

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MARCUS MITCHELL,

Plaintiff-Appellant,

v.

MORTON COUNTY SHERIFF KYLE KIRCHMEIER, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
CASE No. 1:19-CV-149
THE HONORABLE JUDGE DANIEL M. TRAYNOR

**BRIEF OF *AMICUS CURIAE*
NATIONAL CONGRESS OF AMERICAN INDIANS
IN SUPPORT OF PLAINTIFF-APPELLANT**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), National Congress of American Indians is a nonprofit organization with no parent corporations and in which no person or entity owns stock.

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

Established in 1944, the National Congress of American Indians (“NCAI”) is the oldest and largest national organization comprised of Tribal Nations.¹ NCAI’s mission is to protect and preserve the treaty and sovereign rights of Tribal Nations and to promote a better understanding of Native peoples, their cultures, and ways of life. NCAI is uniquely situated to provide critical context to the Court with respect to the activities related to and surrounding Standing Rock.

NCAI expressed its interest in and support for the movement at Cannonball, North Dakota (the “Movement”) with the 2016 passage of Resolution #PHX-16-023, calling upon the U.S. Army Corps of Engineers (“Army Corps”) “to deny the easement request to drill under Lake Oahe and do a full Environmental Impact Statement.”² Indeed,

¹ Pursuant to Fed R. App. P. 29(a)(2), Amicus has requested and obtained the consent of all parties to file this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), undersigned counsel hereby certified that no party’s counsel authored this brief in whole or in part, and no such counsel and no person (other than the *Amicus Curiae*, its members, or its counsel) contributed money intended to fund the preparation or submission of this brief.

² Res. #PHX-16-023, *Support for the Standing Rock Sioux to Protect its Lands, Waters, and Sacred Places*, NCAI (Oct. 2016), <https://www.ncai.org/resources/resolutions/support-for-the-standing-rock-sioux-to-protect-its-lands-waters-and-sacred-places>.

the Movement had broad support from Indian Country—356 separate Tribal Nations sent their flags to fly at the site where the peaceful protestors camped, and nearly 300 Tribal Nations passed resolutions or wrote letters of support for the Standing Rock Sioux Tribe’s (“Standing Rock” or “SRST”) efforts to protect SRST’s treaty rights.

NCAI was not alone in its support for the Movement. The President of the United States, in reference to the Movement, said to tribal leaders, “I know many of you have come together, across tribes and across the country, to support the community at Standing Rock and together you’re making your voices heard.”³ This Movement was a peaceful protest involving nearly all of Indian Country. It was not a radical protest of a fringe group.

In fact, NCAI’s resolution proclaimed “that in carrying out this resolution we remain in peace [as] . . . Indian Country’s first concern is for the safety of the peaceful protectors, law enforcement officers, government officials, and workers in Cannon Ball, ND, and any act of

³ Catherine Thorbecke, *President Obama Tells Standing Rock Demonstrators: ‘You’re Making Your Voice Heard’*, ABCNews Online (Sept. 26, 2016), <https://abcnews.go.com/US/president-obama-tells-standing-rock-demonstrators-youre-making/story?id=42361295>.

violence is unwelcome.”⁴ And as a joint statement on the Movement from the Department of Justice, the Department of the Army, and the Department of the Interior read: “In recent days, we have seen thousands of demonstrators come together peacefully, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites.”⁵

NCAI respectfully submits this *amicus* brief in support of Mr. Mitchell and the thousands of other Americans who stood in prayer and objected to the Army Corps’ complete abdication of its treaty and trust duties and responsibilities to protect and preserve the drinking water, sacred sites, and graves of Tribal Nations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Marcus Mitchell’s participation in the peaceful Movement and his decision to place himself, arms raised, in between law enforcement

⁴ NCAI Res., *supra* note 2.

⁵ Joint Statement from the Department of Justice, the Department of the Army and the Department of the Interior Regarding Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers (Sept. 9, 2016), <https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing>.

armed with 12-gauge shotguns and women and elder protestors, left him with irreparable damage to his eye, vision, hearing, and sense of smell, as well as chronic, debilitating pain on the left side of his face. Pet. App. AA45. The Native youth at Standing Rock who began this Movement are familiar with the history of similar violence inflicted on their people, but they began this Movement with hope. They began the Movement by taking a peaceful, prayerful “stand to be the voice for [their] community, for [their] great grandparents, and for Mother Earth.”⁶

These Native youth inspired Marcus Mitchell and thousands of others (Native and non-Native) who decided to join them in Cannonball, just one mile north of the Standing Rock Sioux Reservation. For six months, they engaged in a peaceful, prayerful protest—all the while demanding that the United States, specifically the Army Corps, uphold the treaty rights of the SRST and refuse to allow a private company, Dakota Access, LLC (“Dakota Access”), to build its pipeline. Mr. Mitchell and thousands of other peaceful protestors advocated for the

⁶ Anna Lee et al., *Jo Ellen Darcy: Stop the Dakota Access Pipeline*, CHANGE.ORG, (April 2016) <https://www.change.org/p/jo-ellen-darcy-stop-the-dakota-access-pipeline>.

