No. 21-1071

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
HON. DANIEL M. TRAYNOR, U.S.D.J.

BRIEF OF TABATHA ABU EL-HAJ, ERWIN CHEMERINSKY, GENEVIEVE LAKIER, LYRISSA LIDSKY, KERMIT ROOSEVELT, AMANDA SHANOR, STEVEN H. SHIFFRIN, GEOFFREY R. STONE, NADINE STROSSEN AND LAURA WEINRIB AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel for *amici curiae* hereby certifies that all *amici* are individuals.

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INTEREST OF *AMICI CURIAE*

Amici are scholars of the First Amendment. They have an interest in promoting the sound interpretation of the First Amendment in a way that does not dilute the important freedoms of petition, assembly, and association afforded by the Supreme Court's precedents.

Amici's names are set forth in the Appendix.[1]

STATEMENT OF THE CASE

Marcus Mitchell was peacefully protesting on a public bridge when four law enforcement officers shot him with lead-filled munitions. Charges against Mitchell for criminal trespass and obstruction of a government function were later dismissed. Taking the allegations in the Complaint as true, as the Court must, the officers singled Mitchell out for retaliation and arrest because of his speech. The district court did not consider the legal importance of those allegations, however, because it concluded that Mitchell had lost the protections of the First Amendment by committing a misdemeanor. This brief explains the analytical errors in that decision.

SUMMARY OF ARGUMENT

The story of the United States is a story of dissent. Born from a resistance to arbitrary rule, our national ethos embraces the ability of individuals to change

[1] All parties have consented to the filing of this brief.

history through their voices. Justice Brandeis observed that those who fought for independence understood the centrality of free speech and assembly to public discussion and to "the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). Over time, social movements have "prodded, provoked, and pushed the United States to actually be the nation it imagined itself to be." Ralph Young, Dissent: The History of an American Idea 1 (2015). The First Amendment "right of peaceable assembly" has been critical to the functioning of our democratic society, as the Supreme Court has long recognized. *See Bates v. City of Little Rock*, 361 U.S. 516, 522-23 (1960).

In this case, Marcus Mitchell alleges that he sought to exercise that right when he went to a public bridge to protest the Dakota Access Pipeline (DAPL). The district court's conclusion that Mitchell "lost the protections of the First Amendment" once law enforcement officers determined he was trespassing, AA68, is doctrinally unsound. While the Constitution does not preclude "*even-handed enforcement* of [a state's] general trespass statute," *Adderley v. State of Fl.*, 385 U.S. 39, 47 (1966) (emphasis added), the veneer of a trespass does not authorize the suppression of disfavored speech, as alleged here, on public property.

The Supreme Court's precedents are unyielding on this point, *see Nieves v. Bartlett*, 139 S. Ct. 1715, 1727 (2019), and the Court should bring this case in line with them. But a broader threat to First Amendment interests is at stake. As

criminal prohibitions proliferate across the country, the state's already considerable discretion to assert nominal violations of law grows as well, along with the risk that that discretion will be exercised to squelch disfavored expressive activity in the public forum. A court's scrutiny of the suppression of petitionary conduct should be probing, not deferential—else the protections of the First Amendment give way to an untrammeled power to quell dissent.

ARGUMENT

The right to assemble and to petition the government has sustained countless social and political movements throughout our history. Civic activism and democratic participation in this country depend on the continued recognition of a robust right to organize, assemble, and petition the government for redress.

The Supreme Court has long affirmed the centrality of this right to the working of democracy, and two fundamental principles guide our way here. First, the government's ability to restrict access to quintessential public forums is sharply circumscribed. "In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited." *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Second, and relatedly, the government may not use generally applicable laws to shield the suppression of provocative speech in public places.

See Terminiello v. City of Chi., 337 U.S. 1, 4-5 (1949) (holding unconstitutional a conviction under a "breach of the peace" law that "permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest"); *accord Cohen v. California*, 403 U.S. 15, 21 (1971); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

The decision under review contravenes these fundamental principles, with dangerous implications. The court concluded its analysis with the finding that Mitchell had trespassed on Backwater Bridge. But an individual's First Amendment rights do not evaporate once the state has declared a trespass in a public forum. A court still must scrutinize whether the state has used generally applicable laws in a way that unconstitutionally suppresses speech: the First Amendment does not prevent the police from enforcing a valid law, but neither are misdemeanor laws a blank check for law enforcement to stifle unwanted protest. *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) ("[A] state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."). At the pleading stage in particular, our constitutional values demand careful attention to the allegations of a citizen who gave voice to a disfavored viewpoint in a public street, and a willingness to question law enforcement's putative reasons for having violently quieted him.

