint on expression comes to [the reviewing court] with a heavy presumption against its constitutional validity." *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

Although "permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints," *Alexander*, 509 U.S. at 550, *any* government conduct that "den[ies] access to a forum for expression before the expression occurs" constitutes

a prior restraint, *United States v. Frandsen*, 212 F.3d 1231, 1236 (11th Cir. 2000). This includes checkpoints and roadblocks set up near to a protest or a concert. *See Bourgeois v. Peters*, 387 F.3d 1303, 1319 (11th Cir. 2004) ("Because individuals must, in effect, receive the permission of police officers to enter the area of the protest and to exercise their rights to freedom of speech and assembly, the search policy [instituted through a checkpoint] establishes a prior restraint on protected expression."); *Collins v. Ainsworth*, 382 F.3d 529, 545 (5th Cir. 2004) (holding that "Ainsworth's use of the driver's license checkpoints amounted to an impermissible prior restraint on the Concert" because "[n]o procedural safeguards were put in place to prevent censorship of legitimate speech and music"); *Mia Luna, Inc. v. Hill*, 2008 WL 4002964, at *5 (N.D. Ga. Aug. 22, 2008) (If "the Defendant restricted access to its venue and searched and seized incoming patrons by operating roadblocks," that was a prior restraint.).

The discriminatory road closure in question was even more onerous than the checkpoints and roadblocks held to be impermissible prior restraints in *Bourgeois*, *Collins*, and *Mia Luna.* The closure of Highway 1806 from late-October through March to the Tribe and its supporters plainly operated to "deny access to a forum for expression before the expression occurs," *Frandsen*, 212 F.3d at 1236 —namely *nine miles* of Highway 1806 and its curtilage (much of which had been near-constantly used for speech in the months leading up to the closure). Amend. Compl. ¶¶ 45, 48, 50, 55. If a police checkpoint that let drivers pass after a brief stop can constitute a prior restraint, a roadblock that fully prevented any NoDAPL-related speech from occurring over multiple miles of a regularly used public forum certainly does. *See Collins*, 382 F.3d at 545. Moreover, this closure also significantly burdened travel to the camps, restraining speech in those forums in much the way that the checkpoint in *Bourgeois* did.

County Defendants have argued that these road closures were used to control prospective illegal conduct and that any effects on associated speech were merely incidental. *But cf.* Amend. Compl. ¶¶ 49-50 (alleging that the NoDAPL movement was overwhelmingly peaceful, and therefore required nothing of this nature). However, the "law is clear that First Amendment activity may not be banned simply because prior similar activity led to or involved instances of violence. . . . The courts have held that the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure." *Collins v. Jordan*, 110 F.3d 1363, 1372-73 (9th Cir. 1997); *Kunz v. People of State of New York*, 340 U.S. 290, 2924 (1951) (holding that "[t]here are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence," and, therefore, rejecting the lower court's "mistaken[]" suppression of speech based on evidence that the speech in question "had, in the past, caused some disorder"); *United States v. Aglialoro*, 2001 WL 209912, at *4 (D. Or. Feb. 14, 2001) (holding that the Forest Service's apprehension around protestors' potentially unruly behavior did not "justify a ban on protected speech and expressive conduct, nor [did] the generalized interest in reducing road damage, especially given the minimal showing . . . that the road closure is necessary to serve that purpose"). Like in *Aglialoro*, accepting Plaintiffs' pleadings as true, the closure of Highway 1806 was not "necessary to serve" purposes related to prospective disorder or violence, *see, e.g.*, Amend. Compl. ¶¶ 49-50, 85, traffic safety, see *id.* ¶¶ 59-61, 85, the protection of construction, see *id.* ¶¶ 72, 85, or any other permissible purpose, *see id.* ¶ 85 (detailing more effective and less restrictive alternative mechanisms of accomplishing these goals); *id.* ¶¶ 79-84 (stating an alternative "true purpose" of the road closure).

Moreover, Defendants' reliance (at 48-51) on *Cross v. Mokwa* is inapposite. *Mokwa* involved criminal defendants seeking to escape the criminal consequences of their criminal actions based on the theory that their arrest restrained future speech: in *Mokwa*, the plaintiffs "were lawfully arrested for illegally occupying a condemned building," and thus *incidentally* prevented from engaging in a protest they had planned for later. 547 F. 3d 890, 896 (8th Cir. 2008). The Court held that *Virginia v. Hicks* applied: the state may complete an otherwise lawful arrest irrespective of the effects of the arrest on the arrestee's future intended speech. *Id.* at 876 (holding that, "[a]t a minimum, it was not clearly established in 2003 that a police officer could be liable on a 'prior restraint' theory for making arrests that were supported by probable cause").[11]

Indeed, even if this Court applies *Mokwa*, it would not command a different result. *Mokwa* noted several "critical" facts in holding that the arrest of plaintiffs did not constitute a prior restraint: that "violent conduct is not speech," that "plaintiffs carefully avoid the question whether the police actions in question were aimed at deterring, and in fact chilled, only unprotected violent protest activity," and that the arrests in question were "supported by probable cause." 547 F.3d at 896. Here, Plaintiffs have alleged, first, that the conduct at issue was not violent, but was overwhelmingly peaceful speech, travel, and prayer. *See* Amend. Compl. ¶¶ 49-

[11] Defendants also reference *Brewer v. Hoxie Sch. Dist. No. 46 of Lawrence County, Arkansas*, in passing. *See* County Def. Memo at 50 (citing 238 F.2d 91, 102 (8th Cir. 1056)). *Brewer* concerned a court's issuance of an injunction that prevented an anti-desegregation group from "interfering" with "the orders heretofore made integrating the public school of Hoxie." 238 F.2d at 94. Because "the terms of the injunction that was issued in this case did not go beyond preventing [acts that] . . . present no legitimate issue of free speech or assembly," the Court held that it did impermissible infringe speech. *Id.* at 102. It is unclear whether *Brewer* held that no protected speech was impacted by the injunction (in which case it would not be a prior restraint) or that the injunction was the least restrictive means of satisfying a compelling government interest (in which case it was a permissible prior restraint). Either way, this case is easily distinguishable: Plaintiffs have alleged here that the road closure predominantly impacted peaceful and lawful protected speech, religious exercise, and travel, including on *miles* of road on which no construction occurred and for *months* of time on which no construction was occurring or could occur. *See, e.g.*, Amend. Compl. ¶¶ 49-50, 72.