SRST's treaty rights in a clear exercise of their First Amendment rights.

A few months after the protestors left, in May of 2017, the United States District Court concluded that the Army Corps had failed to take the requisite hard look that the National Environmental Policy Act (“NEPA”) requires with regard to the impacts of a potential Dakota Access pipeline spill on the fishing and hunting treaty rights of the Standing Rock Sioux Tribe. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 132 (D.D.C. 2017) (agreeing in part that the Army Corps’ “[Environmental Assessment] never examined the impacts of spills on [SRST] and its Treaty rights.”) (internal quotation marks and citation omitted).⁷ Indeed, the protected speech that Mr. Mitchell participated in called attention to the Army Corps’ violation of these treaty rights.

⁷ The D.C. Circuit Court of Appeals recently affirmed the District Court’s decision that the Army Corps violated federal law when it granted Dakota Access the easement to cross the Missouri River without first undertaking a full Environmental Impact Statement. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021).

While at Cannonball, North Dakota, Mr. Mitchell neither carried firearms nor engaged in acts of violence. Nothing in the record before the District Court demonstrates or suggests that he threatened to commit any act of violence. And when law enforcement ultimately shot him with a lead bean bag, destroying his eye and ripping apart his face, he was standing on a bridge on a public road, in front of elders, with his arms lifted to show he had no weapons. He did absolutely nothing to endanger public safety, and the District Court's suggestion that he or his fellow protestors somehow engaged in conduct that justified Morton County law enforcement's use of excessive force against Mr. Mitchell is not supported by the allegations in the Complaint.

If the excessive force used to silence Mr. Mitchell's protected speech stands, the ability of all NCAI member Tribal Nations to peacefully exercise their First Amendment rights—without risking injury from life-threatening, excessive police force—will be greatly undermined. NCAI therefore has a unique interest in advocating that the constitutional rights of Mr. Mitchell to speak, peacefully, in support of tribal sovereignty, treaty rights, and the preservation of Native American sacred sites and burials be protected. For the reasons that

follow, NCAI respectfully requests that this Court reverse the District Court's dismissal of Mr. Mitchell's claims.

ARGUMENT

I. The District Court mischaracterized the Movement at Standing Rock.

The District Court dismissed Mr. Mitchell's constitutional claims based on an erroneous and improper conclusion that the Movement he participated in was violent and dangerous. In reviewing a Motion to Dismiss under Federal Rules of Civil Procedure Rule 12(b)(6), the Complaint controls. Under Rule 12(b)(6), the court must accept the facts in the complaint as true "and draw all reasonable inferences in favor of the nonmoving party." *Cole v. Homier Distributing Co., Inc.*, 599 F.3d 856, 861 (8th Cir. 2010).⁸ Here, the District Court failed to accept the facts alleged in Mr. Mitchell's Complaint as true.

As the District Court acknowledged, "Mitchell alleges everyone was peacefully protesting[.]" Pet. App. AA56. However, in rejecting Mr.

⁸ See also *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 931 (8th Cir. 2012) (courts "may consider some materials that are part of the public record or *do not contradict the complaint*, as well as materials that are necessarily embraced by the pleadings.") (emphasis added).

Mitchell's retaliatory arrest claims, the District Court refused to adopt the allegations in the Complaint and instead mischaracterized the Movement as "a tumultuous protest that frequently devolved into violence." Pet. App. AA73.

Such a conclusion is at odds with Mr. Mitchell's Complaint. The protests Mr. Mitchell participated in were peaceful and often took the form of group prayer. Pet. App. AA54. As to Mr. Mitchell's arrest, he alleges that officers shot him "without cause or provocation," as he was standing with his "hands raised above his head" to show "he was unarmed and peaceful" and saying "mni Wiconi," Lakota for "water is life." Pet. App. AA 44, AA48-49. The District Court's conclusion that Morton County law enforcement officers were simply arresting individuals involved in a "tumultuous protest" cannot be squared with the plain language in Mr. Mitchell's Complaint.

Furthermore, the District Court's reliance on allegations from outside of the pleadings violates the Federal Rules of Civil Procedure, and ultimately undermines the protections the U.S. Constitution commands for free speech. The Movement, including Mr. Mitchell's involvement in it, was peaceful and grew from the efforts of Native

youth who took a stand for their rights under federal laws, including treaties and environmental and cultural protection statutes. From its inception, the Movement at Standing Rock was both peaceful and awe-inspiring, commanding nothing less than the protections the U.S. Constitution prescribes.

The Movement began on March 26, 2016, when a group of Standing Rock youth ran from Wakpala, South Dakota to Mobridge, South Dakota to raise awareness about the proposed pipeline.⁹ Their tribal leadership had provided comments to the Army Corps regarding the significant damage the pipeline would cause to sacred sites and the graves of their relatives if the pipeline was constructed along its proposed path just one mile north of the Standing Rock Sioux Reservation border.¹⁰ In addition to their run, several Native youth created a petition in opposition to the pipeline that ultimately garnered over half a million signatures. In their petition, the Native youth

⁹ Mary Kathryn Nagle, *Reclaiming Native Truth: A Project to Dispel America's Myths and Misconceptions, Lessons Learned from Standing Rock*, ECHO HAWK CONSULTING, FIRST NATIONS DEVELOPMENT INSTITUTE, 7 (July 1, 2018), <https://nativephilanthropy.candid.org/reports/lessons-learned-from-standing-rock/>.