I. THE RIGHT TO ASSEMBLE AND TO PETITION THE GOVERNMENT FOR REDRESS OCCUPIES A UNIQUE AND VITAL POSITION IN OUR DEMOCRATIC SOCIETY

A. The First Amendment's protections are founded on a Colonial tradition of protest.

Protests and demonstrations catalyzed pivotal change in the Founding Era. Throughout the revolutionary period, colonists used provocative acts to resist the affronts of British rule. When Parliament's enactment of the Stamp Act in 1765 stirred outrage, citizens burned effigies, gathered in crowds, and marched to the Liberty Tree. These demonstrations succeeded in securing the repeal of the Stamp Act—but they also helped unify the colonies, establishing "the formation of the revolutionary ethos." Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. Univ. L. Rev. 1097, 1106 (2016); *see* Timothy Zick, Speech Out of Doors: Preserving First Amendment Liberties in Public Places 30 (2009) ("[R]udimentary streets and town squares [were] critical to the revolutionary spirit and cause.").

Peaceful protest in the colonial understanding was a raucous affair.[2] After citizens marching on King Street in front of the Boston Custom House were fired upon by the very British troops they were protesting, ten thousand mourners reportedly attended the funerals of the five who were killed. Three years later, a

[2] *See* Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 Mo. L. Rev. 961, 968-69 (2015); Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. Pa. J. Const. L. 949, 968-69 (2014).

group of colonists voiced their frustration with yet another tax on tea by trespassing on ships loaded with the stuff and dumping hundreds of chests of it into the harbor. The Boston Massacre and the Boston Tea Party are so deeply entrenched in our national mythos that it is easy to forget they were clamorous assemblies at the time. John Adams described the Boston Tea Party as "so bold, so daring, so firm, intrepid, and inflexible, . . . that I cant but consider it an Epocha in History." Diary of John Adams, December 17, 1773, https://founders.archives.gov/documents/Adams/01-02-02-0003-0008-0001.

The Framers enshrined the right of assembly in the First Amendment on this foundation. During the debates over the Bill of Rights, Representative John Page of Virginia voiced the concern that "people have . . . been prevented from assembling together on their lawful occasions." *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 Tulane L. Rev. 565, 575 (2010). Representative Theodore Sedgwick of Massachusetts explained that the right to assemble was "self-evident," something "that would never be called into question." Elizabeth McCaughey, *Marbury v. Madison: Have We Missed the Real Meaning?*, 19(3) Presidential Studies Quarterly 491, 501 (1989). The protests of the revolutionary era were bold expressions of civil disobedience to the ruling order. The founders appreciated the deep historical and common law roots of the right to assembly and its importance to social change.

B. Since the Founding, demonstrations against the government have continued to change American history.

Generations of Americans have taken up the mantle of protest to spur social and legal change. The use of assembly and protest links transformative movements in history across the political spectrum, from the abolition of slavery to the women's suffrage, civil rights, environmentalist, and pro-life movements.

Abolitionists spoke out against slavery, boycotted products, and gathered frequently to disseminate their message. Their message was controversial, and anti-slavery advocacy drew intense and sometimes violent resistance. In one case, two noted abolitionists, William Lloyd Garrison and George Thompson, addressed the Boston Female Anti-Slavery Society undeterred by the mob that formed; the event became a symbol of the movement's resolve. *See* John D. Inazu, Liberty's Refuge: The Forgotten Freedom of Assembly 588 (2012). Years later, Garrison returned to Boston to burn a copy of the Constitution in the Commons, proclaiming the document "an agreement with death and a covenant with hell." Ralph Young, Dissent: The History of an American Idea 126 (2015).

