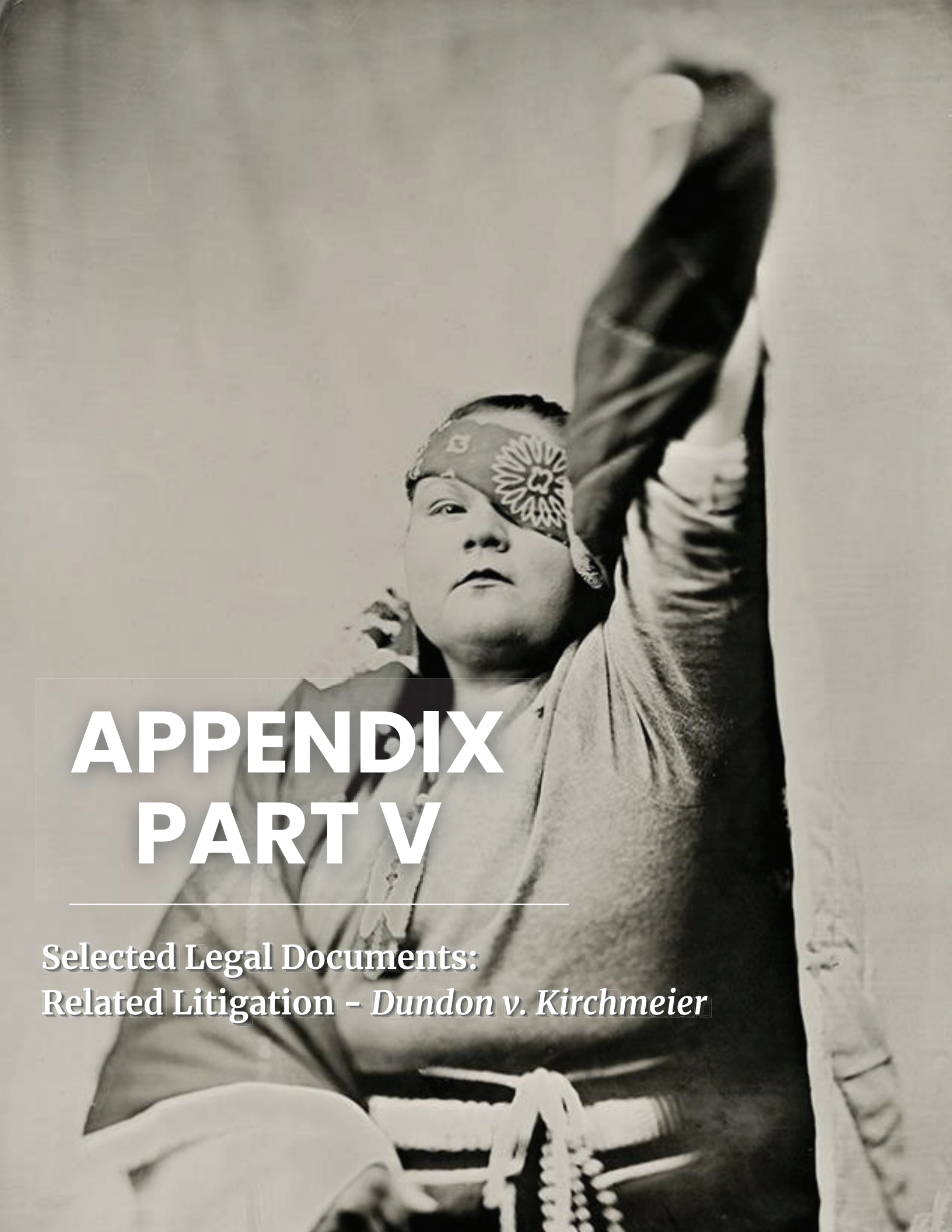

APPENDIX PART V

Selected Legal Documents: Related Litigation - *Dundon v. Kirchmeier*

Related Litigation

Dundon v. Kirchmeier
Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief (Complaint)
November 2016

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

VANESSA DUNDON, JADE KALIKOLEHUAOKALANI WOOL, CRYSTAL WILSON, DAVID DEMO, GUY DULLKNIFE III, MARIAH MARIE BRUCE, FRANK FINAN, ISRAEL HOAGLAND-LYNN, and NOAH MICHAEL TREANOR, on behalf of themselves and all similarly-situated persons, Plaintiffs, v. KYLE KIRCHMEIER, MORTON COUNTY, CITY OF MANDAN, JASON ZIEGLER, STUTSMAN COUNTY, CHAD KAISER, and DOES 1-100, Defendants.	No. 1:16-cv-406 **CIVIL RIGHTS CLASS ACTION COMPLAINT FOR DAMAGES AND INJUNCTIVE AND DECLARATORY RELIEF** **JURY TRIAL DEMANDED**

INTRODUCTION

1. This is a civil rights class action for damages and injunctive relief arising from Defendants' curtailment of Plaintiffs' First and Fourth Amendment rights by using highly dangerous Specialty Impact Munitions (SIM), explosive teargas grenades, teargas canisters, and a water cannon spraying high pressure water, as a means of dispersing protests and prayer ceremonies associated with opposition to the Dakota Access Pipeline (DAPL). Plaintiffs are Native Americans and other concerned citizens, known as "water protectors," who have protested and wish to continue protesting against DAPL.

2. On November 20, 2016, water protectors gathered to pray and to peacefully protest the continued construction of DAPL and the ongoing blockage of the public highway 1806. At Backwater Bridge, a bridge on Highway 1806, they were met by Defendants, a joint force of police officers from the Morton County Sheriff's Department, City of Mandan Police Department, and Stutsman County Sheriff's Department. Several of these officers arrived in military vehicles and deployed an arsenal of dangerous implements and devices, including SIM, explosive teargas grenades, and teargas canisters. The Stutsman County Sheriff's Department brought an armored vehicle with a water cannon mounted on top, which was used to spray water on Plaintiffs and others despite the subfreezing temperature. No orders to disperse, or warnings were given before deployment of these high levels of force against the unarmed water protectors. On this night, over 200 water protectors, including Plaintiffs, were injured by excessive police force, some of them very seriously.

3. This is not the first time Defendants attacked water protectors who were praying and peacefully exercising their right to protest under the First Amendment to the U.S. Constitution. Defendants' attack represented the most brutal of an increasingly violent campaign by Defendants to suppress and chill Plaintiffs' constitutionally protected rights. Accordingly, Plaintiffs seek an immediate court order to curtail the unlawful use of excessive force. The use of SIM, explosive grenades, chemical agents, and water cannons or hoses, as means of crowd dispersal should be prohibited.

JURISDICTION AND VENUE

4. This action seeks damages and injunctive relief under 42 U.S.C. §§ 1981 & 1983. This court has subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1343. It has supplemental jurisdiction over the state law claims under 28 U.S.C. § 1367. This court also has

jurisdiction under the provisions of 28 U.S.C. § 2201 as this action is filed to obtain declaratory relief regarding the constitutionality of the actions and policies of local government.

5. Venue properly lies within this District under 28 U.S.C. § 1391(b). The named defendants perform their official duties in this District, and the events and omissions giving rise to plaintiffs' claims occurred in this District. Intradistrict venue is proper in the Western Division of the District of North Dakota pursuant to D.N.D. Civ. L.R. 3.1 and Gen. L.R. 1.1 because the claims asserted herein arise from acts and/or omissions which occurred in Morton County, North Dakota.

PARTIES

6. Plaintiff VANESSA DUNDON is a United States Citizen and an enrolled member of the Navajo Nation. She came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ (the Seven Council Fires) in opposition to the construction of DAPL, which is desecrating their ancestral land and burial sites and threatening the environment and water. (Ex. U, Dundon Decl.)

7. Plaintiff JADE KALIKOLEHUAOKALANI WOOL is a United States Citizen of Native Hawaiian and Oglala Lakota heritage. The Lakota is one of the seven nations, the Seven Council Fires, that compose the Oceti Šakowiŋ, also known as the Great Sioux Nation. She came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their sacred ancestral land and burial sites and threatening the environment and water. (Ex. E, Wool Decl.)

8. Plaintiff CRYSTAL WILSON is a United States Citizen of Blackfoot and Afro-indigenous heritage. She came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL,

which is desecrating their sacred ancestral land and burial sites and threatening the environment and water. (Ex. Q, Wilson Decl.)

9. Plaintiff DAVID DEMO is a United States Citizen of Penobscot heritage. He came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their ancestral land and burial sites and threatening the environment and water supply. (Ex. S, Demo Decl.)