50. Second, rather than "avoid[ing] the question" of the aims of the "police actions in question," Plaintiffs have explicitly pled that the purpose of the road closure was to chill constitutionally protected conduct and to extort political concessions from the Standing Rock Tribe—and not to "deter . . . only unprotected violent protest activity." *See id.* ¶¶ 79-84, 49-50 (also alleging the lack of "violent protest activity" to deter: the "vast majority" of the speech and prayer in question was entirely peaceful). Finally and possibly most crucially, the fact that the police in *Mokwa* had probable cause for their arrest was of paramount importance in that case; indeed, *Mokwa* and *Virginia v. Hicks* imply that an arrest made *without* probable cause for purposes of suppressing future speech *would* constitute a prior restraint. Here, Defendants did not have probable cause to restrain any of the Plaintiffs in this case from speaking in this public forum in October *or* in November *or* in December *or* in January *or* in February *or* in March, let alone in all of these months. *Cf., e.g.*, Amend. Compl. ¶¶ 49-50, 79-84. Because Plaintiffs' allegations establish that this road closure constituted a prior restraint on their speech, it is subject to *at least* strict scrutiny, "bearing a heavy presumption against its constitutional validity." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990); *see* Part I.E, *supra* (applying strict scrutiny).

Finally, Plaintiffs have pled that the decision as to who was permitted to use the road was left to the uncontrolled will of officials, and, therefore, that this is a *per se* unconstitutional prior restraint. *See, e.g.*, Amend Compl. ¶ 76.

"It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.'" *Shuttlesworth v. City of Birmingham,*

*Ala.*, 394 U.S. 147, 151 (1969); *City of Lakewood v. Plain Dealer Pub. Co.,* 486 U.S. 750, 755–58 (1988); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). In *Shuttlesworth*, the Court considered an ordinance that left "the members of the Commission [] to be guided only by their own ideas of 'public welfare, peace, safety, health, decency, good order, morals or convenience'": "There can be no doubt that [this] ordinance, as it was written, conferred upon the City Commission virtually unbridled and absolute power to prohibit any 'parade,' 'procession,' or 'demonstration' on the city's streets or public ways. *Shuttlesworth*, 394 U.S. 147, 150 (1969) (striking the ordinance down due to its lack of "narrow, objective, and definite standards").

Defendants now claim that "[t]he only persons who were given government authorization to travel upon Highway 1806 in this vicinity were persons who had a legitimate business being in the secured area." County Def. Memo at 37. Far from saving the road closure, this claim reinforces its unconstitutionality: Defendants' "legitima[cy]" guideline was less defined, and more susceptible to abuse, than the ordinance held unconstitutional in *Shuttlesworth*. *See* 394 U.S. at 153-54 ("The City Commission could withhold a permit whenever 'in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require.'"). Indeed, this is revealed through the guideline's alleged irregular and discriminatory application: "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." Amend. Compl. ¶ 77 (emphasis added);[12] *see also, e.g.*, *id.* ¶ 76. Under

[12] Defendants' reliance on *Griefen*—out-of-circuit precedent—is unavailing. *Griefen* held that a *Shuttlesworth* analysis did not apply when the road that was closed "for a valid rather than a disguised impermissible purpose":

clearly established Supreme Court precedent, the guidelines or systems of exemptions used pursuant to this closure "ma[de] the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official" and therefore were *per se* unconstitutional. *See, e.g.*, *Shuttlesworth*, 394 U.S. at 151; *City of Lakewood*, 486 U.S. at 755-58.

**E. Strict Scrutiny**

Because the road closure was viewpoint-based and a prior restraint—and for several additional reasons not challenged by County Defendants, *see* Plaintiffs' Opposition to State Defendants' Motion to Dismiss—strict scrutiny applies. Plaintiffs' allegations establish that the road closure fails under this analysis.

Strict scrutiny requires that a speech regulation represent the *least restrictive means* available for furthering a *compelling* government interest. *See Sable Communications of Cal. v. FCC*, 492 U.S. 115, 126 (1989). "Strict scrutiny is an exacting inquiry, such that 'it is the rare case in which . . . a law survives strict scrutiny.'" *Republican Party of Minnesota v. White*, 416 F.3d 738, 749 (8th Cir. 2005) (quoting *Burson v. Freeman,* 504 U.S. 191, 211 (1992)); *see also Bernal v. Fainter*, 467 U.S. 216, 220 n.6 (1984) (noting that "strict-scrutiny review is 'strict' in theory but usually 'fatal' in fact").

Like with intermediate scrutiny, the strict scrutiny inquiry begins by determining the actual purpose of the government regulation in question. *See, e.g.*, *Cornelius*, 473 U.S. at 811. This purpose must be "compelling"; "only those interests of the highest order and those not

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"The process of granting authority to enter a lawfully closed zone differs markedly from the process of licensing expressive activity." *Griefen*, 200 F.3d at 1262. Here, Plaintiffs have specifically alleged facts showing that the road closure was *not* "valid" but was instead for "a disguised impermissible purpose." *See, e.g.*, Amend. Compl. ¶¶ 79-84. Further distinguishing this case from *Griefen*, Plaintiffs have alleged that Defendants' selectively applied their vague "legitimacy" guideline to control speech and other constitutionally protected conduct on *miles* of road and over *months* of time during which no construction was occurring. Finally, Plaintiffs have alleged that the discriminatory road closure licensed some expressive activity on the road and its curtilage—that by certain local residents and DAPL-affiliates—while prohibiting other. *See, e.g.*, Amend. Compl. ¶¶ 6, 55.

otherwise served can overbalance [constitutional claims that trigger strict scrutiny]." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *compare U.S. v. Eichman*, 110 S. Ct. 2404 (1990) (promoting respect for the U.S. flag is not compelling interest); *and Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (protecting a non-captive audience from being offended is not compelling interest); *with Branzburg v. Hayes*, 408 U.S. 665 (1972) (noting that the government has a compelling interest in "extirpating the traffic in illegal drugs, in forestalling assassination attempts on the President, and in preventing violent disorders [like the direct overthrow of the Government by way of force and violence] endangering both persons and property"). It is not enough, however, that the government's purpose be compelling. "In order to withstand strict scrutiny, the law must advance a compelling state interest by the least restrictive means available." *Bernal*, 467 U.S. at 219.