Later movements adopted vigorous public protest methods to further their own efforts. Activists in the temperance movement conducted "pray-ins" in drinking establishments—even destroying their stocks of liquor—in the decades leading up to the Eighteenth Amendment. *See, e.g.*, Jed Tannenbaum, *The Origins of Temperance Activism and Militancy Among American Women*, 15 J. of Soc.

Hist. 235, 242-73 (1985). Members of the National Woman's Party held marches, went on hunger strikes, and protested in front of the White House to advocate for suffrage. 1 Revolts, Protests, Demonstrations, and Rebellions in American History: An Encyclopedia, Steven L. Danver, ed., 481 (2011). The civil rights movement built on these precedents. The March on Washington alone drew over 250,000 participants, advocating for better education, housing, and access to public facilities; one year later, Congress passed the landmark Civil Rights Act of 1964.

At critical moments, the courts recognized the rights of protestors to peacefully assemble and protected their conduct from unlawful infringement. After decades of state-mandated racial segregation in restaurants, schools, and libraries, activists staged "sit-in" demonstrations to flout Jim Crow laws and advance racial equality. When four students from a historically Black college decided to challenge a local Woolworth's segregation policy by sitting at the diner's counter all day, their expression drew attention and sparked a larger movement. Twenty-five more people returned to the diner the next day, and sit-ins across the country soon followed, highlighting the effects of segregation and its exclusion of Black citizens from physical spaces. Many participants faced charges for breaching the peace, but their convictions could not be reconciled with constitutional protections: the demonstrations that helped dismantle segregation were "an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments

guaranteeing freedom of speech and of assembly." *Brown v. Louisiana*, 383 U.S. 131, 141 (1966) (plurality opinion).

Advocates for voting equality employed similar acts of civil disobedience, and courts affirmed their First Amendment right to do so. Civil rights leaders chose Selma to begin a march to demand ballot access, and met violent resistance: on "Bloody Sunday," marchers attempting to walk beyond a blockade of state troopers were attacked, beaten, and dispersed. Event, Selma to Montgomery March, Stanford Univ., The Martin Luther King, Jr. Research & Educ. Inst. (Mar. 25, 1965), https://kinginstitute.stanford.edu/encyclopedia/selma-montgomery-march. They were able to march safely only after a federal court interceded. *See generally* David Garrow, Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965 (2009). The court found that the state of Alabama had acted with the "effect of preventing and discouraging [Black] citizens from exercising their rights of citizenship, particularly . . . the right to demonstrate peaceably for the purpose of protesting discriminatory practices . . . ." *Williams v. Wallace*, 240 F. Supp. 100, 105 (M.D. Ala. 1965). The march along Highway 80 was "nothing more than a peaceful effort . . . to exercise a classic constitutional right; that is, the right to assemble peaceably and to petition one's government for the redress of grievances." *Id.* Later that year, Congress passed the Voting Rights Act of 1965. Black voters have turned out in force since.

More recently, the pro-life movement has used similar tactics to advance its message. Activists often demonstrate near abortion providers or converse with women considering abortion to offer support, information, or religious sentiment like prayer. This advocacy can be effective. *See McCullen v. Coakley*, 573 U.S. 464, 487 (2014) (noting that the testimony at trial showed that petitioner convinced eighty women not to have abortions). States have attempted to stifle pro-life speech by creating neutral "buffer zones" that, in effect, penalize communication in the area near abortion providers as a trespass, even when it encompasses a traditional public forum like a sidewalk or public street. But the Court has recognized that these restrictions can be unconstitutional if the laws and their enforcement are used to target disfavored speech. The state "undeniably [has] significant interest in maintaining public safety on . . . streets and sidewalks," but it cannot "pursue[] those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers." *Id.* at 496-97. The government may not chill speech merely because it inconveniences the public.

Looking backwards through history, it is easy to lose sight of the radical beginnings of movements that eventually succeeded in securing social and political change. But these efforts all started with the exercise of speech and assembly rights by a few dissenting voices that grew louder as protest led to persuasion. From abolitionists to pro-life advocates, the Supreme Court has firmly recognized that

the First Amendment requires states to respect and protect those dissenting voices. *See id.* at 496.