¹⁰ *Id.*

explained why they were exercising their constitutional right to free speech in opposition to the Dakota Access Pipeline:

I'm 13 years-old and as an enrolled member of the Standing Rock Sioux Tribe, I've lived my whole life by the Missouri River. It runs by my home in Fort Yates North Dakota and my great grandparents' original home was along the Missouri River in Cannon Ball. The river is a crucial part of our lives here on the Standing Rock Reservation.

But now a private oil company wants to build a pipeline that would cross the Missouri River less than a mile away from the Standing Rock Reservation and if we don't stop it, it will poison our river and threaten the health of my community when it leaks.

My friends and I have played in the river since we were little; my great grandparents raised chickens and horses along it. When the pipeline leaks, it will wipe out plants and animals, ruin our drinking water, and poison the center of community life for the Standing Rock Sioux.

In Dakota/Lakota we say "mni Wiconi." Water is life. Native American people know that water is the first medicine not just for us, but for all human beings living on this earth.

The proposed Dakota Access Pipeline would transport 570,000 barrels of crude oil per day, across four states. Oil companies keep telling us that this is perfectly safe, but we've learned that that's a lie: from 2012[-]2013 alone, there were 300 oil pipeline breaks in the state of North Dakota.

With such a high chance that this pipeline will leak, I can only guess that the oil industry keeps pushing for it because they don't care about our health and safety. It's like they think our lives are more expendable than others'.

So we, the Standing Rock Youth, are taking a stand to be the voice for our community, for our great grandparents, and for Mother Earth. Join us, and sign to ask the Army Corps of Engineers to stop the construction of the Dakota Access Pipeline.¹¹

The youth decided to open a prayer camp in Cannonball, North Dakota, where Dakota Access was planning to construct the pipeline across the Missouri river, and where their relatives were buried—through the sacred sites in the pipeline’s proposed path.¹² The organizers of this Movement were not radical environmentalists or ecoterrorists, they were young citizens of the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, fighting to ensure a livable homeland for present and future generations and to protect the graves of their ancestors.

The youth named their camp “Sacred Stone”—where before the Army Corps’ damming of the Missouri River in the 1950s, the River’s natural current spit out perfectly spherical stones that looked like cannonballs. From the beginning, the youth focused on prayer. “Days

¹¹ Anna Lee et al., *supra* note 6.

¹² Saul Elbein, *The Youth Group That Launched a Movement at Standing Rock*, N.Y. TIMES, (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/magazine/the-youth-group-that-launched-a-movement-at-standing-rock.html>.

began with a water ceremony; the sacred fire had to be regularly fed; meals began with prayer and a ‘spirit plate’ served for the ancestors; alcohol and drugs were strictly forbidden.”¹³

On April 26, 2016, when it was clear that the Army Corps was moving toward granting Dakota Access the necessary easement to construct the pipeline across the River, Standing Rock and Cheyenne River Sioux youth ran from Cannonball to Omaha, Nebraska, to deliver a petition to the Army Corps.¹⁴ The petition the youth carried from Cannonball now contained 457,000 signatures and demanded that the Army Corps refrain from granting Dakota Access the easement the company needed to construct the pipeline across the River.¹⁵ The petition included the words “mni Wiconi.”¹⁶ Water is life. The same words uttered by Mr. Mitchell before the Morton County Sheriff’s Office brutalized him. Despite their efforts, the Colonel of the Army Corps refused to even meet with the Native youth who had run so far to peacefully deliver their message.

¹³ *Id.*

¹⁴ Nagle, *supra* note 9, at 7.

¹⁵ *Id.*

¹⁶ Anna Lee et al., *supra* note 6.

When the Army Corps ignored their request, the youth then ran from their camp at Cannonball all the way to Washington, D.C.¹⁷ In July 2016, thirty young runners ran over two thousand miles to the White House and demanded that President Obama stop the pipeline.¹⁸ While in Washington, D.C., they delivered a petition with more than 160,000 signatures to the Army Corps asking that the pipeline not be built next to their Reservation.¹⁹

Less than two weeks after the Native youth ran to the White House, the Army Corps issued a Final Environmental Assessment (“EA”) and “finding of no significant impact” (“FONSI”), thereby granting Dakota Access an easement to construct the pipeline under Lake Oahe and the Missouri River.²⁰ Two days after the issuance of the EA, the SRST filed a complaint in the United States District Court, District of Columbia, alleging that the EA violated federal law (“Standing Rock Complaint”). In the Standing Rock Complaint, the

¹⁷ Nagle, *supra* note 9, at 7.

¹⁸ *Id.* at 10.

¹⁹ *Id.* at 18.

²⁰ Complaint For Declaratory and Injunctive Relief, ¶ 69, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534) [hereinafter *Standing Rock Complaint*].