Defendants' discriminatory road closure fails strict scrutiny for the same reasons that it fails intermediate scrutiny. First, the government's illegitimate purpose of extorting political concessions from the Standing Rock Sioux Tribe does not constitute a compelling government interest. *See* Amend. Compl. ¶ 79; Part I.B.1 (discussing this in detail). Moreover, as discussed in Part I.B.2, *supra*, the road closure's limitation of constitutionally protected conduct on *miles* of road (and in the camps) and throughout *months* of time during which no construction was occurring or would occur is not narrowly tailored, let alone the least restrictive means of advancing Defendants' purported interests in construction or safety (which, again, are rejected as purposes by Plaintiffs' factual allegations and therefore must be disregarded on a motion to dismiss).[13] Finally, Plaintiffs have alleged a nonexclusive list of specific less restrictive means

[13] Indeed, Plaintiffs have also pled facts that establish that Defendants did not have a "compelling interest" in protecting a bridge that was not damaged, *see* Amend. Compl. ¶ 61, ensuring the completion of construction that had already been finished, *see id.* ¶ 79, or in quelling mayhem where there was none, *see Id.* ¶¶ 49-50.

that the Defendants could have used here: "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." Amend. Compl. ¶ 85 (alleging, also, that these alternative strategies were less costly and would have "substantially improve[d] public safety" while imposing less of a burden on constitutionally protected conduct in the area); *Bernal*, 467 U.S. at 219.

Accepted as true, these allegations establish that the road closure fails strict scrutiny.

**II. First Amendment Free Exercise (Count II)**

Second, Plaintiffs have sufficiently alleged a claim to relief under the Free Exercise Clause of the First Amendment.

The Free Exercise Clause "protect[s] religious observers against unequal treatment." *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 542 (1993).[14] Any state action that "target[s] the religious for 'special disabilities' based on their 'religious status'" is subjected to the "strictest scrutiny." *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2019 (2017). As with Free Speech claims, the government's purpose is a key part of this inquiry, and—with two exceptions—laws that are neutral and generally applicable must only pass rational basis review, even if they incidentally burden some religious expression. *See Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 884 (1990). The first

[14] Beliefs that are philosophical and personal, rather than religious, do not implicate the Free Exercise clause. *See Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Defendants do not challenge that Plaintiffs' beliefs are sincerely held or sufficiently religious.

exception is: "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Id.*; *Bowen v. Roy*, 476 U.S. 693, 708 (1986). Second, when the regulation in question infringes on religious exercise "in conjunction with other constitutional protections," it is subject to strict scrutiny. *Smith*, 494 U.S. at 873 (characterizing, as a "hybrid rights" claim, *Cantwell v. State of Connecticut*, 310 U.S. 296, 302 (1940) (applying strict scrutiny to statute that abridged Free Exercise and Press rights)).

Plaintiffs' Free Exercise claim is sufficient in three independent respects: (A) Plaintiffs' allegations show that the road closure was not neutral or generally applicable; (B) Plaintiffs allege, in the alternative, that if the road closure was neutral and generally applicable, that Defendants had in place a system of individual exemptions that they refused to extend to Plaintiffs in cases of religious hardship; and (C) Plaintiffs' allegations show that the discriminatory road closure burdened Plaintiffs' "hybrid" Free Exercise, Speech, and Travel rights. For *each* of these reasons, Plaintiffs have adequately stated a claim to relief under the Free Exercise Clause of the First Amendment (Count II). *See Iqbal*, *see* 556 U.S. at 675.

**A. The Road Closure Was Not Neutral or Generally Applicable**

First, Plaintiffs have alleged facts showing that the road closure was not neutral or generally applicable.

A regulation need not be facially discriminatory to be impermissible: the Free Exercise clause "protects against government hostility which is masked, as well as overt." *Lukumi*, 508 U.S. at 542. Among other things, the Court must examine whether the law in question is overbroad or underinclusive, as either would indicate that the state's given reasons are mere pretext for an improper animus. *Id.* at 544. To determine if the government is covertly

suppressing religious beliefs, the court must "meticulously" review the record, evaluating "both direct and circumstantial evidence" for a possibly discriminatory intent. *Id.*

Plaintiffs allege here that the road closure was not generally applicable, but was instead carefully tailored to exclude only the "Tribe and its supporters," a group defined by common religious beliefs and practices, *see* Amend. Compl. ¶¶ 55, 77 (alleging also that "any broader impacts were incidental and marginal"); like the impermissible ordinance in *Lukumi*, the road closure was crafted "with care to forbid few" uses of the road "but those occasioned by religious [practice]," *Lukumi*, 508 U.S. at 543. Second, Plaintiffs' allegations establish that Defendants had no legitimate nondiscriminatory purpose for closing the road. *See, e.g.*, Amend. Compl. ¶ 79; *see also id.* ¶¶ 80-84, 49-50, 132 (alleging facts showing that there was no 'mayhem'-related need to close the road); *id.* ¶¶ 60, 66-69 (alleging facts showing that there was no bridge-damage related need to close the road beyond October 28, 2016); *id.* ¶ 72 (alleging facts showing that there was no DAPL-construction-related need to close the road beyond, at the latest, early November). Third, the discriminatory road closure was both substantially underinclusive and overbroad to Defendants' asserted interests (which are contradicted by Plaintiffs' pleadings and must therefore be disregarded). *See, e.g. Lukumi*, 508 U.S. at 542. The closure impacted constitutional protected conduct on *miles* more road and throughout *months* more time than was necessary—while, at the same time, failing to adequately protect the purportedly damaged bridge: although the barricade on the closure's southern end "presented a physical boundary to any travel past the bridge on *or around* Highway 1806," "it did not prevent travel onto the bridge itself." *See, e.g.*, Amend. Compl. ¶ 7; Part I.B; *see also id.* ¶ 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."). Finally, Plaintiffs have alleged that Defendants "persistently mischaracterized public indigenous religious observances in this area as riotous, violent, and/or dangerous." Amend. Compl. ¶ 143, 99; *cf. id.* ¶¶ 49-50. The mischaracterization of marginalized groups, including religious groups, as violent or dangerous or criminal is widely understood to be an indicator of prejudice. *See, e.g.*, R. Richard Banks et al., *Discrimination and Implicit Bias in a Racially Unequal Society*, 94 CAL. L. REV. 1169 (2006) (discussing social science research).

