

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

CIVIL NO. 1:18-CV-00212

Cissy Thunderhawk; Waste'Win Young;)
and Reverend John Floberg 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)
Gerhardt Jr.; TigerSwan LLC; and Does 1 to)
100,)

Defendants.)

**REPLY MEMORANDUM OF LAW IN
SUPPORT OF COUNTY DEFENDANTS'
MOTION TO DISMISS PLAINTIFFS'
AMENDED COMPLAINT**

INTRODUCTION

Defendants Morton County and Morton County Sheriff Kirchmeier (“County Defendants”) request the Court dismiss Plaintiffs’ claims against all Defendants, in their entirety, as the premise underlying all of Plaintiffs’ claims – namely Plaintiffs’ alleged right to engage in their constitutional rights in the vicinity, and at the times at issue, is wholly without merit. Plaintiffs have failed to allege a violation of their constitutional rights. The materials this Court may properly consider in relation to County Defendants’ Rule 12(b)(6) motion to dismiss establish legitimate nondiscriminatory reasons for the closures of Highway 1806 and the Backwater Bridge during the time periods at issue in furtherance of compelling government interests of protecting

the health and safety of the public, and in preserving private property rights following demonstrated criminal activity adversely impacting those interests.

Even assuming, arguendo, a constitutional violation has been alleged, the individual government official defendants are entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

LAW AND ARGUMENT

As a preliminary matter, County Defendants agree with, and incorporate herein by reference, *Reply Brief in Support of Motion to Dismiss Amended Complaint* (doc. 71) (“State Reply”) filed by State Defendants herein. As correctly argued by the State Defendants: 1) Plaintiffs rely upon conclusory allegations lacking corresponding factual allegations required to state valid claims against individual defendants under 42 U.S.C. § 1983; 2) whether government officials could protect public safety and prevent trespass upon private property was not dependent upon any alleged factual dispute about “whether the NoDAPL movement at Standing Rock was overwhelmingly peaceful”;¹ 3) this Court is not required to divorce itself from reality and ignore its own prior decisions and numerous public documents which objectively establish legitimate nondiscriminatory reasons for the highway and bridge closures; and 4) Plaintiffs’ discuss constitutional law at a high level of generality rather than make 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

¹ Although the majority of the individuals involved in protesting against the DAPL project in 2016 and 2017 were peaceful, it cannot reasonably be disputed that groups of individuals engaged in criminal activity, and that the frequency and severity of such criminal activity dramatically increased in October and November of 2016 in the vicinity at issue as established by public records and other materials this Court may consider in the context of Rule 12(b)(6).

immunity. State Defendants' arguments also apply to Plaintiffs' claims against County Defendants.

In addition to the reasons why Plaintiffs' claims against County Defendants should be dismissed, as discussed in County Defendants' principal brief, Plaintiffs' claims should be dismissed for the reasons discussed below.

I. Legitimate Nondiscriminatory Reasons Justified the Closure of Highway 1806 and the Backwater Bridge

Plaintiffs' claims are all premised upon the assertion there was no legitimate nondiscriminatory reason for the government to close Highway 1806 and the Backwater Bridge during the time periods at issue – a legal conclusion. However, the materials this Court may properly consider in relation to County Defendants' Rule 12(b)(6) motion to dismiss establish legitimate nondiscriminatory reasons for the closures of Highway 1806 and the Backwater Bridge in furtherance of compelling government interests of protecting the health and safety of the public, and in preserving private property rights following demonstrated criminal activity adversely impacting those interests. Material provided to the Court by County Defendants and State Defendants include not only charging documents, but also actual convictions and admissions of guilt. Plaintiffs should not avoid dismissal simply by denying such criminal activity occurred in the face of irrefutable evidence.

