UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Cissy Thunderhawk; Wašté Win Young; Reverend John Floberg and José Zhagñay, on behalf of themselves and all similarly-situated persons, Plaintiffs, vs. County of Morton, North Dakota; Sheriff Kyle Kirchmeier; Governor Doug Burgum; Former Governor Jack Dalrymple; Director Grant Levi; Superintendent Michael Gerhart Jr; Tigerswan LLC; and Does 1 to 100, Defendants.	**REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT** **Case No. 1:18-cv-00212**

INTRODUCTORY STATEMENT

The plaintiffs' response confirms four dispositive points. First, the plaintiffs depend upon conclusory allegations that lack the corresponding factual allegations required to state valid claims against individual defendants under 42 U.S.C. § 1983. Second, the question whether government officials could protect public safety and prevent trespass on private property in response to demonstrated criminal activity is not, as plaintiffs contend, dependent upon an alleged factual dispute about "whether the NoDAPL movement at Standing Rock was overwhelmingly peaceful." Third (and relatedly), the plaintiffs want the Court to divorce itself from reality by ignoring its own previous decisions and numerous public records that objectively establish legitimate nondiscriminatory reasons for the highway and bridge closures. Finally, the plaintiffs discuss constitutional law at a high level of generality rather than making the necessary showing that government officials had notice of clearly established law that would demonstrate plain incompetence under the unique and particularized facts of this case for purposes of qualified immunity. State defendants respectively request that the Court grant their motion to dismiss.

LAW AND ARGUMENT

I. The plaintiffs depend upon conclusory allegations that require dismissal under Iqbal and Twombly.

In footnote 1 on page 5 of their response, the plaintiffs confirm their dependence upon conclusory allegations as the basis of their claims against the state defendants, such as alleging a Morton County policy was implemented "with the assistance and approval of Governor Jack Dalrymple, NDDOT Director Grant Levi, and Highway Patrol Superintendent Michael Gerhart Jr." See ECF Doc. 62 at 5 n.1. This allegation is unaccompanied by actual facts -- what, where, when, or hows -- required to state a plausible claim for relief. When did Dalrymple, Levi, or Gerhart assist in implementing the alleged policy? How did that alleged assistance manifest itself? What oral or written evidence demonstrates the alleged assistance? What was the specific nature of the assistance? And importantly, how did a specific personal act cause the constitutional violation alleged?

The allegation's conclusory nature is evident: no proper verdict form could simply lump the defendants together and ask for speculation on the type, manner or effect of assistance given in implementing Morton County's policy and how it caused a constitutional violation for which an individual was liable. Claiming the state defendants implemented an alleged policy is stating a conclusion, not a fact. Under the plaintiffs' reasoning, they could name anyone involved they choose and claim they assisted in implementing the alleged policy, and the allegation would survive a motion to dismiss. Qualified immunity cannot be negated by such reasoning. See, e.g., Dodds v. Richardson, 614 F.3d 1185, 1194 (10th Cir. 2010) ("In conducting qualified immunity analysis ..., courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights." (quoting Hope v. Pelzer, 536 U.S. 730, 751 n.9 (2002) (Thomas, J., dissenting)).

"When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558 (2007) (internal quotation marks and citation omitted). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Otherwise "a plaintiff with a largely groundless claim [can] take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value" of a case. Twombly, 550 U.S. at 558 (internal quotation marks and citation omitted). This Court "retain[s] the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters, 459 U.S. 519, 528, n.17 (1983) (quoted in Twombly, 550 U.S. at 558). This is especially true where the lack of well plead facts impacts an important substantive right, namely the right not to be sued at all. Pearson v. Callahan, 555 U.S. 223, 231 (2009).

Here, mere allegations regarding the state defendants' status as authorized policymakers, even if true, do not raise a valid claim. Without particular facts to support the conclusion that each individual state defendant personally assisted in implementing an alleged County policy, and personally and directly participated in any alleged constitutional violations, the complaint should be dismissed.

II. The undisputed fact that the protests were overwhelmingly peaceful is irrelevant to the question whether legitimate reasons justified the highway/bridge closure due to undisputed and ongoing criminal activity.