10. Plaintiff GUY DULLKNIFE III is a United States Citizen and member of the Oglala Lakota Sioux Tribe. He came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their ancestral land and burial sites and threatening the environment and water supply. (Ex. M, Dullknife Decl.)

11. Plaintiff MARIAH MARIE BRUCE is a United States citizen. She came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their ancestral land and burial sites and threatening the environment and water. (Ex. I, Bruce Decl.)

12. Plaintiff FRANK FINAN is a United States citizen. He came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their sacred ancestral land and burial sites and threatening the environment and water. (Ex. O, Finan Decl.)

13. Plaintiff ISRAEL HOAGLAND-LYNN is a United States citizen. He came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their sacred ancestral land and burial sites and threatening the environment and water. (Ex. H, Hoagland-Lynn Decl.)

14. Plaintiff NOAH MICHAEL TREANOR is a United States citizen. He came to North Dakota to support the peaceful protest by the water protectors and the people of the Oceti Šakowiŋ in opposition to the construction of DAPL, which is desecrating their ancestral land and burial sites and threatening the environment and water supply. (Ex. G, Treanor Decl.)

15. Defendant MORTON COUNTY is a body corporate for civil purposes and subject to suit pursuant to N.D. Cent. Code § 11-10-01.

16. Defendant KYLE KIRCHMEIER is a law enforcement officer, the Sheriff and an authorized policymaker of Defendant MORTON COUNTY, and is being sued in his individual capacity.

17. Defendant CITY OF MANDAN is a body corporate for civil purposes and subject to suit pursuant to N.D. Cent. Code § 40-01-02.

18. Defendant JASON ZIEGLER is a law enforcement officer, the Chief of Police, and an authorized policymaker of defendant CITY OF MANDAN, and is being sued in his individual capacity.

19. Defendant STUTSMAN COUNTY is a body corporate for civil purposes and subject to suit pursuant to N.D. Cent. Code § 40-01-02.

20. Defendant CHAD KAISER is a law enforcement officer, the Sheriff, and an authorized policymaker of defendant STUTSMAN COUNTY, and is being sued in his individual capacity.

21. Plaintiffs are ignorant of the true names and/or capacities of defendants sued herein as DOES 1 through 100, inclusive, and therefore initiate suit against said defendants by such fictitious names. Plaintiffs will amend this complaint to allege their true names and capacities when ascertained. The DOE defendants include other individuals who supervised and/or participated in the conduct complained of herein. Plaintiff is informed and believes and therefore

alleges that each of the DOE defendants is legally responsible and liable for the incident, injuries and damages hereinafter set forth, and that each of said defendants proximately caused said incidents, injuries and damages by reason of their negligence, breach of duty, negligent supervision, management or control, violation of constitutional and legal rights, or by reason of other personal, vicarious or imputed negligence, fault, or breach of duty, whether severally or jointly, or whether based upon agency, employment, or control or upon any other act or omission. Plaintiffs will ask leave to amend this complaint to insert further charging allegations when such facts are ascertained.

In doing the acts alleged herein, defendants, and each of them, acted within the course and scope of their employment.

22. In doing the acts and/or omissions alleged herein, defendants, and each of them, acted under color of authority and/or under color of law.

23. In doing the acts and/or omissions alleged herein, defendants, and each of them, acted as the agent, servant, employee and/or in concert with each of said other defendants.

GENERAL ALLEGATIONS

24. Plaintiffs VANESSA DUNDON, JADE KALIKOLEHUAOKALANI WOOL, CRYSTAL WILSON, DAVID DEMO, GUY DULLKNIFE III, MARIAH MARIE BRUCE, FRANK FINAN, ISRAEL HOAGLAND-LYNN, NOAH MICHAEL TREANOR, and all other similarly situated persons are herein referred to collectively as "Plaintiffs." Defendants MORTON COUNTY, KYLE KIRCHMEIER, CITY OF MANDAN, JASON ZIEGLER, STUTSMAN COUNTY, CHAD KAISER, and DOES 1 to 100 are herein referred to collectively as "Defendants."

BACKGROUND

25. Energy Transfer Partners has proposed to construct a 1,172-mile long Dakota Access Pipeline (hereinafter DAPL) to carry 570,000 barrels a day of highly volatile fracked crude oil from the Bakken oil fields in North Dakota to Illinois. The pipeline was originally planned to cross the Missouri River, referred to as Mni Šoše by the Lakota people, north of Bismarck, but due to concerns and public outcry about contamination to the water supply, the pipeline company, Dakota Access LLC, rerouted the pipeline. As of the last census data available, Bismarck had a population of 55,532 and of that, 94.78% are white. http://bismark.areaconnect.com. The current pipeline route now crosses the Missouri River at Lake Oahe, the primary drinking water source for the Standing Rock and Cheyenne River Sioux Tribes, as well as thousands of other people who live in this area. The Missouri River is sacred to the Oceti Šakowiŋ people and central to their lifeways and culture. Lake Oahe is also an area of great cultural, historic, religious, and spiritual significance to the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and other members of the Oceti Šakowiŋ..

26. DAPL's path runs through Lakota ancestral and treaty lands. Lakota ancestral territories include all of the Dakotas and others. The 1851 Treaty of Fort Laramie (1851 Treaty) entered into by the United States and the Great Sioux Nation recognized all lands west of the Missouri River in current day North and South Dakota as territory of the Oceti Šakowiŋ. 11 Stat. 749 (Sept. 17, 1851). The 1851 Treaty encompass lands through which the DAPL is being and is to be constructed. In 1868, the United States entered into a second treaty with the leaders of the Great Sioux Nation (1868 Treaty) by which the United States again recognized the territory of the Oceti Šakowiŋ and guaranteed the territory against intrusions by the United States and outsiders. 15 Stat. 635 (Apr. 29, 1868). The DAPL's planned path if allowed will violate the 1851 Treaty.

27. DAPL threatens their environment, fish and wildlife, sacred ceremonial and burial sites, and vital water supply. The Pipeline and Hazardous Materials Safety Administration (PHMSA) has reported more than 3,300 incidents of leaks and ruptures at oil and gas pipelines since 2010.

28. In April 2016, Standing Rock and Cheyenne River Tribe members and other concerned citizens, known as "water protectors," began protesting the DAPL. Despite objections from the Tribes, construction began in August, 2016, and water protectors gathered in increasing numbers in spiritually based protest camps near Highway 1806.

29. On or about September 3, Standing Rock tribal officials informed the federal government and DAPL construction managers that the proposed pipeline construction was in direct conflice with traditional sacred areas and burial grounds. DAPL declined to suspend construction and instead accelerated the destruction of these known areas. Indigenous leaders and water protectors went to this location to pray in ceremony and to attempt to halt the permanent destruction and desecration of these graves and sacred areas. DAPL security employees attacked water protectors protesting the bulldozing of sacred sites and burial sites with dogs and pepper spray. A number of protesters suffered injuries, including dog bites. Law enforcement, including MORTON COUNTY Sheriff personnel stood by and made several false arrests of water protectors and members of the media. See http://www.nytimes.com.

30. Shortly after this incident, and in response to overwhelming tribal and public outcry, on September 9, the U.S. Army Corps of Engineers ("Army Corps") withdrew an easement to drill and install a pipeline under Lake Oahe and requested that DAPL cease all construction within 20 miles of Lake Oahe. Dakota Access, LLC ignored this request - which has since been repeated by the Army Corps twice. The company has now completed all planned construction in North Dakota other than the area directly under Lake Oahe, where it has set up its drilling equipment

and has announced that drilling is imminent despite the federal order. The proposed tunneling under the Lake and river pose the greatest threat to the tribes and others who rely on these freshwater bodies for their livelihoods.

31. At the same time, rather than defending the public interest and halting DAPLs illegal construction, Defendants increased their use of force and arrests of water protectors, responding to nonviolent First Amendment expression in an increasingly militarized and violent fashion. On multiple occasions in October, Defendants conducted indiscriminate and unlawful mass arrests of people who were exercising their First Amendment rights to voice their opposition to the proposed pipeline, accompanied by unjustified violence against nonviolent protesters. For example, on October 22, Defendants surrounded a peaceful prayer march and arrested more than one hundred people without any warning or opportunity to disperse. Ex. I, Decl. Bruce. On October 27, Defendants responded to a demonstration near highway 1806 in Humvees and helicopters, and unleashed a Long Range Acoustic Device (LRAD) sound weapon, SIM, and chemical agents on peaceful water protectors, and arrested more than 100 people, many of whom were engaged in prayer ceremonies.