Plaintiffs' assertion the majority of the protest activities were peaceful, even if true, would not change the analysis. Public records provided to the Court conclusively establish criminal activity in the vicinity which posed a serious risk to the health and safety of DAPL construction workers, the general public and of the protesters themselves, and infringed upon the private property rights of those with whom the protesters disagreed, warranting closure of Highway 1806 in this vicinity for reasons unrelated to the content of the protesters' speech. It cannot reasonably

be disputed the State and Morton County had a compelling interest in restoring the rule of law to this vicinity, to protect the health and safety of the public and protesters from unlawful and dangerous activities of individuals protesting upon Highway 1806 and adjacent lands, and to prevent similar mayhem from re-occurring.

Plaintiffs' assert their claims only pertain to Highway 1806 and its curtilage – not to private property located adjacent thereto. However, Plaintiffs' allegations concede protesters were exercising their alleged power of eminent domain when they occupied private property in the direct path of the DAPL project (i.e. the North Camp). Plaintiffs apparently concede law enforcement were authorized and justified in preventing unlawful trespass upon this private property in the secured area. As discussed in County Defendants' principal brief, law enforcements efforts to obtain the voluntary evacuation of the private property was unsuccessful and a violent riot ensued. During the October 27 riot, protesters caused substantial damage to private property, including, among other things, burning heavy construction equipment utilized on the DAPL project, burning public and private vehicles and NDDOT electronic signage upon the Backwater Bridge causing damage thereto, and burning private vehicles at other locations in the vicinity. Protesters also engaged in illegal conduct and direct physical assaults upon law enforcement and DAPL workers by, among other things, throwing objects, evading and resisting arrest, hindering the progress of the police line by securing themselves to vehicles utilized by law enforcement, firing live rounds of ammunition at law enforcement, and twice stampeding bison toward law enforcement and other protesters. Law enforcement was ultimately able to remove the protesters to locations south of the Backwater Bridge. The Cantepeta Creek and Cannonball River formed a natural barrier between several large protester camps established south thereof (housing several thousand protesters), and the DAPL project location to the north. Preventing protesters from once again accessing and

damaging private property interests, assaulting DAPL workers and law enforcement, and preventing protesters from once again physically interfering with progress on the DAPL project were compelling interests of the State and Morton County. These compelling interests fully justified the closure of Highway 1806 from the Backwater Bridge to Fort Rice.

In addition, the undisputable facts and common sense establish law enforcement's decision to secure this vicinity through closure of Highway 1806 was justified. It is not disputed protester camps located immediately south of the Cantapeta Creek, and roughly one mile distant from the DAPL project site, were occupied by thousands of protesters. By comparison, the nearest community from which a sizeable law enforcement response could be dispatched was Mandan, North Dakota, located approximately 35 miles to the north of the DAPL project site. In other words, there was a considerable disparity in distances to access the DAPL project site which needed to be addressed. Further, it is not disputable individuals involved with the protests had already demonstrated a willingness to ignore lawful commands of law enforcement, to physically engage law enforcement, and had engaged in criminal activity in furtherance of their objective of preventing completion of the DAPL by any means necessary. Under these circumstances, utilization of the Cantapeta Creek and the Cannonball River into which the creek flows as a natural barrier between the DAPL project site and those who had acted upon their intentions to stop completion of the DAPL project through criminal behavior made common sense. Query the number of law enforcement officers (i.e. State and County resources) which would have been required to have been committed to full-time monitoring of the DAPL project site for a period of months to prevent a repeat of the October 27 riot (considering protesters repeated refusal to obey lawful commands and engagement with law enforcement) had Highway 1806 remained open right through the middle of the DAPL project site. The subsequent large scale November 20, 2016 riot

at the Backwater Bridge, during which large numbers of protesters from these camps attempted to penetrate and circumvent law enforcement's police line and barricade at the Backwater Bridge to once again gain access to the DAPL project site evidences this point.

Ultimately, legitimate nondiscriminatory reasons existed for the closures of Highway 1806 and the Backwater Bridge during the time periods at issue, unrelated to the content of the protesters' speech. The closures were in furtherance of compelling government interests of protecting the health and safety of the public, and in preserving private property rights following demonstrated criminal activity adversely impacting those interests. Such legitimate nondiscriminatory justifications are fatal to all of Plaintiff's claims. *See Weed v. Jenkins*, 2016 WL 4420985 *6 (E.D. Mo. 2016) (rejecting First Amendment claim by protesters arrested by police, noting protesters were arrested for engaging in trespass, blocking traffic, and creating hazards for others, not for the content of their speech).