C. Protest has special importance to Native communities.

The occupation of physical space has had historical importance for protestors from Native communities as well. Given the tragic history of dispossession and occupation of Native lands, Native communities have long used occupation of physical spaces to protest and attempt to prevent their communities from being pushed out of traditional and sacred land.

The history of dislocation of Native peoples in this country requires little prologue. Native peoples' claims to land and sovereignty have been repeatedly subordinated to the priorities and interests of the European colonizer. *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the Courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted."). The U.S. Government has a history of neglecting or violating its treaties with Native peoples, honoring "the rule of the strong, not the rule of law." *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2474 (2020) (cataloguing the history of Congress and the states ignoring treaties with Native peoples by practice and by law). The Trail of Tears is just the best-known of many instances of an entire Native group being forcibly relocated from their ancestral

lands. *Indian Resistance and Removal*, Seminole Tribe of Fl., https://www.semtribe.com/stof/history/indian-resistance-and-removal (last visited Apr. 16, 2021) (describing the Seminole peoples' resistance to violent roundup and forced relocation after the Indian Removal Act).

In the modern era, Native people have exerted resistance by occupying physical spaces. The 1969 occupation of Alcatraz Island is one example: a group of Native American activists occupied the Island, claiming it belonged to the Sioux tribe under the Fort Laramie Treaty of 1868. *See* Dean J. Kotlowski, *Alcatraz, Wounded Knee, and Beyond: The Nixon and Ford Administrations Respond to Native American Protest*, 72(2) Pacific Hist. Rev. 201, 207-09 (2003). Though unsuccessful in reclaiming Sioux sovereignty over that land, the yearlong peaceful occupation succeeded in shaping the Nixon administration's engagement with Native issues. *See id.*

Protests against the Dakota Access Pipeline carry on this tradition. The pipeline intersects the land of the Great Sioux Nation, whose claims to the territory long predate the 1851 Fort Laramie Treaty between the Nation and the U.S. Government. *Indigenous Resistance to the Dakota Access Pipeline, criminalization of dissent and suppression of protest*, Univ. of Ariz. Rogers Coll. Of Law, Indigenous Peoples Law & Policy Program (Mar. 16, 2018), https://law.arizona.edu/sites/default/files/Indigenous%20Resistance%20to%20the

%20Dakota%20Access%20Pipeline%20Criminalization%20of%20Dissent%20and%20Suppression%20of%20Protest.pdf. Sioux peoples and their allies have turned to protest and resistance within the physical space they are campaigning to preserve. *See generally id.*

II. THE CLOSURE OF A PUBLIC BRIDGE TO AN ASSEMBLY REQUIRES A CAREFUL TIME-PLACE-MANNER ANALYSIS

A. The right to access public spaces for protest lies at the core of First Amendment protection.

The First Amendment broadly protects the right to assemble and petition the government in public spaces. Spaces like streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). In these spaces, the "maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system." *Stromberg v. People of State of Cal.*, 283 U.S. 359, 361, 369 (1931) (overturning conviction under statute that prohibited displaying a red anarchist flag "in any public place or in any meeting place or public assembly" (quotation omitted)).

In the modern era, the public forum doctrine has become the primary means

of protecting assembly rights.[3] The Supreme Court—often in cases that arise out of public civil demonstrations—has consistently protected access to public forums from unwarranted government intrusion. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 459, 460 (2011) (protecting religious protestors on public land outside of a military funeral from tort liability); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (protecting protestors against foreign governments from criminal prosecution arising from picketing on public sidewalks near foreign embassies); *United States v. Grace*, 461 U.S. 171, 173 (1983) (protecting a leafleteer's access to public sidewalks surrounding the U.S. Supreme Court building); *Edwards*, 372 U.S. at 230 (protecting segregation protestors from criminal prosecution for breaching the peace while marching on South Carolina State House grounds).

Government power to restrict access to public spaces for protest is most limited in traditional public forums such as "parks, streets, sidewalks, and the like." *See Mansky*, 138 S. Ct. at 1885. These traditional public forums occupy a "special position in terms of First Amendment protection." *Snyder*, 562 U.S. at 456 (quotation omitted). Content-based restrictions in traditional public forums (and designated public forms) thus must overcome strict scrutiny. *Mansky*, 138 S. Ct. at

[3] *See* Bhagwat, *supra* at 5, at 1104-05 ("As it turns out, in modern times the Assembly Clause has essentially disappeared from judicial discourse—the Supreme Court has not addressed the Clause in over thirty years, and when issues arise regarding regulation of public gatherings, they are inevitably litigated under the public forum doctrine, which the Court treats as a branch of free speech law.").