Tribe incorporated the youth's arguments, averring that the Army Corps did not have the authority to grant Dakota Access the easement.²¹ Standing Rock filed a motion for preliminary injunction, seeking to stop construction before irreversible damage was done to the burials sitting in the pipeline's proposed path.²²

On August 12, despite SRST's lawsuit and its pleas not to desecrate the burial grounds of tribal ancestors, Dakota Access began constructing the pipeline. In response, Chairman of the SRST, David Archambault II, along with many other tribal citizens, walked to the construction site and engaged in a peaceful protest, asking Dakota Access to stop its construction because the construction would destroy Dakota and Lakota cultural resources.²³

In response, Morton County law enforcement arrested them.²⁴ The arrest of Chairman Archambault on August 12 marked the beginning of an over-militarized response to a peaceful protest. In an Official

²¹ *Id.* ¶ 3.

²² *Id.* ¶¶ 1, 51.

²³ Valerie Taliman, *Dakota Access Pipeline Standoff: Mni Wiconi, Water is Life*, INDIAN COUNTRY TODAY, (last updated Sep. 13, 2018), <https://indiancountrytoday.com/archive/dakota-access-pipeline-standoff-mni-wiconi-water-is-life>.

²⁴ *Id.*

Statement released six days after his arrest, Chairman Archambault stated that Standing Rock “supports the right of our citizens and supporters of [the SRST] to engage in peaceful, non-violent expressions of their opposition to the Pipeline.”²⁵ He further expressed:

We gather near Cannonball River in prayer. We emphasize that these demonstrations are non-violent actions that are grounded in the shared belief that we must protect current and future generations that rely on our rivers and aquifer to live. We insist on peaceful action and we have asked those coming to join us in solidarity come in a peaceful, safe, and prayerful manner.²⁶

Chairman Archambault’s arrest and prayerful response inspired thousands to travel to Cannonball, North Dakota, and stand with Standing Rock.²⁷

The Movement’s guiding principles were clear from the beginning; the protestors (also known as “Water Protectors”) were peaceful and focused on prayer. Chairman Archambault wrote: “Any act of violence hurts our cause and is not welcome here. We invite all supporters to

²⁵ Standing Rock Sioux Tribe, (@StandingRockST), FACEBOOK, (Aug. 18, 2016), <https://www.facebook.com/StandingRockST/photos/a.422881167740159/1337366169624983>

²⁶ *Id.*

²⁷ Nagle, *supra* note 9, at 8.

join us in prayer that, ultimately, the right decision—the moral decision—is made to protect our people, our sacred places, our land and our resources.”²⁸

Indeed, after Morton County made massive, illegitimate arrests in October 2016, the SRST reminded the then thousands of individuals at the camp that they would not be permitted to stay in the camp if they reacted to law enforcement’s aggression with violence: “We have stood side by side in peaceful prayer and will continue to do so as we fight to permanently protect that which is sacred to all of us.”²⁹ In one statement, Chairman Archambault said: “we’re asking everybody to remain prayerful and peaceful and not to react to any form of aggression that law enforcement brings.”³⁰ He also reiterated that SRST did not want to see pipeline construction workers, law enforcement, or

²⁸ Standing Rock Sioux Tribe, (@StandingRockST), FACEBOOK, (Oct. 10, 2016), https://www.facebook.com/permalink.php?story_fbid=1395174323844167&id=402298239798452.

²⁹ *Id.*

³⁰ *In Fight Over N.D. Pipeline, Tribe Leader Calls For Peace And Prayers*, NPR (Oct. 27, 2016), <https://www.npr.org/2016/10/27/499479185/in-fight-over-n-d-pipeline-tribe-leader-calls-for-peace-and-prayers>.

Water Protectors injured.³¹ As one public figure observed: “They spend basically the entire day doing prayers, chanting. I’ve never been around so peaceful a stand.”³²

The Movement at Standing Rock was a peaceful and communal outgrowth of the Native youth’s efforts to stand up for their community. Mr. Mitchell’s Complaint alleges as much, and the District Court committed reversible error when it failed to accept the well-pled allegations in Mr. Mitchells’ Complaint as true.

II. North Dakota’s Over-Militarization in Reaction to the Peaceful Movement Threatens the First Amendment Rights of All Americans

If allowed to stand with no consequence, the level of violence used by Morton County law enforcement against peaceful protesters will threaten the First Amendment rights of not just Native Americans, but all Americans. The District Court’s Order sets a precedent of granting impunity to governments and law enforcement officials who deliberately

³¹ *Id.*

³² Marlena Baldacci, Emanuella Grinberg & Holly Yan, *Dakota Access Pipeline: Police remove protesters; scores arrested*, CNN (Oct. 27, 2016, 9:52 PM), <https://www.cnn.com/2016/10/27/us/dakota-access-pipeline-protests>.

trample on the civil liberties of Americans when those civil liberties are exercised in support of locally, or historically, unpopular views or beliefs. That is not what the United States Constitution stands for.