II. Plaintiffs Had No Lawful Right to Exercise Their Constitutional Rights At the Locations In Question During the Time Periods in Question

In addition, and as a result of the legitimate nondiscriminatory closure of Highway 1806 and the Backwater Bridge, Plaintiffs had no lawful right to exercise their constitutional rights at the locations in question during the time periods in question, as discussed in County Defendants' principal brief (pp. 34-40.) Plaintiffs do not dispute the State and County Defendants had the legal authority to close Highway 1806 and the Backwater Bridge. The United States Supreme Court has repeatedly stated the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time[.]" and that "[t]he control of travel on the streets is a clear example of governmental responsibility to insure" an organized society maintaining public order. *Cox v. Louisiana*, 379 U.S. 536, 554-55 (1965).

III. Plaintiffs Have Not Alleged A Violation Of Their Constitutional Rights

In addition to the reasons discussed above, which alone justify dismissal of all of Plaintiffs' claims in this action, Plaintiffs' allegations also fail to allege plausible claims of violation of their constitutional rights for the reasons discussed in County Defendants' principal brief, and below.

A. Plaintiffs' Free Speech and Free Exercise Claims Should Be Dismissed (Counts I and II)

As explained in County Defendants' principal brief and in the State Reply, Highway 1806 in the vicinity at issue was and is a rural high-speed (65 mph) highway, and did not constitute a traditional public forum either before or at the time of the events at issue. Federal courts have recognized "the shoulders of highways are certainly not traditional public fora, such as streets or parks." *Robb v. Hungerbeeler*, 281 F.Supp.2d 989, 1000 (E.D. Mo. 2003); *see also Cuffley v. Mickes*, 44 F.Supp.2d 1023, 1027 (E.D. Mo. 1999) ("The shoulders of interstate highways are certainly not traditional public fora, such as parks and street corners where people have traditionally gathered to present, share and exchange ideas."). High speed rural highways were not at issue in *Griefen* or *Frisby*. *See United States v. Griefen*, 200 F.3d 1256 (9th Cir. 2000) (involving closure of a portion of a national forest to facilitate road construction); *Frisby v. Schultz*, 487 U.S. 474, 476 (1988) (involving a city street). *Jacobson v. United States*, involved a Border Patrol checkpoint on a rural Arizona two-lane road, without any indication the road at issue was part of a high speed highway system.

There is also nothing to indicate the State or Morton County intended to, or did, open Highway 1806 or its curtilage in the vicinity at issue, or the Backwater Bridge as forums of any kind. As explained by the United States Supreme Court:

Public property which is not by tradition or designation a forum for public communication is governed by different standards. We have recognized the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Service v. Greenburgh Civic Ass'n*, 453 U.S. [114, 129, 101 S.Ct. 2676, 2684, 69 L.Ed.2d 517 (1981)]. In addition to time, place, and manner regulations,

the state may reserve the forum for its intended purpose, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speakers view. *Id.*, 453 U.S., at 131 n.7, 101 S.Ct., at 2686, n.7. As we have stated on several occasions, “the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.” *Id.*, 453 U.S., at 129, 101 S.Ct., at 2684; *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 1216, 47 L.Ed.2d 505 (1976); *Adderley v. Florida*, 385 US. 39, 48, 87 S.Ct. 242, 247, 17 L.Ed.2d 149 (1966).

Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).

It would also make no sense to categorize the Backwater Bridge over which Highway 1806 passes as traditional public fora from a public safety standpoint. It is not disputed there is no pedestrian sidewalk over the Backwater Bridge – just the north/south bound lanes of Highway 1806 with a speed limit of 65 miles per hour.