Accepted as true, Plaintiffs' allegations establish that Defendants carefully tailored the road closure to exclude those who practiced indigenous religious beliefs, *id.* ¶¶ 55, 77, that Defendants had no legitimate non-discriminatory purpose for closing the road, *id.* ¶¶ 49-50, 55, 60-61, 69, 71-72, 77, that the road closure was inadequate and overbroad in fulfilling Defendants' *stated* (but pretextual) purposes, *id.* ¶¶ 80-82, 7, 66-68, 70, 60-63, that a primary result of this inadequacy and overbreadth was to substantially burden the disfavored indigenous religious practice in question, *id.* ¶¶ 44, 47-48, and that Defendants broadcast their animosity towards indigenous religious practice through numerous public statements, *id.* ¶¶ 5, 80-83, 143. This gives rise to the inference that the road closure was motivated by anti-religious animus and strict scrutiny therefore applies. *See, e.g.*, *Lukumi*, 508 U.S. at 542.

**B. Defendants Refused to Grant Religious Exemptions to Plaintiffs**

Plaintiffs have alleged, in the alternative, that Defendants maintained a system of exemptions from the closure that they did not extend to Plaintiffs in cases of religious hardship.

In *Bowen v. Roy*, the Court considered a statute that conditioned unemployment benefits on whether the employee missed work "without good cause": "The 'good cause' standard created a mechanism for individualized exemptions. If a state creates such a mechanism, its

refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Bowen v. Roy*, 476 U.S. 693, 708 (1986) (applying, therefore, strict scrutiny). The Court in *Smith* reiterated the applicability of this rule, even when the law otherwise appears to be neutral and generally applicable: "where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith*, 494 U.S. at 884.

Plaintiffs have alleged here that the road closure did exactly that. County Defendants now claim that the touchstone for who could use the road was who had "legitimate business" to do so. County Def. Memo at 37. This is remarkably similar to the "good cause" requirement in *Roy* and, similarly, created a system of exemptions to the road closure. *See Roy*, 476 U.S. at 708. Plaintiffs moreover allege that "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." Amend. Compl. ¶ 138; *see also id.* ¶¶ 76-77; *id.* ¶ 55; *id.* ¶ 72 ("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 [the road closure]."). These allegations are sufficient to trigger strict scrutiny—and therefore to state a claim to relief. *See supra* Part I.E.

**C. The Road Closure Violated Plaintiffs' "Hybrid" Free Exercise Rights**

Finally, Plaintiffs have adequately alleged facts supporting a "hybrid" Free Exercise claim to relief.

When state action burdens not only Free Exercise rights, but other constitutional rights—like freedom of speech and the press—the *Sherbert* test applies even if the action in question is neutral and generally applicable. *See Smith*, 110 S. Ct. at 1601 (noting that its decision did not overrule its prior cases applying *Sherbert* to "hybrid" claims); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472-73 (8th Cir. 1991) (holding that *Smith* "left open the viability of free exercise attacks on government actions that . . . violate the first amendment in conjunction with other constitutional protections"; and reversing the district court due to its failure to consider hybrid rights claim); *cf. Olsen v. Mukasey*, 541 F.3d 827, 832 (8th Cir. 2008) (reiterating that "strict scrutiny" applies to such "hybrid rights" challenges).

As described throughout this brief and in Plaintiffs' allegations, the road closure infringed closely intertwined speech, travel, and free exercise (in conjunction with commerce). For instance, Plaintiffs allege: "Much of the religious exercise that was substantially burdened by the discriminatory road closure also had an accompanying significant expressive purpose or assembly component . . . . 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." Amend. Compl. ¶¶ 140, 44-45; *see also id.* ¶¶ 65, 131-132 (alleging burdens on press).

Applying *Sherbert* to this case, Plaintiffs have alleged numerous facts showing that the road closure imposed a "substantial burden" on their ability to worship by numerous "sacred and ceremonial" sites that abutted the road. *See, e.g.*, Amend. Compl. ¶¶ 2, 9, 54, 71-72, 74-75, 85, 167; *Sherbert v. Verner*, 374 U.S. 398 (1963). "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." Amend. Compl. ¶ 137; *Sherbert*, 374 U.S. 398. This clearly states a Free Exercise claim. *See also supra* Part I.E (applying strict scrutiny).

### III. Privileges and Immunities (Count III)

Although Plaintiffs have stated right-to-travel claims for relief arising under the Fifth and Fourteenth Amendment, Privileges and Immunities Clause, and Section 1985(3), County Defendants have only asked this Court to dismiss "Plaintiffs' claim under the Privileges and Immunities Clause of Article IV." *See* County Def. Memo at 57-58.[15]

As the Supreme Court has repeatedly recognized, the Privileges and Immunities Clause gives rise to a constitutional right to travel. *See, e.g.*, *Saenz v. Roe*, 526 U.S. 489, 500 (1999) (noting that there are "*at least* three different components" of the "right to travel," of which at least two arise under the Privileges and Immunities Clause (emphasis added)). Plaintiffs allege that their P&I right to travel was violated in two specific respects: (A) the road closure was intended to, and did, discriminatorily burden visitors to North Dakota; and (B) the closure was intended to, and did, burden migration to North Dakota.

#### A. Burdens on Out-of-State Visitors

One of the components of the right to travel identified in *Saenz v. Roe* is that a "citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits. *Saenz v. Roe*, 526 U.S. 489 (1999) (describing this as "the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"). *Hughes*, 840 F.3d

[15] Plaintiffs do not discuss claims here that County Defendants have not asked this Court to dismiss. Nevertheless, if this Court would find a more complete discussion of Plaintiffs' claims helpful, Plaintiffs herein incorporate by reference the relevant portions of their right-to-travel discussion from their Opposition to State Defendants' Motion to Dismiss.

at 995. Included among these privileges and immunities is "the right of a citizen of one state to pass through, or to reside in any other state." *Id.* n.14. Any regulation that burdens such rights, by, for example, "requiring the nonresident to pay more than the resident for a hunting license or to enroll in the state university," must be justified by a "substantial reason." *Id.* (internal citations omitted). As *Saenz* recognized, the Court has construed the reach of the Privileges and Immunities Clause broadly, extending it to all nonresidents "who enter a State[,] whether to obtain employment, to procure medical services, or even to engage in commercial shrimp fishing." *Id.*; *see also Hughes*, 840 F.3d at 995 (holding that even "[a] purely intrastate restriction . . . implicate[s] the right of interstate travel" that arises under the Privileges and Immunities Clause if "it is applied *discriminatorily* against [travelers from other states]").