North Dakota took an overmilitarized approach to a non-violent, lawful protest at the outset. Five days after Morton County arrested Chairman Archambault and 17 other peaceful protestors,³³ on August 17, 2016, North Dakota law enforcement set up a roadblock approximately 25 miles north of the Sacred Stone Camp,³⁴ making it all the more difficult for individuals travelling from across the country to support the peaceful protest to actually get there via state highway. On August 19, 2016, just seven days after Chairman Archambault was arrested for peacefully protesting the unlawful destruction of the graves

³³ Lauren Donovan, *Standing Rock Sioux chairman arrested at Dakota Access Protest*, THE DICKINSON PRESS (Aug. 12, 2016, 10:04 pm), <https://www.thedickinsonpress.com/news/4093752-standing-rock-sioux-chairman-arrested-dakota-access-protest>.

³⁴ Lauren Donovan, *Negotiations underway to remove protest roadblock*, THE BISMARCK TRIBUNE (Aug. 31, 2016), https://bismarcktribune.com/news/state-and-regional/negotiations-underway-to-remove-protest-roadblock/article_727d3f6c-54dc-5695-9020-5978c4640748.html?fbclid=IwAR0A8B0pUL-aGimDEbuA5Lsx2cCvCGsbytRX0T451Cimo3utYAPu8T2jKKM.

of his relatives,³⁵ the Governor of North Dakota declared a “state of emergency.”³⁶ As the University of Arizona Rogers College of Law, Indigenous Peoples Law and Policy Program noted to the Inter-American Commission on Human Rights, the over-militarization of the governmental and corporate response was undeniable: “During the seven months from September 2016 to February 2017, at least 76 different law enforcement agencies, federal agencies, and private security firms hired by [Dakota Access] were present at some time.”³⁷

The use of violence and force to intimidate these peaceful protestors culminated over Labor Day weekend, 2016. On Friday,

³⁵ Chairman Archambault was arrested on August 12, 2016, for disorderly conduct but was subsequently acquitted by a Morton County jury. ICT Staff, *Archambault Acquitted on DAPL Charges*, INDIAN COUNTRY TODAY (June 2, 2017), <https://indiancountrytoday.com/archive/archambault-acquitted-dapl>.

³⁶ Caroline Grueskin, *Governor issues emergency declaration in response to pipeline protests*, THE BISMARCK TRIBUNE (Aug. 19, 2016), https://bismarcktribune.com/news/state-and-regional/governor-issues-emergency-declaration-in-response-to-pipeline-protests/article_6b189499-0d39-5223-93a4-5f10e53e735c.html.

³⁷ Seanna Howard, Michelle Cook, Carl Williams & Rachel Lederman, Report to the Inter-Am. Comm’n HR: Criminalization of Human Rights Defenders of Indigenous Peoples Resisting Extractive Industries in the United States, June 24, 2019, at 13–14 [hereinafter Rep’t to IACHR], https://www.ohchr.org/Documents/Countries/LAC/HRDAmericas/Univer_sitiy_of_Arizona_IP_Law_Policy_Program.pdf.

September 2, 2016, SRST’s former Tribal Historic Preservation Officer (“THPO”), Tim Mentz, filed an affidavit in the United States District Court, District of Columbia, identifying the locations of numerous burials and culturally important stone features that were under imminent threat of destruction from construction of the pipeline.³⁸ Specifically, Mr. Mentz identified at least 27 burials and 82 stone features, which include 16 stone rings and 19 effigies, none of which were included in the pipeline company’s archaeological survey, and all of which would be destroyed if construction moved forward.³⁹

Less than 24 hours after Mr. Mentz’s filed his Declaration in federal court, on Saturday morning, September 3, 2016, Dakota Access maliciously sent bulldozers to the sites Mr. Mentz had identified, and they proceeded to bulldoze through the burials and sacred sites in the path of the pipeline.⁴⁰ Mr. Mentz stated to the District Court: “It

³⁸ Supplemental Declaration of Tim Mentz, Sr. in Support of Motion For Preliminary Injunction at 1, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534-JEB).

³⁹ *Id.* at 3, 7–8.

⁴⁰ Sam Levin, *Guards for North Dakota pipeline could be charged for using dogs on activists*, THE GUARDIAN (Oct. 26, 2016, 5:15 PM), <https://www.theguardian.com/us-news/2016/oct/26/north-dakota-pipeline-protest-guard-dogs-charges>.

appears that DAPL drove the bulldozers [through] approximately 20 miles of uncleared right of way to access the precise area that we surveyed and described in my declaration.”⁴¹

When unarmed, peaceful Americans began to assemble to protest the intentional and unlawful destruction of human graves by raising signs and their voices along a public highway, a private security force hired by Dakota Access was deployed, complete with attack dogs leashed by unlicensed and incompetent handlers from an unregistered security company.⁴² In an October 25, 2016 public statement, Reverend Jesse Jackson described the attacks as “a scene reminiscent of the attacks on nonviolent rights marchers in Birmingham.”⁴³ “A number of [I]ndigenous people, including a pregnant woman, were bitten and sprayed and one person was deliberately struck with a truck. Law

⁴¹ Declaration of Tim Mentz, Sr. in Support of Motion for TRO, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534-JEB).

⁴² Levin, *supra* note 40.