32. When the arbitrary mass arrests in October failed to deter protesters from exercising their First Amendment rights, Defendants resorted to even more violent tactics. On November 2, hundreds of protesters, including indigenous elders, held a prayer ceremony across a river from the pipeline construction site. When a few protesters entered the frigid river, Defendants bombarded the entire group with tear gas and SIM, endangering their safety and health.

33. Defendants responded to a November 15 DAPL protest on a public roadway near a DAPL construction yard with widespread and indiscriminate use of chemical agents and stun guns. Ex. I.

34. Defendants' November 20, 2016, response to the water protectors was the most violent yet, resulting in many serious injuries including at least one critical injury which has left a 21 year-old woman permanently disabled.

VANESSA DUNDON

35. Vanessa Dundon is an enrolled member of the Navajo Nation and a supporter of the movement to stop the Dakota Access Pipeline. Dundon came to the water protectors' camp September 11, 2016, to stop the pipeline's desecration of ancestral, sacred and burial sites and its threat to the environment and water supply. She also came to stand up for indigenous peoples' rights. (Ex. U, Dundon Decl.)

36. On Sunday, November 20, 2016 at sundown around 7:00 or 8:00PM (CT) Dundon went to Backwater Bridge immediately north of Oceti Šakowiŋ camp on Highway 1806 to peacefully protect the water and to stop the pipeline from going through the Missouri River. It was very cold outside. She was one of the first people to arrive at the bridge. When she arrived at the bridge, other water protectors were using tow equipment in an attempt to move one of the burned out trucks from the bridge so emergency vehicles could reach camp. Army Corps had promised to remove the vehicles that had been placed there by law enforcement, but they never did, so people in camp mobilized to remove the vehicles for health and safety reasons as well as in the public interest. After the first truck was removed, a group of water protectors began to remove the second truck and Dundon saw a woman standing by herself across the razorwire barricade and in front of a line of law enforcement. The woman appeared to be a member of the media. Out of concern for the woman's safety, Dundon told her to move out of the way and the woman moved to the side of the road. At that moment, she and Dundon were the closest people to the line of law enforcement officers. As Dundon watched her move to the side of the road, Dundon

heard a tear gas cannon go off. Dundon tried to see where the tear gas cannon was being shot and saw that it was coming straight for her face. She did not have time to move to avoid being hit by the canister. Dundon saw the tear gas canister was on fire or burning and was about a foot from her face. She instinctively closed her eyes and was struck in the face and right eye by a canister. (Ex. U, Dundon Decl.)

37. After Dundon was shot in the eye, she fell to the ground and grabbed her bandana to cover her eye and turned around to run away. She was then shot in the back of her left leg right below her butt with a rubber bullet. The shot with the bullet caused her to fall down. Dundon couldn't see well and was in pain so she called out for help. At that point two water protectors grabbed her arms and they ran away from the frontline until they reached a minivan. Dundon could still not see at this point and was trying to open her eye. Her eye was bleeding so much that she could not see and she was worried her eyeball had been dislodged from its socket. (Ex. U, Dundon Decl.)

38. Dundon was one of the first people on the bridge, and thus no ambulances had been summoned to Oceti Šakowiŋ yet so had to be transported by a camp medic minivan. In the minivan a male EMT from camp helped clean her face and told Dundon. At the medic yurt at Oceti Šakowiŋ, emergency triage was performed and butterfly sutures were placed on her eye to stop the bleeding. (Ex. U, Dundon Decl.)

39. Dundon was then transported to the Emergency Room at Sanford Hospital in Bismarck, North Dakota. At Sanford Hospital, she was seen by an ophthalmologist who put several stitches in her eye and she was kept overnight in the ER. She was also given an MRI of her right eye while she was there. At 8:30AM (CT) the next morning on November 21, 2016, Dundon was awoken by hospital staff and told that she had a follow up appointment at 1:30pm that day and

she should leave the hospital and come back. She was alone and was walked to the lobby and was very dizzy and almost passed out. Once she got to the lobby, she laid down to wait for her cousin to come pick her up and was approached by hospital security. She told security that she was still dizzy and could not stand long, she was subsequently readmitted to the hospital. Dundon then saw a doctor and told him everything that had happened. He called Social Services and they discharged Dundon at about 10:30AM (CT) but she did not have a ride yet so she was sent to the doctor's office for her afternoon appointment by taxi. (Ex. U, Dundon Decl.)

40. The opthamologist advised Dundon to see a retina specialist for the damage she sustained to her eye. A water protector from camp picked Dundon up from the doctor's office and drove her to Grubes Retina Clinic in Mandan, North Dakota. When Dundon arrived at Grubes Retina Clinic they refused to treat her. To the best of her knowledge and belief, they refused to treat her because they knew she was a water protector from Standing Rock. (Ex. U, Dundon Decl.)

41. The next day, Dundon was taken to the Emergency Room in Acensia Hospital in Fargo, North Dakota. In Acensia, she was given an ultrasound of her right eye and told that there was so much bleeding and hemorrhaging that it was difficult to determine the extent of damage. She was told there was a possibility that her retina was detached and there was likely damage to her cornea. She was advised to see a retina specialist the next day. (Ex. U, Dundon Decl.)

42. The next day, November 23, 2016, she went to see Dr. Baggins, another ophthalmologist, in Fargo. Dr. Baggins told her the injury was very serious and said more likely than not, her retina was detached. He also said that even if it wasn't yet detached, it likely would detach in the near future because of the extent of her injury, and that her eye would take several months to heal in order to determine the full extent of the permanent damage sustained. He said she needed to be seen by a specialist in Minnesota for further treatment. He set an appointment for her to

see Dr. Robert Mittra in Plymouth, Minnesota on November 25, 2016. On November 25, 2016, Dundon was seen by Dr. Mittra. Dr. Mittra did another ultrasound of her right eye and put ointment on it and bandaged it so the swelling could go down. Dr. Mittra told her that she had a cut on her eyeball and the swelling needed to go down before she could receive further treatment. Dr. Mittra said treatment for her eye will take months and several follow up appointments. He advised that Dundon not return home to Arizona because of the elevation difference, which could harm her eye. Dr. Mitta also told her not to lift anything, cough too hard or otherwise put pressure on her eye. The doctor said the trauma to her eye will likely affect her vision for the rest of her life and it is unclear at this time if she will be able to see out of her right eye again. Dundon's eye is in severe pain and causes pain on the right side of her face. She has difficulty sleeping because of the pain. There is an almost constant throbbing and pressure in her eye. (Ex. U, Dundon Decl.) She worries about the ongoing effects to her health as a result of the injuries she sustained by the police.

43. As a result of these events, she worries that she will be subjected to further police abuse if she continues to participate in First Amendment expression to protect the water in Morton County. As a result of the actions of the Morton County Sheriff and assisting agencies, she is afraid and nervous about participating in further First Amendment activity in opposition to the Dakota Access Pipeline in Morton County, even thought she wants to gather and assemble peacefully with others who share her views. (Ex. U, Dundon Decl.)

JADE KALIKOLEHUAOKALANI WOOL

44. Jade Kalikolehuaokalani Wool is of Native Hawaiian and Oglala Lakota Sioux Tribe heritage. Wool came to the water protector camp in August 2016 after finding out about the situation in Standing Rock. As an indigenous woman, she believes she needs to be at the camp

in solidarity with the water protectors and to uphold tribal sovereignty rights. (Ex. E, Wool Decl.)

45. On Sunday, November 20, 2016 in the evening, Wool went to the bridge immediately north of the Oceti Šakowiŋ camp on Highway 1806 to peacefully gather with other water protectors to protest construction of the pipeline underneath the Missouri River. It was very cold and windy, with temperatures below freezing that night.. (Ex. E, Wool Decl.)

46. Wool could see a lot of law enforcement officers or security officers and lots of military vehicles on the other side of the bridge behind significant barricades. The officers and their vehicles were on the opposite side of a razor-wire fence. When she arrived at the bridge, she could hear people screaming and could see flashes from explosions. A few minutes after she arrived at the bridge, a grenade loudly exploded in the air right above her head. When that grenade went off, Wool was in the middle of a crowd of water protectors and for a few minutes she was dazed and could not really hear because of the noise of the explosion. (Ex. E, Wool Decl.)

47. Wool was also hit directly by a water cannon that the officers were using on the water protectors. When she got hit, the force of the torrent of water pushed her backward and she was completely soaked by the water cannon, even her boots were filled. The officers sprayed the crowd of water protectors with the water canon for about ten minutes at a time in the freezing night air. Officers would stop for a few minutes and then start again. This went on for the entire hour that Wool was on the bridge. (Ex. E, Wool Decl.)