With respect to Plaintiffs’ First Amendment Free Exercise claim, Plaintiffs do not allege the sacred and ceremonial sites are located on Highway 1806 or its curtilage, or on the Backwater Bridge. Instead, they vaguely allege such alleged sites are “located alongside this public nine-mile stretch of Highway 1806.” (Doc. 44 at ¶ 137.) In other words, the alleged sacred and ceremonial sites are located on privately owned property adjacent to Highway 1806. Plaintiffs have not alleged they were granted permission by the private property owners located adjacent to Highway 1806 to exercise their religious practices at the alleged sacred and ceremonial sites, and considering the private property at issue in the vicinity of the DAPL project site was privately owned by the company building the DAPL project, Plaintiffs’ could not realistically allege they were given any such permission. Therefore, Plaintiffs’ free exercise claim also fails as a matter of law as the government did not control access to the sacred and ceremonial sites at issue, and the opening of Highway 1806 and the Backwater Bridge would not have resulted in the Plaintiffs’ access to the alleged sacred and ceremonial sites.

Regardless, as discussed, the closures at issue served compelling government interests of protecting the health and safety of the public, and in preserving private property rights following demonstrated criminal activity adversely impacting those interests. These government actions, unmotivated by religious animus, do not violate the Free Exercise Clause, even if such actions had the incidental effect of burdening religious practices. *See Emp't Div. Dep't of Human Res., of Or. v. Smith*, 494 U.S. 872, 878-79 (1990) (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”) As a result, Plaintiffs have failed to plead a plausible violation of their constitutional rights under the First Amendment.

B. Plaintiffs’ Right to Travel Claim Should be Dismissed (Count III)

Plaintiffs have failed to allege a plausible claim of violation of their constitutional right to travel. “If a statute does not burden entry into or exit from the state, then it does not directly impair the right to free interstate movement.” *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d 987, 995 (8th Cir. 2016) (citing *Saenz v. Roe*, 526 U.S. 489, 500 (1999)). In addition, “a purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them.” *Id.* (quoting *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277 (1993) (emphasis in original)). “For the [Privileges and Immunities] Clause to apply, the discriminatory treatment must burden out-of-state residents.” *Id.* at 996 (citing *United Bldg. & Constr. Trades Council v. Mayor & Council of Camden*, 465 U.S. 208, 218 (1984)).

In *Hughes*, the Eighth Circuit appellate court rejected the argument a city’s issuance of traffic citations through the use of an automatic traffic enforcement system (i.e. traffic cameras) violated drivers’ right to travel, noting:

The drivers fail to allege discriminatory enforcement against out-of-state drivers. They state that the ATE system issues more citations to out-of-state drivers than to in-state drivers. However, they do not allege that the ATE system issues citations discriminatorily based on whether a vehicle has in-state or out-of-state registration. *See Bray*, 506 U.S. at 277, 113 S.Ct. 753. The drivers note that the ATE system allows out-of-state residents to contest, by mail, a Notice of Violation. This convenience for non-residents does not burden the right to travel. *See United Bldg.*, 465 U.S. at 218, 104 S.Ct. 1020. The drivers do not allege a violation of the right to travel under the Privileges and Immunities Clause.

Id. at 996.

In the present case, Plaintiffs fail to allege a viable claim of violation of their right to travel because the closure of Highway 1806 did not directly impair the right to free interstate movement across a North Dakota border with another state. It is not disputed the closed portion of Highway 1806 at issue was located entirely within North Dakota, and was located roughly 35 miles from the North Dakota/South Dakota border. There never was any restriction upon travel between North Dakota and South Dakota, or between South Dakota and the Reservation. South Dakota is located on the opposite side of the Reservation from where the secured area was located. Plaintiffs have failed to allege a viable claim as “[A] purely intrastate restriction does not implicate the right of interstate travel, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them.” *Hughes v. City of Cedar Rapids, Iowa*, 840 F.3d at 995 (italics in original). Plaintiffs’ fail to allege the enforcement of the closures at issue were dependent upon the registration of the vehicles attempting to travel upon Highway 1806 and the Backwater Bridge, or were otherwise dependent upon in-state versus out-of-state residency. Further, Plaintiffs, all alleged North Dakota residents, lack standing to vindicate the rights of any such out-of-state travelers purportedly injured by any such discriminatory treatment. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (courts have a “constitutionally proscribed role . . . to vindicate [only] the individual rights of the people appearing before it.”). As discussed in County Defendants’ principal brief, the Privileges and Immunities Clause provides no protection for

citizens/residents of the State whose regulation is challenged. *See United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 217, 104 S.Ct. 1020, 79 L.Ed.2d 249 (1984) (noting New Jersey residents disadvantaged by ordinance of municipality located in New Jersey have no claim under the Privileges and Immunities Clause (*citing The Slaughter House Cases*, 83 U.S. 36, 16 Wall. 36, 77, 21 L.Ed.394 (1872))).