1885. The government has more flexibility in non-public forums—spaces "not by tradition or designation a forum for public communication," *id*. at 1886 (quotation omitted)—but even there, any "regulation on speech [must be] reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view," *id* at 1885 (quotation omitted). And while the government may, in any forum, impose "reasonable restrictions on the time, place, or manner of protected speech," such restrictions must be content-neutral and narrowly tailored to serve a significant government interest. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Critically, these restrictions may not be deployed to suppress any particular viewpoint.

B. The district court failed to analyze whether the restriction of speech on Backwater Bridge was a constitutional time-place-manner restriction.

Mitchell's complaint alleges that Backwater Bridge was a public forum. AA15 ¶ 25. The allegation is certainly facially plausible—public streets are ordinarily considered to be traditional public forums. "No particularized inquiry into the precise nature of a specific street is necessary; all public streets are held in the public trust and are properly considered traditional public fora." *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).[4] The complaint—which is taken as true at this

[4] Streets on military bases are an exception that does not apply here. *See Greer v. Spock*, 424 U.S. 828, 838 (1976).

stage—specifically alleges that Backwater Bridge and Highway 1806 are a "public right-of-way," AA28 ¶ 91, and further alleges that the Bridge was consistently used for expressive activity—the DAPL protests—in the months leading up to Mitchell's arrest, AA17 ¶ 37 ("On November 20 and 21, 2016 hundreds of water protectors gathered on Backwater Bridge near the law enforcement blockade on Highway 1806.").

Indeed, at least one other lower court has already found that Backwater Bridge is a traditional public forum, in another case arising from DAPL protests, based on allegations that are indistinguishable from Mitchell's here. *See Thunderhawk v. Cnty. of Morton*, 483 F. Supp. 3d 684, 714 (D.N.D. 2020) (quoting the plaintiffs' allegation that Highway 1806 and the Bridge "have historically been used not only for travel by cars, trucks, horseback, ATVs, and pedestrians but also, as the only public space throughout much of this area, for a range of expressive activities"). There was certainly no way, on a motion to dismiss in which the plaintiff's factual allegations are taken as true, for the district court to draw a contrary conclusion. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Because this complaint at least plausibly alleges that Backwater Bridge was a public forum, the district court should have proceeded to analyze whether the complaint had also plausibly alleged that the state had impermissibly restricted

speech on it. But the district court failed to reach this question based on its threshold error in concluding that Mitchell lost the protections of the First Amendment, under *Adderley*, once the police decided he was trespassing on the public bridge. *Adderley* merely holds that "[n]othing in the Constitution of the United States prevents [a state] from *even-handed enforcement* of its general trespass statute." 385 U.S. at 47 (emphasis added). It does not countenance the selective application of trespass law to silence speech in a public place or to convert public forums into no-speech zones, as the complaint alleges here.[5] At the pleading stage, the court may not bypass the question whether the State's enforcement of its trespass law was properly founded at all.[6]

Just as the government may not "transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property," *Grace*, 461 U.S. at 180, the government may not use constructive trespass principles to render a traditional public forum unavailable for expressive activity, if its purpose is to suppress that

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[5] In particular, the complaint alleges a history of "racially discriminatory policing against the Indigenous community in North Dakota," AA10 ¶ 6, including incidents directly related to the DAPL protests leading up to Mitchell's injury, AA 28-29 ¶¶ 90-92. With regard to Mitchell specifically, the complaint alleges that the defendants retaliated against him based on his "association with the water protectors and opposition to the DAPL." AA33 ¶ 115.

[6] *Amici* recognize that the parties also dispute whether the district court correctly concluded that *Heck* is an independent barrier to relief in this case, AA67; that particular issue is outside the purview of this brief.

activity. In his famous dissent in *Adderley*, Justice Douglas implored that "[w]e do violence to the First Amendment when we permit this 'petition for redress of grievances' to be turned into a trespass action." *Adderley*, 385 U.S. at 52 (Douglas, J., dissenting). But he and the *Adderley* majority agreed that trespass law cannot be *unevenly* enforced to stifle speech.