48. She saw a water protector who looked like he was injured and was crawling on the ground. Other water protectors tried to pull him away from the water cannon and while they were doing this, an officer kept firing the water cannon at the injured man. Wool located a

plastic lid from a storage tote, and she moved near the injured man and tried to shield him from the water cannon. She was close enough to see the face of the officer intentionally shooting the water cannon at specific targeted people. She could see the officer looking at her before the officer hit her again with the water. At one point, the force of the water cannon knocked the plastic lid into her head. (Ex. E, Wool Decl.)

49. Soon after the injured man was moved away by the water protectors, another grenade exploded in front of Wool's face. Pieces of the grenade hit Wool's face in several places. The grenade burned her face and knocked her to the ground. After the grenade hit her, she was in shock and could not talk or respond to others around her. She remembers being put in a truck and being taken to the medical tent at Oceti Šakowiŋ camp. She was transported to the hospital in Bismarck. The doctors had to cut off her clothes and hook her up to an IV. Her body ached, and her head hurt. (Ex. E, Wool Decl.)

50. Wool feels very shaken up by what happened that night. She still feels nauseated and has not been able to eat well for a few days. She still has a headache. She feels very nervous and anxious and cannot sit still very long or sleep through the night. She still feels cold all the time as a result of hypothermia or exposure caused by the repeated drenchings. (Ex. E, Wool Decl.)

51. As a result of these events, she worries that she will be subject to other abuses in the future if she participates in further peaceful prayer and protests in support of the water protectors in Morton County. Because of the actions of the Morton County police, she is nervous about participating in further First Amendment activities in opposition to the pipeline in Morton County even though she wishes to gather and assemble peacefully with others who share her views. (Ex. E, Wool Decl.)

CRYSTAL WILSON

52. Crystal Wilson is of Blackfoot and Afro-indigenous heritage. She is a member of the movement to stop DAPL. She came to the water protectors' camp in late September 2016 to gather with other indigenous people. Since she has been in the camp, she has been volunteering and participating in peaceful, prayerful actions. (Ex. Q, Wilson Decl.)

53. On Sunday, November 20, 2016 in the evening around 7:00PM (CT), Wilson went to the bridge immediately north of Oceti Šakowiŋ camp on Highway 1806 to peacefully gather with other water protectors to stop the pipeline from going through the river and polluting the Missouri River. She was praying with the other water protectors while she was there. It was very cold and windy. During the first hour, she and others were peacefully praying, unarmed, and not threatening police. Still, police were shooting a high-powered water cannon, tear gas canisters and flash-bang grenades at her. She left for a rest and returned to the bridge with more appropriate winter clothing. (Ex. Q, Wilson Decl.)

54. After she returned, a native elder was singing an indigenous song with his arm outstretched on either side, and the police were soaking him with the water cannon, even though it was very cold outside. Wilson held a piece of plastic up to shield others. Then, she heard a bang and felt an impact on her chest. She grabbed an aluminum sheet to protect herself and others. Then she walked back away from the police line. She noticed at the time she was covered with ice on her hair and back from the water canon. (Ex. Q, Wilson Decl.)

55. On November 20th, Wilson did not hear any request to disperse from the police throughout the entire night: when she was on the bridge, before or after she was shot, gassed, and soaked by the water cannon. (Ex. Q, Wilson Decl.)

56. As a result of these events, Wilson worries that she will be subjected to other abuses if she participates in further peaceful protest and prayer in support of the water protectors in

Morton County. Because of the actions of the Morton County Sheriff and assisting agencies, she is very nervous about participating in further First Amendment activity in opposition to the pipeline in Morton County even though she wishes to gather and assemble peacefully with others who share her views. (Ex. Q, Wilson Decl.)

DAVID DEMO

57. David Demo is of Penobscot heritage. Demo is a supporter of the movement to stop DAPL. He came to the water protectors' camp mid-August 2016, to protest the pipeline's desecration of ancestral sacred and burial sites and its threat to the environment and water supply. (Ex. S, Demo Decl.)

58. On Sunday, November 20, 2016 at 8:30PM or 9:00PM (CT), he went to the bridge immediately north of Oceti Šakowiŋ camp on Highway 1806 to peacefully protest and pray to stop the pipeline from going through the river and polluting the Missouri River. (Ex. S, Demo Decl.)

59. It was a cold night and below freezing. As he approached the bridge, and the line of police, he was holding a "GoPro" camera on a stick, filming the police behind the razor wire. He was there to observe what was going on, and continue protesting the pipeline. Within five minutes, he was targeted with the water cannon and was thoroughly soaked for about thirty seconds, even though he was not threatening the police or barricade in any way. He never heard warnings issued to get off the bridge, or that he would be assaulted with the water canon, or that projectiles would be fired against him. At the end of the approximately thirty seconds, one of the officers shot him with what seems to be a rubber bullet hitting him on the middle finger of his right hand, which was holding the video camera on a stick. (Ex. S, Demo Decl.)

60. After he was hit by the rubber bullet, he went back behind the bridge to receive first aid treatment from the medics. He drove back to Sacred Stone camp to put on dry clothes, and he returned to the bridge to join the protest. He was able to keep himself from getting soaked while on the bridge by using a board or tarp to protect himself. He stayed there until approximately 5am. (Ex. S, Demo Decl.)

61. He went to the Indian Health Service hospital in Fort Yates at approximately 6:30am and received treatment for his hand where he was shot. The doctors told him he had several broken knuckle bones, and he was informed that he would need reconstructive surgery. (Ex. S, Demo Decl.)

62. He never heard an order to disperse while he was on the bridge on the night of November 20, 2016. Officers only said to get away from the razor wire barricade. He did step back from the razor wire when the officers requested it, but he still was targeted with the water cannon and munitions. (Ex. S, Demo Decl.)

63. The events of November 20 were very traumatic. It was shocking for Demo to observe and experience such brutal, cruel, excessive force by public officers. (Ex. S, Demo Decl.)

64. As a result of these events, Demo worries that he will be subjected to other abuses if he participates in further peaceful protest and prayer in support of the water protectors in Morton County. Because of the actions of the Morton County Sheriff and assisting agencies, he is very nervous about participating in further First Amendment activity in opposition to the pipeline in Morton County even though he wishes to gather and assemble peacefully with others who share his views. (Ex. S, Demo Decl.)

GUY DULLKNIFE III

65. Guy Dullknife III is a member of the Oglala Lakota Sioux Tribe and resident of the Pine Ridge Indian Reservation in South Dakota. He comes from a Reservation where the community depends on water from the Missouri River as its sole water resource. The Pine Ridge Indian Reservation is within the poorest county in the United States, and the tribal community there would not be able to afford to buy water to replace their sole water source. He came to peacefully protest the building of the pipeline which may in the future leak and cause harm to his community. (Ex. M, Dullknife Decl.)

66. On the evening of November 20, 2016 at around 10 or 11pm, Dullknife went to the bridge over the Cannonball River on highway 1806 north of Oceti Šakowiŋ camp to observe the prayer assembly. The temperature was below freezing. When he got there, he saw that the police were using water cannons to soak water protectors. He also saw a woman kneeling about 12-to-14 feet from the barbed wire the police had placed on the bridge. He saw the police officer firing the water cannon point directly at the woman. The police officer aimed the water cannon at her, and she was knocked down. The police continued spraying the woman while she was on the ground even though she posed no threat to the police. Another person helped Dullknife hold up a board to protect the woman from the water while she prayed. (Ex. M, Dullknife Decl.)

67. Dullknife was hit in the chest, stomach, and leg by what he believes were shotgun-fired beanbags. One bean bag hit him in the chest, and he caught it with his hand. He now has pain and bruising from those injuries. (Ex. M, Dullknife Decl.)

68. While at the bridge, he observed three trucks brought in filled with water so they could continue to soak the protesters. One of the trucks was a fire engine. He observed the police shoot and injure many people that night with beanbags, rubber bullets, tear gas, flash-bangs, and

grenades. He even overheard highly unprofessional police officers laughing and celebrating after they hit people with projectiles. (Ex. M, Dullknife Decl.)

69. As a result of these events, Dullknife worries that he will be subjected to other abuses if he participates in further peaceful protest and prayer in support of the water protectors in Morton County. Because of these actions of the Morton County Sheriff and assisting agencies, he is very concerned about participating in further First Amendment activity in opposition to the pipeline in Morton County even though he wishes to gather and assemble peacefully with others who share his views. (Ex. M, Dullknife Decl.)