The plaintiffs mistakenly suggest the state defendants' motion to dismiss "makes plain [that] the substance of this litigation turns in large part around a factual dispute: whether the NoDAPL movement at Standing Rock was overwhelmingly peaceful[.]" ECF Doc. 62 at 3. The opposite is true. The state defendants never disputed that fact, and still do not. But that undisputed fact does not bear upon the question whether legitimate,

nondiscriminatory reasons justified the highway and bridge closures because of a criminal faction that infiltrated the otherwise peaceful protests. The Constitution does not require a head count comparing the number of peaceful protestors to the riotous ones before government officials can take action against the riotous. The fact that followers of a certain religion may be overwhelmingly peaceful does not prevent the government from protecting society against a small faction of religious extremists who resort to violence and criminal conduct to further their cause. The 911 attack, Oklahoma City bombing, and Boston Marathon bombing are all examples of the devastation a small group, even a single individual, can cause.

For the plaintiffs to suggest they can avoid dismissal simply by refusing to acknowledge in their complaint that criminal activity prompted the highway and bridge closures, would be similar to an employee claiming he could avoid dismissal of a First Amendment retaliatory discharge suit simply by omitting reference to his conviction for embezzling from his employer from his complaint. Ignoring the documented violent and criminal conduct that accompanied the DAPL protests by calling it a "counternarrative" invented by defendants should not save this case from dismissal.

The public records consist of more than mere charging documents; they are actual convictions and admissions of guilt. These records establish that criminal activity preceded the closures and was ongoing throughout the time the highway and bridge remain closed. It is appropriate for the Court to consider its previous decisions and numerous public records before allowing a potentially massive factual controversy to proceed that essentially depends upon the Court disregarding reality.[1]

[1] The Court's ability to consider material outside the four corners of the plaintiffs' amended complaint without converting the state defendants' motion into one for summary judgment was discussed at length in their initial brief, is further discussed in the response to the plaintiffs' motion to exclude extrinsic evidence (including the contention that, at a minimum, the Court must address qualified immunity at the dismissal stage), and will not further be repeated here.

III. The plaintiffs' discussion of constitutional law at a high level of generality confirms the state defendants' entitlement to qualified immunity.

For all the reasons set forth in the state defendants' initial brief, they are entitled to dismissal because the plaintiffs fail to state legally substantive claims. But even if that were not true, the plaintiffs' response confirms the state defendants are entitled to qualified immunity. Lacking from the response are cases setting forth clearly established law with respect to each of the substantive counts that would put government officials on notice they were plainly incompetent under this case's unique facts and circumstances.

With respect to Count I, the failure to oppose the contention that the closures were reasonable under a nonpublic forum analysis is an admission the state defendants' argument on that portion of their motion is well-taken. See Concord Energy, LLC v. Wightwolf Ventures, LLC, No. 4:14-CV-146, 2016 WL 7496892, at *2 (D.N.D. Mar. 11, 2016) ("Under D.N.D. Civ. L. R. 7(f), a failure to respond to the Defendants' partial summary judgment motion regarding these claims may be deemed an admission that the motion, limited to those claims, is well taken."); cf. Jasperson v. Purolator Courier Corp., 765 F.2d 736, 740 (8th Cir. 1985) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue."). The plaintiffs hinge their opposition entirely on the contention that Highway 1806 is a "street" and thus "without more" must be considered a traditional forum subject to time, place, and manner analysis.

But roads and city streets are not synonymous with high-speed highways; the fact that the former have long been recognized as public forums is irrelevant to the question whether the latter are, let alone whether clearly established law puts that point beyond debate. Frisby v. Schultz did not involve a rural, high-speed highway, but a city street in a Milwaukee suburb. 487 U.S. 474, 476 (1988). And the argument "rejected" in Frisby was that the "street" lost its status as a traditional forum because of the "physical narrowness of Brookfield's streets as well as . . their residential character." Id. at 480. The Supreme Court did not, as plaintiffs contend, reject an argument that the purpose of

a high-speed highway is incompatible with speech or assembly. Likewise, United States v. Griefen never held a rural high-speed highway is a traditional public forum; it involved a road under construction in a national forest. 200 F.3d 1256, 1258 (9th Cir. 2000). Notably, the Ninth Circuit never held the road itself was a traditional public forum, but merely assumed a broader point about "expressive conduct occur[ring] on public grounds, like a national forest" when applying its time, place, and manner analysis. Id. at 1259-60. Similarly, there is no indication that rural Arivaca Road was part of a state's high-speed highway system. Jacobson v. United States, 882 F.3d 878, 882 (9th Cir. 2018).