In the decades since *Adderley*, the Supreme Court has continued to be wary of attempts to restrict speech in public places through use of trespass law. In the context of pro-life protests located at abortion facilities, the Court has repeatedly invalidated trespass regulations aimed at stopping anti-abortion speech rather than protecting the safety of patients. In *Schenck v. Pro-Choice Network of Western New York*, for example, doctors and medical clinics brought suit against anti-abortion organizations that engaged in heated demonstrations and blocked access to clinics. 519 U.S. 357, 361-62 (1997). The Supreme Court reviewed the constitutionality of a district court injunction that prohibited protestors from demonstrating within fifteen feet of clinic entrances and driveways (a fixed zone), and within 15 feet of patients and their vehicles (a floating zone). *Id.* at 366-67. The Court upheld the fixed buffer zone, finding that it did not burden speech more than necessary to serve the government's interests. *Id.* at 384-85. But in an 8-1 vote, the court invalidated the floating buffer zone, reasoning that it "would restrict the speech of those who simply line the sidewalk or curb in an effort to chant,

shout, or hold signs peacefully." *Id.* at 380. Similarly, in *McCullen v. Coakley*, the Court unanimously struck down a Massachusetts law that prohibited individuals from standing on a public sidewalk within 35 feet of an abortion facility. 573 U.S. at 497. The Court based its decision, in part, on the fact that a 35-foot no-speech zone interfered with the rights of speakers in traditional public forums (public walkways and sidewalks) to engage in discussions with those entering abortion facilities. *Id.* at 476-77.

The district court should have continued its analysis past the state's assertion that it attempted to close an area to speech for purportedly neutral purposes. And there is reason to conclude that the closure fails a simple application of the time-place-manner test, if the allegations in the complaint are taken as true.

First, the complaint alleges that law enforcement was actually motivated to close the bridge by the content of the protestors' speech. *See* AA27-29 ¶¶ 88-92. The Complaint alleges that the protests were peaceful. *See* AA16 ¶ 32. The bridge was declared a trespass zone following DAPL protest activity. *See* AA23 ¶ 68; AA28-29 ¶¶ 91-92. These allegations suggest at minimum a dispute of fact over whether the protests themselves were the state's true reason for restricting speech on the bridge.

Second, even taking as true the state's assertion (outside the pleadings) that it closed the bridge for safety reasons, the district court made no findings as to

whether the restriction was narrowly tailored to that interest and whether it left adequate effective alternatives for speech. According to the complaint, Backwater Bridge is a primary access point, and restricting speech on the bridge significantly burdened the protestors' ability to communicate their message. AA15 ¶¶ 24-25. The district court should at least have asked whether the physical space at which the pipeline protestors' speech occurred was—like pro-life protests near abortion clinics—important to the nature of the protest, as the complaint alleged.

Safety reasons may well have been a sufficient, content-neutral reason to close Backwater Bridge, and the closure may well have been narrowly tailored to that interest. But the complaint does not itself permit that conclusion—and the district court improperly tried to avoid that obstacle by placing weight on *Adderley* that the decision cannot bear.

III. THE GOVERNMENT MAY NOT SUPPRESS SPEECH UNDER THE GUISE OF ACCOMPLISHING A LEGITIMATE LAW ENFORCEMENT OBJECTIVE

Even if Backwater Bridge was permissibly closed to protest activity, it does not follow—as the district court assumed—that individuals who found themselves trespassing as a result forfeited *all* of their First Amendment rights. The district court's contrary conclusion is not only unsupported by law but dangerous in implication. Obviously, the First Amendment does not prevent the police from enforcing a valid law. But as recently as *Nieves v. Bartlett*, the Supreme Court has

reaffirmed that the existence of a generally applicable law does not give law enforcement a license to enforce it in a non-neutral way to stifle speech—and by extension, violations of law do not negate all of the lawbreaker's First Amendment rights. 139 S. Ct. at 1727; *see also Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954-55 (2018).