MARIAH MARIE BRUCE

70. Mariah Marie Bruce has been present at several protests since arriving at Oceti Šakowiŋ camp in mid-October, 2016. She has protested and wishes to continue protesting the desecration of ancestral sacred and burial sites and DAPL's threat to the environment and water supply. On Saturday, October 22, 2016, the police had batons and knocked people to the ground so hard she could hear the bodies hit the ground. On November 15, 2016, the police response was even more aggressive than what she had seen previously. The police used batons, guns, loud sound machines, and pepper spray on peaceful protesters. She was concerned for two tribal elders that day, whom she tried to protect because the police used so much pepper spray on them. (Ex. I, Bruce Decl.)

71. On November 20, 2016 at about 6:30pm, Bruce went to the bridge immediately north of the Oceti Šakowiŋ camp. She went there to peaceably protest DAPL. It was a very cold night, and the temperature was below freezing. When Bruce got near the bridge, she saw a barb wire fence across the bridge with the police lined up behind the barb wire. She then walked to the front and was sprayed by police officers with a powerful stream of water from a cannon.

Throughout the entire time she was peaceably protesting at the bridge she was sprayed with water from the water cannon. Her two inner jackets were wet, and her most outer jacket was frozen. Her skirt was frozen, and she had no gloves. At the end of the night she had trouble moving her hands. Her hair was also frozen, and she saw another girl with icicles in her hair. (Ex. I, Bruce Decl.)

72. There were flood lights on the protestors, and Bruce couldn't see without taking her goggles off because of the light, which left her eyes vulnerable to the tear gas being deployed by the police officers. It was hard for her to breathe because the cloud of tear gas was so thick. The tear gas burned her eyes. She tried not to breathe because breathing the tear gas hurt her lungs and burned her nose. (Ex. I, Bruce Decl.)

73. Bruce bent down to grab a lid to a plastic container to use as a shield, and while she was bent over a police officer hit her in the vagina with an explosive teargas blast grenade, which exploded on her body. After Bruce was hit, she did not feel any immediate physical pain, but she thought about how glad she was that she was not pregnant because the impact and explosion could have caused her to miscarry. (Ex. I, Bruce Decl.)

74. Bruce remained near the front of the protests for another 20-30 minutes, but the tear gas was so overpowering that she eventually had to leave the front and seek medical attention. The medics near the front line put milk of magnesia in her eyes to help with the burning from the tear gas. She was then taken to the medics at Oceti Šakowiŋ camp and was given tea to help her body warm-up, as she was very cold. As her body began to warm, she started to feel pain in her vagina and abdomen. The pain suddenly worsened and she began vomiting. The medics became very concerned. Bruce was put into an ambulance and taken to Sanford Hospital in Bismarck, North Dakota. (Ex. I, Bruce Decl.).

75. As of November 22, 2016, she is still in a lot of pain and needs assistance from others to move around. When she stands, it feels like her insides are falling out. She is also concerned about how this injury could impact her ability to have children in the future. (Ex. I, Bruce Decl.)

76. Bruce has seen how the police response is becoming more aggressive and violent over the past few months. The police response was the most aggressive yet on November 20, 2016. Because of these events, she worries that she will be subjected to other abuses if she participates in further peaceful protests in support of the water protectors in Morton County. As a result of the actions of Morton County and assisting agencies, she is afraid about participating in further First Amendment activity in opposition to the pipeline in Morton County even though she wishes to gather and assemble peacefully with other who shares her views. (Ex. I, Bruce Decl.)

FRANK FINAN

77. Frank Finan came to North Dakota to document DAPL's desecration of ancestral sacred and burial sites. Finan also came because he is concerned about environmental injustice. On November 20, 2016 in the evening, he went to the bridge north of Oceti Šakowiŋ to peacefully gather with other water protectors to stop the DAPL from going through the river and polluting the Missouri River. It was a very cold and below freezing that night. On the other side of the bridge, there were police officers and lots of military vehicles. From the bridge, he could see water from a water cannon being aimed at water protectors. There were two small campfires along the side of the highway, which were well controlled. He saw water protectors being carried away from the bridge by medics because they were soaking wet. There was a constant flow of water protectors being removed from the bridge and carried away by medics. He saw smoke canisters being thrown by the police, and he heard sounds like gunshots. (Ex. O, Finan Decl.)

78. While on the bridge, he was sprayed with a cloud of something that burned his eyes badly and made him cough. He then left the bridge to get away from the gas and to get his camera. When he got back to the bridge, he began taking photos. While taking photos, he was shot near his waistline by a police officer with what he assumes was a rubber bullet. The shot was so forceful that he was knocked to the ground. He fell and slid backwards because of the ice on the bridge. Some water protectors helped him to get up, and he was taken to see medics. He still experiences pain whenever he tries to stand-up or sit-down. (Ex. O, Finan Decl.)

79. As a result of these events, Finan worries that he will be subjected to other abuses if he participates in further peaceful demonstrations with the water protectors in Morton County, or if he takes more photos of what is happening in Morton County. Because of the actions of the Morton County Sheriff and assisting agencies, he is very nervous about participating in further First Amendment activity in opposition to the pipeline in Morton County even though he wishes to gather and assemble peacefully with others who share his views, and to document and communicate what is happening to others. (Ex. O, Finan Decl.)

ISRAEL HOAGLAND-LYNN

80. On November 20, 2016 at 8:00pm, Israel Hoagland-Lynn went to the bridge over Highway 1806 north of Oceti Šakowiŋ camp to peacefully protest the DAPL. When he got there, he was 200 feet from the front line of the protests on the bridge. It was cold and below freezing. Eventually he moved closer to the front of the protest, at which point he was sprayed with water from a water cannon being operated by police officers. He left the bridge to warm–up. On his way back to the bridge, he saw two Native Americans crouching on the ground and was asked to help shield those individuals with plywood to protect them from getting shot by the water cannon and rubber bullets. While holding the plywood to shield the Native Americans,

Hoagland-Lynn was continually being shot with the water cannon. The police were also shooting rubber bullets in his direction. A water protector next to him was shot in the finger by a rubber bullet. Hoagland-Lynn reached over to help the water protector when Hoagland-Lynn was shot in the back by a rubber bullet. He knew it was a rubber bullet because he saw it when it fell to the ground. (Ex. H, Hoagland-Lynn Decl.)

81. Hoagland-Lynn then looked up and saw a police officer pointing a gun at him. He curled his head down and shielded his body with the plywood. He was then hit by a rubber bullet in the top of his head. He dropped to the ground and lost consciousness. When he regained consciousness, he felt a hole in his head. He was in severe pain. He was taken to the clinic at the Oceti Šakowiŋ camp where the medics tried to stop his bleeding. He was then transferred by ambulance to St. Alexius hospital in Bismarck. At the hospital, he was diagnosed with a laceration on his head, a chest wall contusion from falling after being shot, and a large bruise on his back where he was shot with the first rubber bullet. His head wound required 17 staples to close the laceration. He still has pain in his head and back. (Ex. H, Hoagland-Lynn Decl.)

82. As a result of these events, Hoagland-Lynn worries that he will be subjected to other abuses if he participates in further peaceful protest in support of the water protectors in Morton County. Because of the actions of the Morton County Sheriff and assisting agencies, he is very nervous about participating in further First Amendment activity in opposition to the pipeline in Morton County even though he wishes to gather and assemble peacefully with others who share his views. (Ex. H, Hoagland-Lynn Decl.)

NOAH MICHAEL TREANOR

83. On Sunday, November 20, 2016 at about 7:00pm, Noah Michael Treanor went to a bridge immediately north of the Oceti Šakowiŋ camp on Highway 1806. He went there to

peacefully protest and to pray to stop DAPL. It was a very cold night and the temperature was below freezing. Treanor walked near the front of the bridge. He stood there praying for about a half hour when police officers started shooting at him with the water cannon and SIM. Treanor stayed on the bridge in the same spot for at least two hours while being shot by the police with the water cannon and SIM. (Ex. G, Treanor Decl.)

84. Later, Treanor bent down on one knee to pray. This time the police shot at him at a closer range with water, so he turned around. The police then started firing rubber bullets, and he was hit in the back of his legs. He then turned around facing the police again and kneeled and prayed for another hour. Police officers again shot at him with the water cannon and SIM while he prayed. (Ex. G, Treanor Decl.)