As Plaintiffs have alleged, the camps along the border of the Standing Rock Reservation were predominantly comprised of "out-of-state visitors to the region." Amend. Compl. ¶ 42; *see also* ¶¶ 40-43. With a sustained population of 7,000-10,000 individuals, these camps may have represented the single largest concentrated group of out-of-state visitors in North Dakota during the time in question—and likely represented the largest concentrated group of out-of-state visitors to *ever* visit Morton County. *Id.* Rather than welcome the "tens of thousands" of visitors to the state, *id.* ¶ 1, Defendants took the drastic step of closing a "key" thoroughfare "imperative to the flow of commerce and emergency responders to and from [the area in question]." *Id.* ¶ 148; *see also Saenz*, 526 U.S. at 489 (noting right to be treated as "welcome visitor").

Moreover, Defendants tailored the closure to maximize its restrictive impacts on the predominantly non-resident population in the area. *See, e.g.*, Amend. Compl. ¶¶ 55, 76-78, 138, 149-53 (describing how Defendants exclusively exempted North Dakota residents from the closure's reach). This unequal treatment, in turn, "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" the numerous out-of-state visitors staying at or seeking to visit the camps, *id.* ¶¶ 148, 153 (noting that "[g]iven 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"); *see also id.* ¶¶ 149-52. These consequences impacted each Plaintiff, whose interests in associating with as many like-minded individuals as possible was injured by the closure's deterrence of out-of-state visitors to the region. Moreover, Plaintiff Father John Floberg's organization of "a peaceful and lawful gathering of five hundred clergy who traveled to Standing Rock, mostly from out-of-state" was "substantially burdened by the discriminatory road closure" due to these numerous described effects. *Id.* ¶ 90. And similarly, the "discriminatory road closure also limited access to [Cissy Thunderhawk's] business for her customers."[16] *Id.* ¶ 86. Taken together, the discriminatory effects of the closure, which were carefully tailored to maximally impact the large group of out-of-state visitors (including, for a period, José Zhagñay, *id.* ¶ 91) staying on the northern border of the Standing Rock Reservation, greatly exceed the sort of burdens held to violate the Privileges and Immunities Clause. *See Saenz*, 526 U.S. at 489; *see also, e.g.*, *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952) (striking down, as a P&I violation, a licensing scheme imposing a $45 burden on non-residents).

Because of these burdens, and because Plaintiffs have pled that the closure substantially and discriminatorily burdened "the right of" this large group of non-citizens "to pass through, or

[16] If it cannot be reasonably inferred from Plaintiffs' allegations why a such a burden on out-of-state visitors traveling to, or seeking to travel to, this region of North Dakota would injure the proprietor of a café in the area, Plaintiffs seek leave to add additional allegations to this effect.

to reside in [North Dakota]," the closure is unconstitutional unless justified by a "substantial reason"—which, as described in Part I, it was not. *Saenz*, 526 U.S. 489; *see also Hughes*, 840 F.3d 987, 995 (8th Cir. 2016) (holding that the Clause applies to any interstate or intrastate travel restriction that "discriminatorily . . . burden[s] out-of-state residents"); *see also* Amend. Compl. ¶ 85 (listing numerous viable and less restrictive alternatives).

**B. Burdens on Migration to North Dakota**

Plaintiffs have also sufficiently alleged that the purpose and effect of the closure was to burden certain unwanted migration to North Dakota.

Another "component" of the right to travel recognized in *Saenz*, also arising from the Privileges and Immunities Clause, is, "the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state." *Saenz*, 526 U.S. at 502. *Attorney General of New York v. Soto-Lopez*, 476 *U.S.* 898, 901 (1986); *Hughes*, 840 F.3d at 995. "A state law implicates [this] right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right." *Soto-Lopez*, 476 U.S. at 903 (internal quotation marks and citations omitted). Any regulations that implicates this right is presumptively unconstitutional: the Court has "not identified any acceptable reason for qualifying the protection afforded by the Clause for 'the citizen of State A who ventures into State B to settle there and establish a home.'" *Saenz*, 526 U.S. at 502.

Plaintiffs have alleged that "[o]ne of the primary functions served by the camps was symbolic . . . . 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." Amend. Compl. ¶¶ 41, 91 (noting that "José sought to and ultimately did establish legal residency in North Dakota, with his sole domicile in the camps"). Moreover, Plaintiffs have alleged, in significant detail, that the purpose of the closure was to deter such travel. *See, e.g.*, *id.* ¶¶ 61, 79-84, 150, 152 (detailing, with substantial support, the closure's "true purpose" of extorting from the Tribe its assistance in halting and reversing migration to these camps). These allegations showing that the "primary objective" of this closure was "impeding travel" are sufficient to implicate the right and trigger strict scrutiny. *See Soto-Lopez*, 475 U.S. at 903.

Moreover, Plaintiffs have also alleged that the closure in question "actually deter[red] such travel." *Id.* For instance, the Amended Complaint describes how the road closure "greatly increase[ing] the risk of serious bodily injury and death to those gathered by the Cannonball River." Amend. Compl. ¶ 78. And, Plaintiffs have alleged that "[i]n icy or snowy conditions, . . . the detour was impassable even when Highway 1806 would not have been." *Id.* ¶ 65. The road closure also "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." *Id.* ¶ 148. These allegations all support the reasonable inference that "one of the effects . . . 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." *Id.* ¶ 150; *see also* ¶ 151 (noting that "numerous" parties were therefore deterred; ¶ 91 (noting that "[a]fter Highway 1806 was discriminatorily closed [and] this travel—and, by virtue, [José's] relocation to North Dakota—became substantially more difficult, [] he ultimately left both the camps and

North Dakota in December); ); ¶ 86 (describing the resulting injury to Cissy); ¶ 153. This, too, is independently sufficient to state a claim for relief under *Saenz* and *Soto-Lopez*.

## IV. Commerce Clause (Count IV)

### A. Interstate Commerce Clause

Plaintiffs have also stated a claim to relief under the Interstate Commerce Clause.

The Commerce Clause to the U.S. Constitution provides that Congress shall have power to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. Art 1 § 8, cl. 3. One of the limitations implied by the Commerce Clause, known as the "Negative," or "Dormant," Commerce Clause, provides that states cannot take action that improperly discriminates against interstate commerce. Under a Dormant Commerce Clause analysis, discriminatory laws motivated by "simple economic protectionism" are subject to a "virtually per se rule of invalidity." *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Maine v. Taylor*, 477 U.S. 131 (1986). This can be shown by "evidence in the record" that "demonstrates that the law has a discriminatory purpose," by laws that discriminate on their face, or by laws with a discriminatory effect. *South Dakota Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 592-93 (8th Cir. 2003). The Court has applied this test broadly. For example, in *Camps Newfound/Owatonna*, the Supreme Court held for a Maine summer camp burdened by a Maine tax: "[t]he record demonstrate[d] that the economic incidence of the tax falls at least in part on the campers." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 580 (1997) (noting that the fact that the "the discriminatory burden is imposed on the out-of-state customer indirectly by means of a tax on the entity transacting business with the non-Maine customer" was a "distinction [that] makes no analytic difference"). Any such showing of discrimination can only be overcome if the State has no other means to

advance its legitimate local purpose. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Maine v. Taylor*, 477 U.S. 131 (1986).