⁴³ Standing Rock Sioux Tribe, (@StandingRockST), FACEBOOK, (Oct. 25, 2016), <https://www.facebook.com/StandingRockST/photos/pcb.1411335645561368/1411335485561384/> [hereinafter *Statement of Rev. Jackson*].

enforcement, including Morton County Sheriff personnel, failed to intervene in the unwarranted attacks on peaceful protestors.”⁴⁴

Morton County law enforcement should have intervened to apprehend the individuals responsible for the unlawful desecration and destruction of Native American graves and stop the privately-sponsored physical assault on nonviolent demonstrators armed only with their voices. Instead, Morton County law enforcement escalated its use of force against the peaceful protestors, encouraging private companies to disregard the rights of Tribal Nations and setting a terrifying precedent for use of force by law enforcement against anyone exercising their First Amendment rights to advocate for justice under the law.

Despite the fact that the Movement remained peaceful and focused on prayer, North Dakota and Morton County continued to escalate the already overmilitarized law enforcement presence. On September 8, 2016, North Dakota Governor Jack Darlymple activated the National Guard to aid in suppression of the protests and further intimidate U.S. citizens exercising their First Amendment rights.⁴⁵ As

⁴⁴ Rep’t to IACHR, *supra* note 37 at 4.

⁴⁵ Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM),

more and more individuals travelled to Cannonball to participate in this peaceful protest, law enforcement amplified its:

[U]se of force and arrests of water protectors, responding to nonviolent expression in an increasingly militarized and violent fashion. On multiple occasions in October 2016, law enforcement conducted indiscriminate and unlawful mass arrests of people who were expressing opposition to the pipeline, accompanied by unjustified violence against nonviolent protesters.⁴⁶

The behavior of law enforcement was so reprehensible that Chairman Archambault of the Standing Rock Sioux Tribe sent a letter to the U.S. Attorney General on October 24, 2016, calling for an investigation into law enforcement’s actions in order “to protect civil rights” of protesters in response to the “overall militarization of law enforcement response.”⁴⁷

On October 27, 2016, Native Water Protectors on horseback were confronted by law enforcement equipped with military vehicles and riot gear. Heavily armed law enforcement officials shot pepper spray, tear

<https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight>.

⁴⁶ Rep’t to IACHR, *supra* note 37 at 4–5.

⁴⁷ Hersher, *supra* note 45.

gas, and a sound cannon or long range acoustic device (“LRAD”)⁴⁸ at the peaceful protesters.⁴⁹ Law enforcement initiated the incident, moving toward one of the Water Protector camps located on Lakota and Dakota treaty lands that morning “in riot gear, some [] armed and they arrived with soldiers driving trucks and military Humvees.”⁵⁰ Law enforcement then fired bean bag rounds, pepper spray, and a sound cannon at the Water Protectors.⁵¹ At least 141 protesters were arrested, bringing the total count of arrests to over 400 since the start of the Sacred Stone Camp in Cannonball.⁵² Many of the individuals whom Morton County

⁴⁸ “The use of [an LRAD device] as a projector of powerfully amplified sound is no different than other tools in law enforcement’s arsenal that have the potential to be used either safely or harmfully . . . some courts have held their usage “to be excessive force where the police used clear disregard for the safety of [those in the vicinity.]” *Edrei v. City of New York*, 254 F. Supp. 3d 565 (S.D.N.Y. 2017) (quoting *Ramage v. Louisville/Jefferson Cnty. Metro. Gov’t*, 520 F. App’x. 341, 346–47 (6th Cir. 2013)).

⁴⁹ Rebecca Hersher, *Police Evict Dakota Pipeline Protesters*, NPR (Oct. 27, 2016), <https://www.npr.org/sections/thetwo-way/2016/10/27/499614734/police-reportedly-arrest-dakota-pipeline-protesters>.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Catherine Thorbecke, *Officials Defend Use of Alleged ‘Dog Kennel’ Cells in Dakota Access Pipeline Protest*, ABC NEWS (Oct. 31, 2016, 5:32 PM), <https://abcnews.com/US/officials-defend-alleged-dog-kennel-cells-dakota-access/story?id=43203236>.

arrested were inhumanely confined to “dog kennel-like holding cells.”⁵³ Violent, dehumanizing treatment like this for exercising constitutionally protected First Amendment rights stifles, if not completely suffocates, free speech.

In response to the use of excessive force and arrests on October 27, 2016, Chairman Archambault remarked that “North Dakota law enforcement continues to engage in unlawful and dehumanizing tactics to subdue peaceful water protectors with tear gas and water cannons.”⁵⁴ “We have repeatedly seen a disproportionate response from law enforcement to water protectors’ nonviolent exercise of their constitutional rights. Today we have witnessed people praying in peace, yet attacked with pepper spray, rubber bullets, sound and concussion cannons.”⁵⁵ One Water Protector said: “I feel like Morton County law

⁵³*Id.*

⁵⁴ Catherin Thorbecke, *Leader of the Standing Rock Sioux Tribe Calls On Obama to Halt Pipeline After Violent Clash*, ABC NEWS (Nov. 21, 2016), <https://abcnews.go.com/US/leader-standing-rock-sioux-tribe-calls-obama-halt/story?id=43690859>.