The Supreme Court has refused to expand the locations considered traditional public forums beyond those historically (immemorially and time out of mind) held in the public trust and used for expressive activity. See, e.g., Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 678 (1998) ("The Court has rejected the view that traditional public forum status extends beyond its historic confines[.]") (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680-681 (1992) (ISKCON)).

North Dakota's state highway system is a relatively new phenomenon, first mentioned in state law in 1943. See N.D. Cent. Code § 24-01-02 (originally enacted at Rev. Code 1943, § 24-0102). Thus, "given the lateness with which [the state highway system] has made its appearance, it hardly qualifies for the description of having 'immemorially ... time out of mind' been held in the public trust and used for purposes of expressive activity." ISKCON, 505 U.S. at 680 (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)). "When new methods of transportation develop, new methods for accommodating that transportation are also likely to be needed. And with each new step, it therefore will be a ***new inquiry*** whether the transportation necessities are compatible with various kinds of expressive activity." Id. at 681 (emphasis added).

The North Dakota legislature has never indicated the state highway system has as its "principal purpose . . . the free exchange of ideas." Cornelius v. NAACP Legal Def. &

Educ. Fund, Inc., 473 U.S. 788, 800 (1985); see N.D. Cent. Code § 24-01-01;[2] N.D. Cent. Code § 39-01-01.1.[3] Common sense alone demonstrates the free exchange of ideas is wholly incompatible with a high-speed highway system. Permitting people to assemble and discuss the environment in the midst of cars, trucks and semis traveling at high speeds is a recipe for personal injury and death, which neither advances First Amendment principles nor is consistent with the express purposes of the state highway system.

Taken to its logical conclusion, the plaintiffs' contention that Highway 1806 is "without more" a traditional public forum because it can be called a "road" or "street" is not only inconsistent with Supreme Court cases indicating a label (sidewalk) does not control over purpose, United States v. Kokinda, 497 U.S. 720, 727-29 (1990), but would mean that all modern high-speed highway systems – including the interstate highway system – must be considered traditional public forums.

The law is far from clearly established in that regard. The plaintiffs did not identify a single case that clearly holds a rural, high-speed highway must be considered a traditional public forum. Indeed, cases addressing locations adjacent to or related to modern high-speed highway systems have concluded such locations are non-public forums. See, e.g., Brown v. Cal. Dep't of Transp., 321 F.3d 1217, 1222 (9th Cir. 2003) ("Because CalTrans has not intentionally made highway overpasses available for public discourse, they are not designated public fora."); Jacobsen v. Bonine, 123 F.3d 1272, 1273-74 (9th Cir.1997) ("[I]nterstate rest areas are also not designated public fora which the government intentionally opened for public discourse [and] the perimeter walkways of a rest area are also not public fora.") (internal quotation marks and citation omitted);

[2]Setting forth the "free flow of traffic," "low cost of motor vehicle operation," "protect[ing] the health and safety of the citizens of the state," "increas[ing] property value," and "generally promot[ing] economic and social progress" as the purposes of the State Highway System.

[3]"[R]recogniz[ing] that the development of a modern and integrated highway system . . . is so essential to safe and efficient highway transportation."

Sentinel Commc'ns Co. v. Watts, 936 F.2d 1189, 1203 (11th Cir. 1991) ("[I]nterstate highways[] are relatively modern creations [that] permit[] traffic to flow over long distances . . . [C]omponents of the Interstate System . . . are hardly the kind of public property that has by long tradition . . . been devoted to assembly and debate. . . . Indeed, as modern phenomena rest areas have never existed independently of the Interstate System; they are optional appendages that are intended . . . to facilitate safe and efficient travel by motorists along the System's highways. At the outset, then, it seems clear to us that rest areas are non-traditional fora.") (internal quotation marks and citations omitted); State of Texas v. Knights of Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (concluding the Adopt-a-Highway Program for speech contained on signage in a state highway system's curtilage is not a traditional public forum).