But it is not enough for a regulation to be non-discriminatory and "regulate[] even-handedly to effectuate a legitimate local public interest." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Non-discriminatory regulations still violate the Commerce Clause if "'the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits'" and there are "nondiscriminatory alternatives" available to "adequately [] preserve the local interests at stake." *Id.*; *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977).

First, Plaintiffs state an interstate dormant Commerce Clause claim to relief arising from the relatively excessive burdens of the road closure on commerce between North and South Dakota. *See Pike*, 397 U.S. at 142. "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 the closure's impact on interstate travel and therefore commerce was significant. *See* Amend. Compl. ¶ 162; *see also Camps Newfound/Owatonna, Inc.*, 520 U.S. at 573 (noting that "the transportation of persons across state lines [] has long been recognized as a form of 'commerce'"). Indeed, for "thousands of local residents," including "of north-central South Dakota," "Highway 1806 is their primary means of visiting family, shopping, seeking medical attention, and conducting other routine and necessary life activities." Amend. Compl. ¶ 3. The burden on interstate travel of closing this "key north-south public right-of-way," *id.*, was particularly severe because the alternative routes available for travel required detouring "on worse-maintained small roads that added significant time, stress, and danger to the trip." *Id.* ¶ 165. "In icy or snowy conditions (which persisted

throughout most of the duration of the discriminatory closure), the detour added . . . often an hour or more and, on numerous occasions, the detour was impassable even when Highway 1806 would not have been." *Id.* ¶ 65; *see also id.* ¶ 78 (noting that "[t]his region of North Dakota experienced severe winter weather for much of the period of the discriminatory road closure, including multiple major blizzards").[17] Accepting these allegations as true, the road closure severely burdened—often fully preventing—travel and therefore commerce between north-central South Dakota and south-central North Dakota. *See Camps Newfound/Owatonna, Inc.*, 520 U.S. at 573. On the other hand, the benefits of the closure were slight: indeed, given that there was no need to close the road related to local unrest, Amend. Compl. ¶¶ 49-50, bridge safety, *id.* ¶¶ 61, 69, or pipeline construction, *id.* ¶ 72, and given the numerous and extensive local burdens of the road closure, the Amended Complaint's allegations support the inference that the local 'benefits' of the closure were slight at best, and much more likely *negative*.[18] Plaintiffs have also alleged numerous specific less discriminatory alternatives that would have better served any local need to preserve traffic or public safety, further showing that the road closure was a locally costly, ineffective, and unnecessary measure. *See id.* ¶ 85. It is clearly established under *Pike* that a regulation that produces only slight local benefits while significantly burdening interstate commerce, with numerous better and less-burdensome alternative policies available, constitutes a violation of the dormant Commerce Clause. *See Pike*, 397 U.S. at 142.

[17] These are each plainly factual allegations that explain *why* the discriminatory closure substantially burdened travel, and not "legal conclusions to the contrary," as Defendants baldly claim. *See* County Def. Memo at 55-56.
[18] The Amended Complaint allows that DAPL construction occurred in the area of Highway 1806 but specifies that the construction "was completed in early-November." Amend. Compl. ¶ 72. This, at most, would provide justification for closing some smaller portion of Highway 1806 from the date at which the construction began through early-November.

Second, Plaintiffs state an interstate dormant Commerce Clause claim to relief arising from the fact that the closure's purpose and effect was to penalize the Tribe's casino. *See Camps Newfound/Owatonna*, 520 U.S. at 580 (holding that it is a violation of the dormant Commerce Clause when a regulation discriminatorily burdens an entity that "benefit[s]" "persons who are not residents [of the state in question])." Plaintiffs have pled here that the road closure was intended to, and in fact did, discriminatorily impair the flow of commerce to the Tribe's casino. *See* Amend. Compl. ¶¶ 160-61 ("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"); *see also* ¶¶ 79, 81. Moreover, Plaintiffs have pled that the casino distributes its income "widely throughout [the Tribe's] South Dakota communities." ¶ 160. Indeed, Plaintiffs have alleged numerous facts indicating that injuring South Dakota beneficiaries of the casino, and thereby pressuring the Tribe to accede to the their demands, was a crucial component of County Defendants' purpose in closing the road. *See id.* ¶¶ 160, 79-84.[19] Because Plaintiffs have alleged facts that, accepted as true, show that the purpose and effect of this road closure was to discriminatorily burden an entity that benefits South Dakota residents, it represents an impediment on commerce that is "all but *per se*" invalid under *Camps Newfound/Owatonna*. 520 U.S. at 580.[20]

[19] Defendants assert counterfactual claims regarding their purpose for closing the road, the need to close the road, or the effect of closing the road. *See* County Def. Memo at 56-57. Because these assertions directly contradict factual claims made by the Plaintiffs regarding the purpose, necessity, and effect of the road closure, Defendants' counterfactual claims must be rejected (or at least disregarded) on this Motion to Dismiss.

[20] Defendants argue that Plaintiffs claim fails because "there is no differential treatment between in-state and out-of-state economic interests" and because Plaintiffs have failed to "identif[y] . . . in-state and out-of-state competitors in the same market." County Def. Memo at 55-56. This is incorrect as both a factual and a legal matter. Factually, Plaintiffs have alleged differential treatment and have identified in-state and out-of-state competitors in the same market. *See, e.g.*, Amend. Compl. ¶¶ 160-6. Legally, to hold that a law is discriminatory and therefore *per se* invalid, a court may look at the effect *or* purpose of the law. *See, e.g.*, *Hazeltine*, 340 F.3d at 592-93. Identifying differential

### B. Indian Commerce Clause

Plaintiffs have also pled a claim to relief under the Indian Commerce Clause.

"It is well established that the Interstate Commerce and Indian Commerce Clause have different applications." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S 163, 192 (1989). Yet it is a non sequitur to conclude, as Defendants do, that the Indian Commerce Clause therefore has *no* application. County Def. Memo at 55. Indeed, in *Seminole Tribe of Florida v. Florida*, the Court noted that there is "no principled distinction in favor of the States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause": "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause." 517 U.S. 44, 62 (1996).