⁵⁵ Catherin Thorbecke, *141 Arrested at Dakota Access Pipeline Protest as Police Move In*, ABC NEWS (Oct. 27, 2016), <https://abcnews.go.com/US/tensions-mount-protesters-police-controversial-pipeline/story?id=43078902>.

enforcement is experimenting on us It's like they received all this free military equipment and they're just itching to try it out.”⁵⁶

Following the October 27 mass arrest, Morton County prosecutors brought felony charges against 139 of the approximately 141 Water Protectors arrested that day.⁵⁷ After they were unable to substantiate the prosecution of the vast majority of them, the County dismissed the majority of the charges. One attorney who represented several Water Protectors against such frivolous charges “estimated that more than 130 people have had charges dropped, signaling the ‘unprecedented’ nature of Morton County pursuing baseless cases.”⁵⁸ According to that attorney, the charges were dropped because “[t]here’s no evidence.”⁵⁹

⁵⁶ Sam Levin and Julia Carrie Wong, *Standing Rock protestors hold out against extraordinary police violence*, THE GUARDIAN (Nov. 29, 2016, 3:56 PM), <https://www.theguardian.com/us-news/2016/nov/29/standing-rock-protest-north-dakota-shutdown-evacuation>.

⁵⁷ Sam Levin and Julia Carrie Wong, *‘Bogus charges’: Standing Rock activists say they face campaign of legal bullying*, THE GUARDIAN (Nov. 30, 2016, 7:00 AM), <https://www.theguardian.com/us-news/2016/nov/30/north-dakota-access-pipeline-standing-rock-legal-fine-threats>.

⁵⁸ *Id.*

⁵⁹ *Id.*

On or about November 20, 2016, law enforcement’s use of force against the peaceful Water Protectors reached new, devastating heights. While protesters were:

[P]eacefully praying, chanting, singing and protesting the road block and the pipeline construction, [law enforcement arrived in armored vehicles] and used high pressure fire hoses to spray water protectors despite the below freezing weather. They shot [Specialty Impact Munitions], chemical agent canisters, explosive flashbangs and ‘stinger’ grenades indiscriminately into the crowd over a period of more than eight hours, without justification, and without providing any clear warnings or opportunity to disperse.⁶⁰

The North Dakota Governor’s tactics were “unnervingly similar to those used by Alabama Governor George Wallace a half-century ago. Just as Governor Wallace militarized his state to create a climate of fear and violence, Governor Darlymple has declared a ‘state of emergency’ and taken actions designed to intimidate Standing Rock and the Tribe’s supporters into silence.”⁶¹

On January 17, 2017, law enforcement officials yet again overstepped their bounds, continuing their pattern and practice of silencing Water Protectors’ voices through excessive force under the

⁶⁰ Rep’t to IACHR, *supra* note 37 at 13–14.

⁶¹ *Statement of Rev. Jackson, supra* note 43.

guise of keeping the peace. As described more fully in Appellant’s brief, Water Protectors immersed in prayer and traditional song gathered on Backwater Bridge to express their opposition to the pipeline.⁶² Law enforcement, in turn, fired bean bag rounds, other projectiles, chemicals, and freezing water into the crowd of Water Protectors that included women and elders.⁶³ Unarmed, peaceful protesters like Mr. Mitchell became victims of this unlawful use of force aimed, once again, at stifling free speech opposing the pipeline.

By the time the Sacred Stone Camp dispersed on February 28, 2017,⁶⁴ North Dakota and Morton County had deployed water hoses, lead bean bag bullets, military trucks, chemical agent canisters, and hand grenades against a group of peaceful protesters engaged in prayer. Meanwhile, these same law enforcement agencies stood by, completely idle, when Dakota Access used bulldozers to destroy 27 Dakota and Lakota graves less than 24 hours after SRST’s former THPO had

⁶² Pet. App. AA61.

⁶³ *Id.* AA59, AA61.

⁶⁴ Michael McLaughlin, *Dakota Access Pipeline Protesters Abandon Camp After Trespassing Threat*, HUFFPOST (Feb. 28, 2017, 6:11 PM), https://www.huffpost.com/entry/dakota-access-protest-camp-accused-of-trespassing-on-tribes-land_n_58b5d6b5e4b0780bac2ddb4b.

disclosed their location to a United States District Court. And Morton County law enforcement did nothing to stop a private company's use of attack dogs against American citizens exercising their right to free speech.

In North Dakota, where the explosive growth of the oil and gas extractive industries has resulted in staggering rates of violent crimes—including sex trafficking and sexual assault—against Native women and children,⁶⁵ focus has not been on public safety. Instead, the over-militarized response of Morton County and North Dakota was focused on silencing a prayerful Movement.

⁶⁵ In a 2013 Tribal Consultation Report, the Department of Justice, Office on Violence Against Women, explained the link between the recent rapid increase in oil production in the Bakken region and a contemporaneous rise in crimes and violence against women and children, stating:

Because of recent oil development, the [Bakken] region faces a massive influx of itinerant workers[,] and [consequently,] local law enforcement and victim advocates report a sharp increase in sexual assaults, domestic violence, sexual trafficking, drug use, theft, and other crimes, coupled with difficulty in providing law enforcement and emergency services in the many remote and sometimes unmapped “man camps” of workers.