Plaintiffs' assertion County Defendants have not requested dismissal of Plaintiffs' right to travel claims under the Fifth and Fourteenth Amendments, and § 1985(3) is incorrect. County Defendants' motion (doc.51) and memorandum of law in support thereof (doc. 52) request dismissal of all of Plaintiffs' claims against County Defendants, regardless of the legal theories alleged. Ultimately, Plaintiffs' right to travel claim, like the others, fails as a result of the legitimate nondiscriminatory justifications for closure of Highway 1806 and the Backwater Bridge in furtherance of the government's compelling interests.

C. Plaintiffs' Commerce Clause Claim Should be Dismissed (Count IV)

Plaintiffs argue the purpose of the closure of Highway 1806 was to "economically penalize the Tribe for supporting a political movement with which Defendants disagree, and to extort political concessions from the Tribe." Plaintiffs' Brief at 49. Plaintiffs argue the effect of this closure was unduly burdensome, and imposed "millions of dollars" of burdens on the commerce of the Tribe. *Id.* The four individually-named Plaintiffs in this action lack standing to pursue an injury that allegedly affects the Tribe. *See Gill v. Whitford*, 138 S. Ct. 1916, 1933 (2018) (courts have a "constitutionally proscribed role . . . to vindicate [only] the individual rights of the people appearing before it.")

Plaintiffs' claim concerning the effects upon commerce to and from the Standing Rock Reservation fails on its face as the dormant Commerce Clause only pertains to commerce between the States, and has no application to commerce between the States and Indian tribes. *See Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("It is well established that the Interstate Commerce and Indian Commerce Clauses have different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." (citations omitted)).

D. Plaintiffs' Retaliation Claim Should be Dismissed (Count V)

In this case, Plaintiffs' retaliation claim fails as Plaintiffs' have not alleged an actual injury to their constitutional rights, as discussed above. In addition, as discussed above, materials which this Court is permitted to consider in the context of a motion to dismiss establish the closure of Highway 1806 and the Backwater Bridge were for the purpose of protecting the health and safety of the public and to protect property rights in the vicinity at issue – all of which constitute substantial and compelling government interests as a matter of law – unrelated to protected speech. *See Bernini v. City of St. Paul*, 665 F.3d 997, 1006-07 (8th Cir. 2012) (determining plaintiffs had failed to allege a dismissible First Amendment retaliation claim where the only reasonable inference from the facts was that the unlawful conduct of the group within which the plaintiffs were a part, not protected speech, motivated the officer's challenged conduct). The closure of Highway 1806 occurred after and in response to widespread unlawful activity in the vicinity at issue which threatened the safety and health of the public, and which threatened private and public property rights. Plaintiffs cursory denial such unlawful activity occurred, despite the

overwhelming evidence to the contrary in public records, as recognized by this Court in its prior decisions, and as generally known within this Court’s jurisdiction, does not preclude this Court from taking judicial notice of such facts or otherwise taking that information into consideration in relation to the pending motions to dismiss. Plaintiffs’ retaliation claim therefore also fails as retaliatory animus was not the “but for” cause of Plaintiffs’ alleged injury. Dismissal of Plaintiffs’ retaliation claim is therefore warranted and requested.