Indeed, the lack of clearly established law with respect to the forum status of state highway systems and their curtilages is itself well-recognized. See, e.g., Suzanne Stone Montgomery, When the Klan Adopts-A-Highway: The Weaknesses of the Public Forum Doctrine Exposed, 77 Wash. U. L.Q. 557, 558 (1999) (noting the "difficulty" of a forum analysis in "the recent Adopt-A-Highway Cases in Missouri, Texas, and Arkansas. In these cases, four different federal courts, confronted with three substantially similar programs, approached the public forum doctrine in five different ways. Therefore, the courts reached three different decisions regarding the type of forum at issue").

Due to the lack of clearly established law regarding the forum status of a rural high-speed highway and its curtilage, the state defendants are entitled to have Count I dismissed. Similarly, the plaintiffs merely discuss constitutional law at a high level of generality with respect to the other counts of their complaint, without identifying cases "where an [official] acting under similar circumstances . . . was held to have violated the [Constitution]." White v. Pauly, 137 S. Ct. 548, 552 (2017). Missing are the cases that hold a highway closure clearly violates the Free Exercise clause, let alone under facts and circumstances similar to those involved here. Missing are the cases that clearly

establish a temporary, intrastate highway closure amounts to a constitutionally *significant* burden on the right to travel despite the availability of alternate (albeit less convenient) routes.[4] Missing are the cases that hold a temporary intrastate highway closure clearly violates the Privileges and Immunities Clause, the dormant Commerce Clause or the Indian Commerce Clause.

The bridge was closed after criminals set fire to vehicles and damaged the bridge and it became a crime scene. There were threats against the lives of law enforcement, subsequently proven in a court of law, during the protests. The plaintiffs would have the Court believe not only that the Constitution required the bridge to be repaired while it was still a crime scene and while a potential threat to public safety still remained (thereby risking suits brought by injured workers), but further that that point of law is clearly established. The plaintiffs would have the Court believe that clearly established law prevents the closure of a section of highway that corresponds with the nearest detour around a closed bridge. See ECF Doc. 62 at 16. If the plaintiffs' position is adopted, this case would stand for the novel proposition that the *Constitution itself* mandates that a state keep a highway open on both sides of a closed bridge, despite the fact that individuals would have to travel all the way to the closed bridge itself, on both sides, before doubling back on their route to take the nearest detour.

The plaintiffs rely upon statistical evidence about the rarity of qualified immunity dismissals in lieu of satisfying the requirement of presenting factually similar cases that would have put government officials on notice of their plain incompetence. The plaintiffs confirm their reliance upon form over substance, and labels over purpose, by contending "there may be few constitutional questions more clearly established than whether a public

[4] It is undisputed that multiple, alternate routes existed between South Dakota and North Dakota, and between Bismarck and Standing Rock. Inconvenient circuity of travel due to a road closure simply does not give rise to an injury of constitutional magnitude. See, e.g., Pande Cameron & Co. of Seattle v. Cent. Puget Sound Reg'l Transit Auth., 610 F. Supp. 2d 1288, 1303 (W.D. Wash. 2009), aff'd, 376 F. App'x 672 (9th Cir. 2010).

road constitutes a traditional public forum," ECF Doc. 62 at 61, despite their failure to identify a single case that clearly establishes the relatively modern phenomena of high speed highway systems and freeways fall within the category of traditional public forums whose principal purpose is the free exchange of ideas.

Qualified immunity protects government officials when they make mistakes of law, mistakes of fact, and even mistakes based on mixed questions of law and fact. Pearson v. Callahan, 555 U.S. at 231. To claim in hindsight that officials should face suit for violating clearly established constitutional rights under the unique circumstances involved in this case disrupts the balance between "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably" and subjecting only the plainly incompetent to suit. Id.

CONCLUSION

For the reasons stated, state defendants Burgum, Dalrymple, Levi, and Gerhart respectfully request that the amended complaint against them be dismissed in its entirety.

Dated this 22nd day of March, 2019.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ James E. Nicolai
James E. Nicolai
Deputy Solicitor General
State Bar ID No. 04789
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300
Email jnicolai@nd.gov

Attorneys for State Defendants.