85. The police then began using two water hoses on Treanor at the same time. He rolled on to the grass at the side of the bridge and tried to shield himself. He was then shot in the head by police . He had a laceration to his head, and he was bleeding profusely. Water protectors then put him on the back of a truck and transported him to Oceti Šakowiŋ camp. There, he was immediately put into an ambulance and transported to Sanford Hospital in Bismarck. At the hospital, his head wound was stapled together. As of November 22, 2016, Treanor still has many bruises on his body, and it hurts to open his eyes and look around. He still gets dizzy and has headaches. His body is achy and sore. (Ex. G, Treanor Decl.)

86. As a result of these events, he worries that he will be subjected to other abuses in the future if he participates in further peaceful prayer and protests in support of the water protectors in Morton County. Because of the actions of the Defendants, he is nervous about participating in further First Amendment activities in opposition to the pipeline in Morton County even though

he wishes to gather and assemble peacefully with others who share his views. (Ex. G, Treanor Decl.)

87. At no time did any of the Plaintiffs or class members present a threat or do anything to justify Defendant's use of force on them.

CLASS ALLEGATIONS

88. The treatment to which Plaintiffs, and the class they represent, have and will be subjected—being shot or injured with SIM, explosive grenades, chemical agents, and water cannons or hoses while engaging in First Amendment activities—were all performed pursuant to policies, customs, and/or practices of Defendants.

89. Plaintiffs, on behalf of themselves and of the class of similarly situated persons, seek an order declaring that Defendants' treatment of Plaintiffs pursuant to these polices, customs, and/or practices is unlawful.

90. Plaintiffs bring this action on their own behalf and on behalf of all persons similarly situated, pursuant to Federal Rule of Civil Procedure 23 (b)(3). Plaintiffs seek certification of a class defined as follows: All persons who were shot or harmed by water, SIM, chemical agent, or grenades on November 20, 2016.

91. Pursuant to Federal Rule of Civil Procedure 23(a), the members of the class are so numerous that joinder of all members is impractical. Plaintiffs do not know the exact number of class members. Plaintiffs are informed and believe, and thereupon allege that there are more than 100 persons in the class defined above.

92. Pursuant to Federal Rule of Civil Procedure 23(a), Plaintiffs are informed and believe, and thereupon allege, that there are questions of law and fact common to the class, including but not limited to:

- Whether the use of SIM, water, chemical agents, and explosive grenades on the Plaintiff class constituted excessive force under the Fourth Amendment;
- Whether Defendants used SIM, water, chemical agents, and explosive grenades to harm the Plaintiff class and chill their freedom of speech and association and free exercise of religion in violation of the First Amendment;
- Whether Defendants are liable for violating the First and Fourth Amendment rights of the Plaintiff class;
- Whether Defendants should be enjoined from continuing to use these weapons indiscriminately, for purposes of crowd dispersal.

93. Pursuant to Federal Rules of Civil Procedure 23(a), Plaintiffs' claims are typical of the class they seek to represent. Plaintiffs and the class they seek to represent were all subjected to excessive force while being shot at or injured by SIM, explosive grenades, chemical agents, and water cannons or hoses intended to prevent them from exercising their right to peacefully protest and/or pray. Plaintiffs have the same interests and have suffered the same type of injuries as the proposed class. Each proposed class member suffered actual damages as a result of the challenged conduct. Plaintiffs' claims arose because of Defendants' policies, customs, and/or practices. Plaintiffs' claims are based upon the same legal theories as the claims of the proposed class members.

94. Plaintiffs' counsel has the resources, experience, and expertise to successfully prosecute this action against Defendants. Counsel knows of no conflicts among any members of the class, or between counsel and any members of the class.

95. Pursuant to Federal Rules of Evidence 23(b)(3), upon certification, class members must be furnished with the best notice practicable under the circumstances, including individual notice

to all members who can be identified through reasonable effort. If this action is certified as a class action, Plaintiffs contemplate that individual notice will be given to class members, at such last known address by first class mail, as well as notice by publication informing them of the following:

i. The pendency of the class action and the issues common to the class;

ii. The nature of the action;

iii. Their right to "opt-out" of the action within a given time, in which event they will not be bound by a decision rendered in the class action:

iv. Their right to "opt-out" to be represented by their own counsel and to enter an appearance in the case; otherwise they will be represented by the named class plaintiffs and their counsel; and

v. Their right, if they do not "opt-out" to share in any recovery in favor of the class, and conversely to be bound by any judgment on the common issues adverse to the class.

EQUITABLE ALLEGATIONS

96. In violation of State and Federal Constitutional and Statutory provisions, Defendants, and their agents and employees, including Defendants DOES 1 to 100, have, and unless enjoined, will continue to subject the Plaintiff class to excessive force and injury that will cause Plaintiffs and the other class members harm, as well as to be fearful of exercising their right to peacefully pray and protest DAPL.

FIRST CLAIM

Retaliation

(First, Fourth & Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983)

97. The First Claim is asserted by Plaintiffs and the proposed class against all Defendants.

98. Plaintiffs reallege and incorporate the allegations of the preceding paragraphs to the extent relevant, as if fully set forth herein.

99. Plaintiffs were engaging in constitutional-protected activity when Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers, caused Plaintiffs to suffer injuries that would chill a person of ordinary firmness from continuing to engage in that activity, and Defendants' adverse actions were substantially motivated by a desire to retaliate against Plaintiffs' exercise of constitutionally-protected conduct.

100. Defendants' retaliation was motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the United States Constitution, and/or was wantonly or oppressively done.

101. As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries entitling them to recover compensatory and punitive damages and declaratory and injunctive relief against the individual defendants.

WHEREFORE, Plaintiffs pray for relief as hereunder appears.

SECOND CLAIM

Unreasonable Use of Force

(Fourth & Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983)

102. The second claim is asserted by Plaintiffs and the proposed class against all Defendants.

103. Plaintiffs reallege and incorporate the allegations of the preceding paragraphs to the extent relevant, as if fully set forth herein.

104. Defendants, acting or purporting to act in the performance of their official duties as law enforcement officers, used unreasonable force in dispersing Plaintiffs. The unreasonable force to

which Plaintiffs were subjected included Defendants' shooting at them with SIM, explosive teargas grenades, teargas canisters, and water cannons in a subfreezing temperature while shining blinding lights upon them from behind razor wire barricades.

105. Defendants' unreasonable use of force was motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' Fourth and Fourteenth Amendment rights secured by the U.S. Constitution, and/or were wantonly or oppressively done.

106. As a direct and proximate result of Defendants' actions, Plaintiffs suffered injuries entitling them to compensatory damages and declaratory and injunctive relief against Defendants.

WHEREFORE, Plaintiffs pray for relief as hereunder appears.

THIRD CLAIM

Policies, Customs, or Practices

(First, Fourth & Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983)

107. The Third Claim is asserted by Plaintiffs and the proposed Class against all Defendants.

108. Plaintiffs reallege and incorporate the allegations of the proceeding paragraphs to the extent relevant, as if fully set forth in this Claim.

109. MORTON COUNTY, Sheriff KYLE KIRCHMEIER, CITY OF MANDAN, Chief of Police JASON ZIEGLER, STUTSMAN COUNTY, and Sheriff CHAD KAISER acting under the color of state law, maintain policies, customs, or practices that permit or are deliberately indifferent to violations of Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution. These include but are not limited to policies, customs and practices which authorize, encourage, condone, and/or acquiesce in the use of excessive force against protesters,

and/or other customs, policies and/or practices. Such policies, customs, or practices are the moving force behind the violation of plaintiffs' First, Fourth and Fourteenth Amendment rights.

110. Defendants, acting under the color of state law, maintain inadequate policies, customs, or practices, in reckless disregard or deliberate indifference to Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution. The inadequacy of the policies, customs, or practices, and the need for such adequate policies, customs, or practices, are patently obvious and foreseeably likely to result in the violation of persons' Fourth and Fourteenth Amendment rights secured by the U.S. Constitution.

111. The policies, customs and practices of defendants posed a substantial risk of causing substantial harm to Plaintiffs, and defendants were aware of the risk.

112. KYLE KIRCHMEIER, JASON ZIEGLER, CHAD KAISER and DOES' actions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution, or were wantonly or oppressively done.

113. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against Defendants, and punitive damages against KIRCHMEIER, ZIEGLER, KAISER and DOES 1 to 100.

WHEREFORE, Plaintiffs pray for relief as hereunder appears.