Although the exact breadth of its reach remains unclear, the Court has consistently maintained that the Indian Commerce Clause at a minimum vests the Federal Government with "the duty of protect[ing]" the tribes from "local ill feeling." *United States v. Kagama*, 118 U.S. 375, 383-84 (1886). And, as a result, regulations that constitute "undue discrimination against, or burdens on, Indian commerce" implicate the Dormant Indian Commerce Clause. *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 157 (1980). Regulations that are not unduly discriminatory or burdensome will also be impermissible when they are preempted by laws passed in accordance with Congress's Indian Commerce Clause power. *See Cotton Petroleum Corp.*, 490 U.S. at 177. The preemption analysis in this context "requires a particularized examination of the relevant state, federal, and tribal interests" [cognizant to] "both the broad policies that underlie the legislation and the history of tribal independence in the field at issue." *Id.* (noting also that "ambiguities in federal law are, as a rule, resolved in favor of tribal

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treatment and in-state and out-of-state competitors is probative of only effect. And under the *Pike* balancing test, even non-discriminatory laws violate the Commerce Clause.

independence"); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980) (holding, also, that no express congressional statement is required for preemption).

Here, Plaintiffs have pled facts that, accepted as true, show that the road closure constituted an "undue discrimination against, or burden on, Indian commerce." *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 157. First, the purpose of the closure was unduly discriminatory, as it was motivated by Defendants' desire to economically penalize the Tribe for supporting a political movement with which Defendants disagree, and to extort political concessions from the Tribe. *See, e.g.*, Amend. Compl. ¶¶ 79-83 (detailing numerous specific facts in support, including Defendants' recognition before closing the road that it is "imperative to the flow of commerce . . . to and from the Standing Rock Reservation"); *Confederated Tribes of Colville Indian Reservation*, 447 U.S. at 157; *Kagama*, 118 U.S. at 383-84. Moreover, the effect of this closure was unduly burdensome: through its placement, discriminatory reach, and five-month duration, the road closure imposed "millions of dollars" of burdens on the commerce of the Tribe. Amend. Compl. ¶ 163; *see also* ¶ 161 (describing how the discriminatory design and enforcement of the closure ensured that its impact on local non-tribal businesses was "relatively minimal"). The road closure therefore falls comfortably within the range of discriminatory regulations of tribal commerce that remain clearly prohibited by the Indian Commerce Clause.

Moreover, a preemption analysis of the closure similarly reveals that the discriminatory purpose and effect of closing Highway 1806 to the Tribe and its supporters similarly violates longstanding precedent on the limits on state or municipal control over Tribal commerce. *See* Part I. Here, by closing a key road leading into the Reservation, Defendants' actions had the de facto effect of regulating both commerce and travel on the Reservation. Under *Bracker*, the

combination of these two factors should be more than sufficient to hold the Defendants' conduct improper under a preemption analysis. *Bracker*, 448 U.S. at 144 (striking down a State motor carrier tax imposed on non-member activity occurring on White Mountain Apache trust lands).

**V. Retaliation (Count V)**

Plaintiffs have pled facts sufficient to make out a *prima facie* case of retaliation.

To state a retaliation claim, "a plaintiff must allege (1) that it engaged in a protected activity, (2) that the defendants responded with adverse action that would chill a person of ordinary firmness from continuing in the activity, and (3) that the adverse action was motivated at least in part by the exercise of the protected activity." *L.L. Nelson Enters. v. Cty. of St. Louis*, 673 F.3d 799, 807-08 (8th Cir. 2012) (internal quotations omitted).

First, Plaintiffs' allegations establish that, before the road was closed, plaintiffs engaged in a wide range of constitutionally protected activity. This includes speech, prayer, and travel on Highway 1806 and its curtilage and at Sacred Stone Camp and Rosebud Camp (including interstate migration). *See, e.g.*, Amend. Compl. ¶¶ 3, 40-41, 44, 49-50. Engaging in political speech or praying on a public forum, or in a private area with the landowner's permission, traveling on a public road, and moving to (or visiting) one state from another are all well-established examples of constitutionally protected activities.

Second, Plaintiffs have also pled that Defendants responded with adverse action that would chill a person of ordinary firmness from continuing the activity. "The ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment." *Garcia v. City of Trenton*, 348 F.3d 726, 728 (8th Cir. 2003). In *Garcia*, the Court considered whether several parking tickets were sufficient to meet the "ordinary firmness test":

"The issue is a close one, in our view. The total amount of the tickets was not large, $35.00. However, they came during a period of less than two months, and the threat of further harassment could reasonably be inferred. Ultimately, this sort of question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge, one ordinary person." *Id.* (remanding, as a consequence). As Plaintiffs have alleged here (and is discussed throughout this brief), the effects of the road closure were not small: among other things, the closure "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." Amend. Compl. ¶ 78. The alleged effects of the closure far exceed the low burden required under Eighth Circuit law. *See, e.g.*, 348 F.3d at 728.

Finally, Plaintiffs' allegations establish the requisite causal relationship between the closure and the protected conduct. *See Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). The Eighth Circuit has made clear that causation is generally not suitable for resolution in a Rule 12(b)(6) motion: "The causal connection is generally a jury question, but it can provide a basis for summary judgment when the 'question is so free from doubt as to justify taking it from the jury.'" *Revels v. Vincenz*, 382 F.3d 870, 928 (8th Cir. 2004); *see Jones v. City of Minneapolis*, 2009 U.S. Dist. LEXIS 84330, at *12-14 (D. Minn. Sep. 15, 2009).

As discussed throughout this brief, Plaintiffs have pled numerous facts showing that the road closure would not have been closed for as long or for so many miles (if at all) but for Defendants' retaliatory aim. *See, e.g.*, Amend. Compl. ¶¶ 61, 67-68, 79-84;150-53, 168. Indeed, Plaintiffs' pleadings establish that Defendants had no other reason for closing the road unrelated to the protected conduct in question. This is more than sufficient to show that the causal "question" is not "so free from doubt as to justify taking it from the jury." *Revels*, 382 F.3d at 928. Plaintiffs have therefore pled a claim to relief for retaliation.

## VI. Municipal Liability (Count VI)

Plaintiffs have alleged facts establishing municipal liability for Municipal Defendants. Indeed, County Defendants do not dispute that municipal liability applies to any violation of Plaintiffs' constitutional rights (or Section 1985(3)). *See* County Def. Memo at 50-51 (arguing only that there is no underlying wrongdoing).