U.S. Dep't of Justice Office on Violence Against Women, 2013 Tribal Consultation Rep. 3 n.2 (2013).

The conduct of Morton County and North Dakota call into question the validity of the constitutional rights of all Americans to peacefully protest and speak out against the unlawful actions of our federal government. It is not “free speech” when you have to risk your life, limb, or lose your eye, in order to peacefully participate.

III. Speech Related to the Preservation of Treaty Rights Constitutes Critical, Constitutionally Protected Speech

The gathering at Standing Rock stood for the simple proposition that the United States should keep its promises—in this case, promises made in the 1851 and 1868 Treaties of Fort Laramie, promises that “Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” U.S. CONST. art. VI.

The Constitution of the United States unequivocally states that “all Treaties made, or which shall be made, under the Authority of the United States shall be *the supreme Law of the Land.*” U.S. CONST. art. VI (emphasis added). Moreover, the treaties the United States has entered into with Tribal Nations and the promises therein provide the backbone for the United States’ federal trust responsibility to Tribal Nations and their citizens. *See Pyramid Lake Paiute Tribe of Indians v.*

Morton, 354 F. Supp. 252, 256–57 (D.D.C. 1972), *supplemented*, 360 F. Supp. 669 (D.D.C. 1973), *rev'd*, 499 F.2d 1095 (D.C. Cir. 1974). As a result of the hundreds of treaties signed with Tribal Nations, the United States “has charged itself with moral obligations of the highest responsibility and trust . . . [i]ts conduct . . . in dealings with Indians, should therefore be judged by the most exacting fiduciary standards.” *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).⁶⁶

If anything, the fact that treaties constitute the “supreme Law of the Land” under the U.S. Constitution should only serve to elevate protections afforded to those who speak out when the United States violates the treaties it has signed with Tribal Nations. In this case, the United States District Court, District of Columbia, agreed with the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the

⁶⁶ Congress has repeatedly and explicitly affirmed this treaty and trust responsibility in legislation. *See, e.g.*, Indian Child Welfare Act of 1978, 25 U.S.C. § 1901(3) (“the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”); § 901 Violence Against Women and Dep’t of Justice Reauthorization Act of 2005, Pub. L. No. 109–162, tit. IX, § 901(6), 119 Stat. 3078 (acknowledging “the unique legal relationship of the United States to Indian tribes creates a federal trust responsibility to assist tribal governments in safeguarding the lives of Indian women.”).

Yankton Sioux Tribe, the Oglala Sioux Tribe, Mr. Mitchell, and all of the other individuals who took a stand in Cannonball, North Dakota, when the District Court concluded that the Army Corps' failure to consider treaty rights violated federal law. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 132 (D.D.C. 2017) (agreeing in part that the Army Corps' "EA never examined the impacts of spills on the Tribe and its Treaty rights.") (internal quotation marks and citation omitted).⁶⁷

As the United States Supreme Court has held, speech and assembly regarding "matters of public concern . . . occup[y] the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). And public streets, like the bridge where Mr. Mitchell was assaulted and then arrested, "occupy a special position in terms of First Amendment protection because of their historic role as

⁶⁷ On appeal, the D.C. Circuit Court of Appeals affirmed the lower court's determination that the Army Corps must undertake a full EIS, and the D.C. Circuit further agreed that vacatur of the easement was proper. *See Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021). The D.C. Circuit, however, did not agree that the pipeline must be shut down and emptied while the Army Corps undertakes to prepare the full EIS, and the Court of Appeals reversed the lower court on those grounds. *See id.*

sites for discussion and debate.” *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).⁶⁸ So long as the U.S. Constitution continues to refer to treaties as the “supreme Law of the Land,” local state and county law enforcement *cannot* resort to excessive force to silence those who exercise their First Amendment right and advocate that the United States uphold its treaty and trust duties and responsibilities.

CONCLUSION

NCAI respectfully requests that this Court to reverse the District Court’s dismissal of Mr. Mitchell’s claims.

Dated: May 24, 2021

Respectfully submitted,

By: /s/ Mary Kathryn Nagle

⁶⁸ North Dakota’s response recalls another scene in the fight for human and civil rights. On March 7, 1965, hundreds of protestors entered the Edmund Pettis Bridge to find armed Alabama state troopers and deputized civilians lying in wait at the other end. These peaceful protestors too were met with horrifying violence because they had the audacity to insist that the United States live up to its promises. There is no question that the use of force against the civil rights protestors on Selma’s “Bloody Sunday” was excessive and unconstitutional. There is also no question that the facts Mr. Mitchell alleges and the injuries he sustained indicate a similar level of violence was used by state and county law enforcement against peaceful protestors on Backwater Bridge.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 6,500 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 6459 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style. This brief has been scanned for viruses and is virus free in compliance with 8th Cir. R. 28A(h).

Dated: May 24, 2021

/s/ Mary Kathryn Nagle

Mary Kathryn Nagle

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: May 24, 2021

/s/ Mary Kathryn Nagle
Mary Kathryn Nagle