FOURTH CLAIM

Training, Supervision, or Discipline

(First, Fourth & Fourteenth Amendments to the U.S. Constitution; 42 U.S.C. § 1983)

114. The Fourth Claim is asserted by Plaintiffs and the proposed Class against all Defendants.

115. Plaintiffs reallege and incorporate the allegations of the preceding paragraphs to the extent relevant, as fully set forth in this Claim.

116. Defendants MORTON COUNTY, KIRCHMEIER, CITY OF MANDAN, ZIEGLER, STUTSMAN COUNTY, KAISER, and DOES, acting under the color of law, maintain hiring, training, supervision, and/or discipline that permit or are in reckless disregard or deliberately indifferent to the violations of Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution. Such hiring, training, supervision, and/or discipline was the moving force behind the violation of plaintiffs' First, Fourth and Fourteenth Amendment rights.

117. The inadequacy of the hiring, training, supervision, and/or discipline and the need for adequate hiring, training, supervision, or discipline, is patently obvious and foreseeably likely to result in the violation of persons' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution.

118. Defendants KIRCHMEIER, ZIEGLER, KAISER, and DOES' actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution, or were wantonly or oppressively done.

119. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs' suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against Defendants, and damages against the individual defendants.

WHEREFORE, Plaintiffs pray for relief as hereunder appears.

FIFTH CLAIM

Unequal Protection of the Law

120. The Fifth Claim is asserted by Plaintiffs and the proposed Class against all Defendants.

121. Plaintiffs reallege and incorporate the allegations of the preceding paragraphs.

122. Defendants, acting under the color of state law are subjecting Plaintiffs to unequal protection of the law in violation of Plaintiffs' constitutional rights. The unequal treatment to which Plaintiffs are subject includes the use of excessive force including deployment of an arsenal of dangerous implements and devices, including SIM, explosive teargas grenades, teargas canisters, and water cannons spraying high pressure water on Plaintiffs and others despite the subfreezing temperature.

123. Defendants KIRCHMEIER, ZIEGLER, KAISER, and DOES's actions and inactions were motivated by evil motive or intent, involved reckless or callous indifference to Plaintiffs' First, Fourth and Fourteenth Amendment rights secured by the U.S. Constitution, or were wantonly or oppressively done.

124. As a direct and proximate result of Defendants' actions or inactions, Plaintiffs suffered injuries entitling them to receive compensatory damages and declaratory and injunctive relief against Defendants, and punitive damages against the individual defendants.

WHEREFORE, Plaintiffs pray for relief as hereupon appears.

Sixth Claim

Declaratory Relief

(28 U.S.C. § 2201)

125. The Sixth Claim is asserted by Plaintiffs and the proposed Class against all Defendants.

126. Plaintiffs reallege and incorporate the allegations of the preceding paragraphs to the extent relevant, as fully set forth in this Claim.

127. There presently exists an actual controversy within this Court's jurisdiction regarding whether or not Defendants' actions and inactions described are lawful, pursuant to the First and

Fourth and Fourteenth Amendments of the U.S. Constitution. Plaintiffs are interested parties because they were subject to actions and inactions described and, accordingly, seek a declaration of their rights concerning the legality of those actions and inactions to which they were subject.

128. As a direct and proximate result of Defendants' actions and inactions, Plaintiffs suffered injuries entitling them to receive declaratory and injunctive relief against Defendants.

WHEREFORE, Plaintiffs pray for relief as hereunder appears.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs seek Judgment as follows:

1. For declaratory and injunctive relief declaring defendants' actions unlawful, and enjoining preliminarily and permanently, from usage of dangerous implements and devices, including SIM, explosive teargas grenades, teargas canisters, and water cannons and hoses as means of crowd dispersal.
2. For compensatory, general, and special damages for Plaintiffs, and for each proposed member of the class, according to proof at trial.
3. For an award of exemplary/punitive damages against Defendants KIRCHMEIER, ZIEGLER, KAISER and DOE individual defendants, in an amount sufficient to deter and to make an example of them, because their actions and/or inactions, as alleged, were motivated by evil motive or intent, involved reckless or callous indifference to the federally protected rights, or were wantonly or oppressively done;
4. For an award of reasonable attorneys' fees and costs, pursuant to 42 U.S.C. § 1988, and any other statute or law as may be applicable; and
5. For an award of any other further relief, as the Court deem fair, just, and equitable.

JURY TRIAL DEMAND

A jury trial is demanded on behalf of Plaintiffs VANESSA DUNDON, JADE KALIKOLEHUAOKALANI WOOL, CRYSTAL WILSON, DAVID DEMO, GUY DULLKNIFE III, MARIAH MARIE BRUCE, FRANK FINAN, ISRAEL HOAGLAND-LYNN, and NOAH MICHAEL TREANOR, and all persons similarly situated.

Dated: November 25, 2016

Respectfully Submitted,

/s/ Rachel Lederman

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Related Litigation

Dundon v. Kirchmeier
Eighth Circuit Court of Appeals
Appeal – Opening Brief
April 2022

No. 22-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Vanessa Dundon, et al.

Plaintiffs-Appellants,

v.

Kyle Kirchmeier, et al.,

Defendants-Appellees.

Appeal from the U.S. District Court for the District of North Dakota
Case No. 1:16-cv-406 DMT ARS
The Honorable Judge Daniel M. Traynor

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SUMMARY OF THE CASE

Appellants responded to a historic call from the Standing Rock Sioux Tribe to come stand together in prayer and nonviolent protest to protect water and sacred sites imperiled by the Dakota Access Pipeline. On the night of November 20-21, 2016, law enforcement, under the command of the Appellees, shot nonviolent water protectors with munitions and freezing blasts of water for ten hours, seriously injuring Appellants and many others.

The district court granted summary judgment on a limited discovery record to all defendants on all claims. Appellants maintain this judgment was entered in error. The court improperly viewed the facts in the light most favorable to Appellees and misapplied the constitutional law of excessive force and qualified immunity. The court also made extensive determinations as to disputed facts, usurping the role of the jury as factfinder, and premised its rulings on these determinations. A jury must determine whether the force used by law enforcement was objectively unreasonable; whether the individual Appellees are liable as supervisors; and whether the entity Appellees under *Monell*.

REQUEST FOR ORAL ARGUMENT

Appellants respectfully request 20 minutes oral argument to adequately address the multiple issues and parties.

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Appellant's Brief

JURISDICTIONAL STATEMENT

Appellants brought their action pursuant to 42 U.S.C. §1983. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343 and 1367. It entered a final order dismissing all claims on December 29, 2021. (App.1; R. Doc. 286; App.92; R. Doc. 287.) On January 28, 2022, Appellants timely filed their notice of appeal. (App.93; R. Doc. 288.) This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF ISSUES

I. The District Court failed to consider the evidence in the light most favorable to Appellants, the non-movants, on summary judgment.

Tolan v. Cotton, 572 U.S. 650, 657 (2014); *Atkinson v. City of Mt. View*, 709 F.3d 1201, 1207 (8th Cir. 2013)

II. Law enforcement Appellees' use of force on Appellants was not objectively reasonable in violation of the Fourth and Fourteenth Amendments to the Constitution.

A. Law Enforcement seized Appellants under the Fourth Amendment when striking them with impact munitions and freezing water.

Torres v. Madrid, 141 S.Ct. 989 (2021)

Atkinson v. City of Mt. View, 709 F.3d 1201 (8th Cir. 2013)

Alsaada v. City of Columbus, 536 F.Supp.3d 216, 262–263 (S.D. Ohio 2021)

Nelson v. City of Davis, 685 F.3d 867 (9th Cir. 2012)

B. Appellants are also protected from excessive force by the Fourteenth Amendment.

Kingsley v. Hendrickson, 576 U.S. 389 (2015)

Whitney v. City of St. Louis, Mo, 887 F.3d 857 (8th Cir. 2018)

C. A reasonable jury could find that Appellees' force used against Appellants was objectively unreasonable

Graham v. Connor, 490 U.S. 386 (1989)

Banks v. Hawkins, 999 F.3d 521 (8th Cir. 2021)

III. Appellees are not entitled to qualified immunity

Williams v. City of Burlington, 27 F.4th 1346 (8th Cir. 2022)

Mitchell v. Kirchmeier, 28 F.4th 888 (8th Cir. 2022)

Baude v. Leyshock, 23 F.4th 1065 (8th Cir. 2022)

IV. Individual Appellees have supervisory liability and entities are liable pursuant to *Monell*

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)

A. Appellee supervisors had opportunity and failed to intervene

Baude v. Leyshock, 23 F.4th 1065 (8th Cir. 2022)

Baude v. City of St. Louis, 476 F.Supp.3d 900 (E.D. Mo. 2020)

Wagner v. Jones, 664 F.3d 259 (8th Cir. 2011)

B. Entities failed to train and supervise

Canton v. Harris, 489 U.S. 378 (1989)

C. Entities liable through acts of policymakers

Soltesz v. Rushmore Plaza Civic Ctr., 847 F.3d 941 (8th Cir. 2017)

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STATEMENT OF THE CASE

A. Procedural History

Appellants appeal from the district court's order granting summary judgment in favor of all Appellees and dismissing Appellants' complaint in its entirety. (App.1–92; R. Doc. 286–287.) Appellees initially filed a motion to dismiss that the court converted to a summary judgment motion after allowing only limited discovery. (App.510; R. Doc. 154.)