Where the policy itself is unconstitutional, "[t]o establish a constitutional violation, no evidence is needed other than a statement of the municipal policy and its exercise." *Szabla v. City of Brooklyn Park, Minn.,* 486 F.3d 385, 389-90 (8th Cir. 2007) (noting, then, that "resolving [the] issues of fault and causation is straightforward"). Plaintiffs have alleged numerous facts showing that the road closure constituted "an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has the final authority regarding such matters." *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999); *see, e.g.*, Amend. Compl., ¶¶ 54, 61, 64, 102-06. Moreover, Plaintiffs have demonstrated that the root of the violation of their constitutional rights was the unconstitutional and discriminatory road closure. *See, e.g.*, *id.* ¶¶ 54, 59, 65, 71, 75-76. For the reasons described throughout this brief, the policy was unconstitutional and unlawful and Plaintiffs have therefore pled an adequate claim to municipal liability.

## VII. Supervisory Liability (Count VII)

Plaintiffs have sufficiently alleged that County Defendants' inadequate training, supervision, or discipline gave rise to constitutional violations. County Defendants' only objection to Plaintiffs' supervisory liability claims is similarly that they are derivative. County Def. Memo at 58-59.

To establish a failure-to-train theory, Plaintiffs must show that the relevant Defendants' "failure to train [] employees in a relevant respect evidences a 'deliberate indifference'" to the

Plaintiffs' constitutional rights. *City of Canton v. Harris*, 489 U.S. 378 (1989). This may be established by showing that the defendants in question:

1) Received notice of a pattern of unconstitutional acts committed by subordinates;
2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;
3) Failed to take sufficient remedial action; and
4) That such failure proximately caused injury to the children.

*Jane Doe A By & Through Jane Doe B v. Special Sch. Dist. of St. Louis Cty.*, 901 F.2d 642, 645 (8th Cir. 1990).

All of the required elements are met. First, Plaintiffs have alleged that the road closure gave rise to a "pattern of unconstitutional acts." *See, e.g.,* Amend. Compl. ¶¶ 76-77, 133, *see also id.* ¶¶ 7, 71. Plaintiffs have also alleged that Defendants had actual notice of the inadequacy of their supervisory practices 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." *Id.* ¶ 107. Despite this ample notice, County Defendants did not take any steps whatsoever to ameliorate the situation, letting the policy continue for months notwithstanding the ongoing constitutional violations, demonstrating their deliberate indifference to Plaintiffs' constitutional rights. *Id.* ¶¶ 8, 108, 146. Finally, because the road closure remained not only enforced but discriminatorily enforced for five months, Plaintiffs' allegations show that deliberate indifference was the cause of at least some of Plaintiffs' constitutional injuries. *See, e.g.*, *id.* ¶¶ 86, 88-90, 110.

## VIII. Qualified Immunity

Finally, the constitutional violations alleged by Plaintiffs each arise under, respectively, clearly established constitutional law—and so qualified immunity does not apply.

Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). If "no reasonable factfinder" could conclude that (1) "the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional right" and that (2) "the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful," qualified immunity applies. *Nance v. Sammis*, 586 F.3d 604, 609 (8th Cir. 2009). Qualified immunity only applies to individuals; municipalities, like Defendant Morton County, cannot avail themselves of this defense.

Although qualified immunity "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017). Qualified immunity most commonly arises in the context of the Fourth Amendment and other such "negligence torts," where officers' heat-of-the-moment decisions may violate suspects' rights under a heavily fact- and context-dependent inquiry with few well-developed standards. *See, e.g.*, Myriam E. Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845, 857 (2001); *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (describing the particular importance of qualified immunity in the "Fourth Amendment context"). Qualified immunity is an extreme remedy that, accordingly, is rarely applied. *See, e.g.*, Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 10 (2017) (reporting a

nationwide study revealing that just 0.6% of Section 1983 claims were dismissed on qualified immunity grounds at the Motion to Dismiss stage).

Here, the rights implicated by Defendants' road closure are each, respectively, clearly established. Although this is best shown through this brief's more detailed discussion of these claims, this final section illustrates the clearly established nature of the rights at issue by discussing two key disputed elements of Plaintiffs' claims.

First, there may be few constitutional questions more clearly established than whether a public road constitutes a traditional public forum. In the words of the Supreme Court, "[n]o particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988). Given that Plaintiffs here have also alleged facts that show that the public road in question has the essential characteristics of a traditional public forum—*see* Part I—the legal status of the road is undoubtedly "clearly established." *Harlow*, 457 U.S. at 818. This is, in some sense, too easy of an example; many constitutional rights will be far less clearly established and yet be sufficiently "beyond debate" to defeat any claims of qualified immunity.

Similarly, the Supreme Court has long recognized that the Privileges and Immunities clause protects not only out-of-state citizens, but "travelers who become permanent residents" *Hughes*, 840 F.3d at 995. It is therefore clearly established that the fact that all Plaintiffs were, for *some* (but not all) of the material time in question, residents of North Dakota cannot by itself defeat a Privileges and Immunities claim, as Defendants assert. County Def. Memo at 57-58. Indeed, the Supreme Court has repeatedly and explicitly applied the Privileges and Immunities clause to protect parties seeking to migrate, or who have recently migrated, interstate—like José Zhagñay. *See, e.g.*, *Soto-Lopez*, 476 U.S. at 903 ("A state law implicates the right to travel when

it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of that right.").

The crucial questions at the heart of each of Plaintiffs' claims—e.g., the extent to which speech may be limited on a traditional public forum; whether a regulation may fail to extend otherwise available exemptions in cases of religious hardship; and so forth—have been addressed in numerous Supreme Court and Eighth Circuit decisions, giving rise to well-developed rules and guidelines. Although no prior court may have considered the constitutionality of a five-month discriminatory closure of Highway 1806 in North Dakota, whether blocking roads "affects people's rights"—as Sheriff Kirchmeier recognized on October 17, Amend. Compl. ¶ 53—is nevertheless a "constitutional question beyond debate." *White*, 137 S. Ct. at 551. The extraordinary remedy of qualified immunity does not therefore apply.

## CONCLUSION

For these reasons, Plaintiffs' allegations are sufficient to state claims to relief for each asserted Count. Accordingly, County Defendants' Partial Motion to Dismiss must be denied.

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Respectfully Submitted

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