E. Plaintiffs’ Municipal and Supervisory Claims, and Request for Class Certification, Should Be Dismissed (Counts VI and VII)

As explained by the United States Court of Appeals for the Eighth Circuit in *Speer v. City of Wynne, Arkansas*, 376 F.3d 960, 986 (8th Cir. 2002), neither a political subdivision or its employees can be held liable in a § 1983 action absent an actual violation of a plaintiff’s constitutional rights. *See also Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658, 691 (1978) (municipality cannot be held liable under § 1983 official municipal policy theory absent such policy actually causing a constitutional tort – a municipality cannot be held liable under § 1983 simply for employing a tortfeasor and cannot be held liable on a respondeat superior theory); *Schulz v. Long*, 44 F.3d 643, 650 (8th Cir. 1995) (“It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located.”); *Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d at 937 (dismissing class certification claim due to dismissal of underlying claims). Taking into consideration the material permitted under Rule 12(b)(6), Plaintiffs have failed to allege a violation of their constitutional rights. As a result, these derivative claims should be dismissed.

IV. Individual Government Defendants Are Entitled to Qualified Immunity

The Supreme Court has instructed that the issue of qualified immunity be resolved “at the earliest possible stage of the litigation.” *Pearson v. Callahan*, 555 U.S. 223, 231(2009) (quotation

omitted); *see Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011). This is because the defense is “an immunity from suit rather than a mere defense to liability” and “is effectively lost if a case is erroneously permitted to go to trial.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Mathers v. Wright*, 636 F.3d at 399 (citing *Mitchell v. Forsyth*, 472 U.S. at 526). In addition, a “driving force behind the creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials be resolved prior to discovery.” *Pearson v. Callahan*, 555 U.S. at 231 (quotation omitted).

Defendants are entitled to qualified immunity as Plaintiffs’ have not alleged a plausible violation of their constitutional rights by Defendants as discussed above, and even if Plaintiffs have alleged a plausible claim for violation of a constitutional right, such right was not so clearly established at the time of the deprivation so that a reasonable officer would have understood his conduct was unlawful under the circumstances presented. Plaintiffs have not cited a single case involving circumstances similar to those at issue in this case in which a court has found a constitutional violation by government officials. As correctly noted in the State Reply, Plaintiffs have not cited any cases holding a highway closure clearly violates the Free Exercise clause, let alone under facts similar to those at issue in this case. Plaintiffs have not cited any cases to establish a temporary, intrastate highway closure amounts to a constitutionally significant burden on the right to travel despite the availability of alternative (albeit less convenient) routes. Plaintiffs have not cited any cases holding a temporary intrastate highway closure clearly violates the Privileges and Immunities Clause, the dormant Commerce Clause or the Indian Commerce Clause.

On the other hand, there are reported cases involving law enforcement lawfully preventing protester access to closed areas to protect the health and safety of the public and to protect property threatened by protesters. *See, e.g. Bernini v. City of St. Paul*, 655 F.3d 997 (8th Cir. 2012)

(involving law enforcement's cordoning off downtown St. Paul, Minnesota as a no-go zone during Republican National Convention in 2008 due to prior heavy property damage by protesters in the vicinity, and utilizing less-lethal munitions to hold back aggressive protesters attempting to breach barricades); *United States v. Griefen*, 200 F.3d 1256 (9th Cir. 2000) (involving police enforcement of a secured area around construction zone to protect property threatened by protesters). There simply is no existing precedent which establishes beyond debate the unconstitutionality of Defendants' alleged conduct in this case. *See Kisela v. Hughes*, 138 S.Ct. 1148, 1151 (2018) (per curiam) ("Although this Court's caselaw 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."). Individual government defendants are therefore entitled to qualified immunity.

CONCLUSION

The Court should dismiss Plaintiffs' claims, in their entirety as against all Defendants, as the premise underlying all of Plaintiffs' claims – namely Plaintiffs' alleged right to engage in their constitutional rights in the vicinity, and at the times, at issue is wholly without merit. Plaintiffs have not alleged a violation of their constitutional rights. Even assuming, arguendo, Plaintiffs have alleged a violation of their constitutional rights, the individually named government official defendants are entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Dated this 5th day of April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2019, a true and correct copy of the foregoing **REPLY MEMORANDUM OF LAW IN SUPPORT OF COUNTY DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was filed electronically with the Clerk of Court through ECF.

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