Misdemeanor violations in particular are not a blank check for purposeful, militaristic suppression of protest activity. Misdemeanor statues are abundant and rapidly proliferating; they afford substantial discretion to law enforcement officers as to whether and when to invoke them. When that discretion is exercised to suppress speech, it is unconstitutional. Courts must scrutinize sufficiently the enforcement of misdemeanor statutes against expressive activity to ensure that peaceable assemblies receive the First Amendment protection they are due, and are not chilled by the prospect of a violent but unaccountable police response. *Cf. Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (statute was unconstitutionally vague on its face that "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (voiding for vagueness a vagrancy ordinance "because it encourages arbitrary and erratic arrests and convictions"). Absent such review, these statutes "furnish[] a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups

deemed to merit their displeasure.'" *Id*. at 170 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)).

A. Law enforcement cannot apply a facially neutral law in a nonneutral manner.

It is a foundational principle that the government may not use generally applicable laws to stifle unpopular speech. In its *Terminiello* decision, the Supreme Court overturned a disorderly conduct conviction against a suspended Catholic priest for making inflammatory public comments about Jews, communists, and President Franklin D. Roosevelt. *Terminiello*, 337 U.S. at 4-5. The Court ruled that by applying the disorderly conduct law to speech that "stirred people to anger, invited public dispute, or brought about a condition of unrest," the law "seriously invaded" the constitutional speech protections. *Id.* (the First Amendment "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

Throughout the 1960s, the Court repeatedly held in the civil rights context that the government may not use generally applicable breach of the peace laws to criminalize the expression of unpopular views. In *Garner*, the Court overturned the convictions of Black protestors who were arrested for sitting quietly at a white only lunch counter. *Garner v. Louisiana*, 368 U.S. 157, 173-74 (1961). A year later in *Taylor*, the Court overturned the convictions of six Black petitioners for violating Louisiana's breach of the peace law by sitting in a segregated waiting room at a

bus depot. *Taylor v. Louisiana*, 370 U.S. 154, 156 (1962). Then in *Edwards*, when Black students were convicted of breach of the peace for refusing to disperse at the state house to protest segregation, the Court ruled that states could not criminalize the peaceful expression of unpopular views and overturned the students' convictions. *Edwards*, 372 U.S. at 237-38. Finally, in *Brown*, the Court overturned the convictions of five Black activists who sat in a public library, peacefully protesting segregation. *Brown*, 383 U.S. at 143. As the *Brown* court emphasized, the state "may not invoke regulations as to use—whether they are ad hoc or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights." *Id*. This recognition is built explicitly into *Adderley*'s pronouncement that "[n]othing in the Constitution of the United States prevents [a state] from *even-handed enforcement* of its *general* trespass statute." *Adderley*, 385 U.S. at 47 (emphasis added). Put simply, the government may not weaponize trespass law to stifle protest in a public place.

The Court reaffirmed this basic principle in *Nieves*. *See* 139 S. Ct. at 1727. There, the Court carved out an exception to the usual no-probable-cause requirement for retaliatory arrest claims, explaining that the requirement "should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* In so doing, the Court explained that "it would seem

insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground that there was undoubted probable cause for the arrest." *Id.* As *Terminiello*, *Garner*, *Taylor*, *Edwards*, and *Brown* demonstrate, the possibility that law enforcement might deploy discretionary criminal laws to stifle speech is not imaginary. Because probable cause can be a means to justify unconstitutional action after the fact, courts must scrutinize the underlying reasons why law enforcement made an arrest.

Once again, the complaint in this case alleges that Mitchell was targeted for heightened force and arrest because of his speech. Law enforcement allegedly singled out certain protestors to "particularly punish them, stop the protest, and chill the rights of other water protectors," as "documented in law enforcement reports." AA20 ¶ 52. The district court could not seasonably find to the contrary on a motion to dismiss—*Nieves* itself was decided on a motion for summary judgment, not on the pleadings. *See Nieves*, 139 S. Ct. at 1727. In holding otherwise, the decision below is wrong.[7]

[7] Incidental legal violations that occur during a protest also do not give the government a blank check to suppress the speech of all in attendance. Isolated legal infractions—even criminal violations—do not transform a predominantly peaceful protest into an illegal assembly. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 920 (1982) (where "an individual belong[s] to a group, some members of which committed acts of violence . . . the State may not employ means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" (quotation omitted)). Rather, when unprotected conduct

B. In a society where criminal laws are rapidly accumulating, the district court's doctrinal error poses a serious threat to First Amendment protections.

As explained, it has never been the case that a person forfeits all First Amendment rights once he violates a criminal law. The district court's contrary conclusion is both wrong and profoundly dangerous to dearly-held constitutional values given the ubiquity—and proliferation—of ordinances affording substantial discretion to law enforcement personnel to enforce criminal prohibitions selectively, and in violation of First Amendment rights.

All three branches of the federal government have raised concern about the proliferation of criminal law. Nearly four decades ago, the Department of Justice raised the alarm that there were, at the time, more than 3,000 statutory crimes, and thousands of more acts were criminalized under federal regulations alone. Gary

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"occurs in the context of constitutionally protected activity . . . precision of regulation is demanded." *Id*. at 916. (quotation omitted); *see also, e.g.*, *Cafeteria Emps. Union, Loc. 302 v. Angelos*, 320 U.S. 293, 296 (1943) (First Amendment does not permit "the right to picket itself [to] be taken away merely because there may have been isolated incidents of abuse falling far short of violence occurring in the course of that picketing"); *Vodak v. City of Chi.*, 639 F.3d 738, 744-45 (7th Cir. 2011) (recognizing that small-scale criminal violations such as "minor property damage and defiance of lawful police orders" did not warrant law enforcement engaging in mass arrests at a protest); *id*. at 749 (city could not "flatly ban groups of people from spontaneously gathering on sidewalks or in public parks in response to a dramatic news event" without "violating freedom of speech and assembly"); *Mo. Cafeteria, Inc. v. McVey*, 362 Mo. 583, 591-92 (1951) (ruling, in relation to flaring tempers and threats of violence at a picket line, that "isolated incidents" of non-peaceful conduct did not "forfeit constitutional rights of free speech so as to justify an injunction against picketing").

Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, Wall St. J. (July 23, 2011). Those numbers have steadily increased since. In 2013, the House Committee on the Judiciary's Overcriminalization Task Force found that there are "an estimated 4,500 [federal] criminal statutes on the books today, up from 165 in 1900, but as many as 300,000 criminally enforceable regulations." *Regulatory Crime: Identifying the Scope of the Problem*: Hearing Before the Over-Criminalization Task Force of the H. Comm. on the Judiciary, 113th Cong. 1 (2013). One scholar argues that the average American now commits three felonies a day. Harvey A. Silverglate, Three Felonies A Day: How the Feds Target The Innocent (2009).

The Supreme Court's nuanced rule in *Nieves* is borne of concern about the proliferation of misdemeanor laws and the resulting potential for discriminatory enforcement. 139 S. Ct. at 1727 ("Today . . . statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests in a much wider range of situations—often whenever officers have probable cause for even a very minor criminal offense." (quotation omitted)). "At many intersections," it noted, "jaywalking is endemic but rarely results in arrest." *Id.* at 1727. But if "an individual who has been vocally complaining about police conduct is arrested for jaywalking at such an intersection, it would seem insufficiently protective of First Amendment rights to dismiss the individual's retaliatory arrest claim on the ground

that there was undoubted probable cause for the arrest." *Id.*

The law today, properly understood, guards against this risk. The police may not use their substantial discretion in enforcing the law to stifle speech, even if they have correctly discerned a violation of law. But affirming the holding below would create a dangerous precedent, empowering law enforcement to forcefully, selectively, and unreservedly suppress speech on the pretextual ground that a crime has been committed. Even the most conscientious citizen among us would struggle to avoid a single misstep at a gathering "so bold, so daring, so firm, intrepid, and inflexible" as to effect social and political change. Fortunately, the First Amendment does not condition its protection on our infallibility.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 24, 2021, I electronically filed the foregoing *Amici Curiae* Brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) because it contains 6,380 words, exclusive of the portions of the brief that are exempted by Federal Rule of Appellate Procedure 32(f). I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

I also certify that the brief and addendum have been scanned for viruses and that the documents are virus-free, as required by Local Rule 28A(h)(2).

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