B. A Historic Call for the Exercise of First Amendment Rights

In August 2016, the Standing Rock Sioux Tribe put out a call for people to join them in peaceful prayer and protest to protect the water of the Missouri River and sacred, historic and cultural sites imperiled by the construction of the Dakota Access Pipeline (DAPL).[1] (App.1673 at ¶¶5–13; R. Doc. 269.) People from over 300 Indigenous Nations and supporters from around the world heeded the call and gathered at Standing Rock in prayer-based camps, calling themselves water

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[1] The Standing Rock, Cheyenne River, and other Sioux Tribes prevailed in their litigation to strike down the permits for the Dakota Access Pipeline. The Court found the Army Corps of Engineers violated the National Environmental Policy Act by failing to adequately consider the likelihood and impact of an oil spill on the Tribes. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 40 F.Supp.3d 1 (D.D.C. 2020) aff'd sub nom. *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032 (D.C. Cir. 2021) cert. denied *Dakota Access, LLC v. Standing Rock Sioux Tribe*, 142 S. Ct. 1187 (2022).

protectors. (App.1673 at ¶¶3–16; R. Doc. 269.)

C. DAPL Permit Halted While Law Enforcement Aggression Increases

In September 2016, the federal government halted DAPL's permitting process for the Missouri River crossing and requested that DAPL cease all construction within 20 miles of Lake Oahe[2]. As of November 20, there was no construction occurring. (App.1673 at ¶18; R. Doc. 269; App.977; R. Doc. 239–14.)

The law enforcement response to water protectors was increasingly violent and entailed hundreds of wrongful arrests from August to November 20, 2016, although the protests remained largely peaceful. (App.130; R. Doc. 14–9; App.381–2; R. Doc. 81–3; App.410; R. Doc. 81–11; App.419; R. Doc. 81–14; App.440; R. Doc. 81–20; App.505; R. Doc. 81–29; App.1677 at ¶14–17,19; R. Doc. 269). Of the eventual total of more than 800 arrests, little more than a handful resulted in convictions. (App.1677 at ¶19; R. Doc. 269; App.94–287; R. Doc. 14–1-14–20). No injuries to law enforcement were reported during this period. (App.4–7 at ¶6–14; R. Doc. 286.)

[2] Lake Oahe is the dammed portion of the Missouri River where DAPL crosses.

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D. November 20–21, 2016: Evidence Disputing Whether Appellants' Presence South of the Barricade Was Unlawful

The U.S. Army Corps of Engineers granted the Standing Rock Sioux Tribe a permit for the prayer camp on federal land, just south of the Backwater Bridge, and this permit was in effect on November 20, 2016. (App.369; R. Doc. 61–9; App.1676; R. Doc. 269.) The bridge is on unceded Sioux land, and under federal law, the Tribe retains property interests in the waters of the Missouri River and in its historic and cultural sites. (App.596–7; R. Doc. 239–1; App.1674–5; R. Doc. 269; App.1517–8; R. Doc. 266; App.1519–20; R. Doc. 266–1; and see *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 40 F.Supp.3d 1.)

In October 2016, law enforcement set up a barricade at the north end of the Backwater Bridge. The barricade consisted of two rows of concrete barriers 12 to 15 feet apart with two rows of concertina wire between them and another row of concertina wire stacked on top. Two burned out trucks were chained to the concrete barrier with large log chains on the south side of the barricade. (App.13–14 at ¶31; R. Doc. 286.) At some point, "No Trespassing" signs were placed north of and behind the concertina wire. While the road was closed to vehicular traffic, there was no signage or blockade giving notice that pedestrians were not allowed on the bridge or roadway south of the barricade. (App.469–70; R. Doc. 81–27; App.540–42,545–547,598; R. Doc. 239–1;

App.635–36; R. Doc. 239–4; App.724; R. Doc. 239–7; App.755–56,760; R. Doc. 239–8; App.822; R. Doc. 239–9; App.834; R. Doc. 239–10; App.983; R. Doc. 239–14; App.1043; R. Doc. 239–15; App.1311; R. Doc. 239–16; App.1540–52; R. Doc. 266–5; App.1585,1617; R. Doc. 266–6; App.1677–78; R. Doc. 269; App.1703; R. Doc. 273–7.)

E. Appellants and Others Gather on November 20, 2016

On November 20th into the morning of November 21, 2016, individuals gathered at the Bridge praying and peacefully protesting to express their opinions about DAPL. (App.1171–2; R. Doc. 239.16.) There were no DAPL workers or civilians present whose safety was threatened by the water protectors, and no construction occurring that could be disrupted. (App.977; R. Doc. 239–14; App.1677; R. Doc. 269.) A single individual tried to climb over the concertina wire and was immediately arrested early in the evening. (App.651–652; R. Doc. 275; App.758–9; R. Doc. 239–8; App.851,887, 896; R. Doc. 239–10; App.1064–5; R. Doc. 239–15; App.1386,1404; R. Doc. 239–16.) Throughout the incident, Appellants were located south of the barricade and at no time breached the barricade. *Id.* According to the Incident Commander, Defendant Kaiser, individuals could legally protest on the south side of the Bridge off the bridge deck. (App.986; R. Doc. 239–14.) Law enforcement stayed north of the barricade, and never crossed south. (App.554–56,558,561–63,577–78, 593; R. Doc. 239–1.)

The two "no trespassing" signs were behind the barricade and off to the sides, on the embankment below the level of the bridge. They were not visible looking straight north at the barricade from the road. There was no other indication that people were not allowed on the bridge or impediment to walking, until the barricade north end of the bridge. (App.983 at 84; R. Doc. 239–14; App.1585; R. Doc. 266–6; App.1678¶21; R. Doc. 269; and see App.471; R. Doc. 81–27; App.1617; R. Doc. 266–6.) In fact in the weeks prior, law enforcement had allowed pedestrians to walk on the bridge. (App.540 at 95, 546–7, 598; R. Doc. 239–1; App.755–6,774; R. Doc. 239–8; App.469–70; R. Doc. 81–27; App.1673; R. Doc. 269.) Appellants, and many other water protectors, never saw the signs. (App.471,473–4; R. Doc. 81–27; App.542; R. Doc. 239–1; App.635–6; R. Doc. 239–4; App.724; R. Doc. 239–7; App.760; R. Doc. 239–8; App.1703; R. Doc. 273–5.) Pedestrians were allowed on the Bridge south of the barricade and the barricade stopped anyone from going north of the Bridge. (App.471; R. Doc. 81–27; App.546–7,598; R. Doc. 239–1; App.755–6,774; R. Doc. 239–8; App.822; R. Doc. 239–9; App.1617; R. Doc. 266–6; App.1678; R. Doc. 269; App.1703; R. Doc. 273–7.) At least one of the two signs was taken down by law enforcement sometime during the November 20–21 event. (App.1703; R. Doc. 273–6-7.)

F. Evidence Disputing That Appellants Received Notice, Warning and Opportunity to Leave Prior to Being Subjected to Force

Although Appellees claim to have given numerous – "hundreds" – of amplified dispersal announcements during the night, this is refuted by the extensive video and audio evidence, Appellants' testimony, and declarations of numerous witnesses including water protectors, medical personnel and attorneys acting as legal observers. Contrary to standard law enforcement practice, Appellees have no documentation or record of any such announcements. According to one of the legal observers, there was a single amplified announcement to the crowd early in the evening on November 20th, that was hard to make out, but it was never repeated. (App.1383; R. Doc. 239–16; App.1670; R. Doc. 267; App.835–6; R. Doc. 239–10; App.1669–71; R. Doc. 267; App.449–50; R. Doc. 81–23; App.1686–7; R. Doc. 270; App.892; R. Doc. 239–10; App.1383; R. Doc. 239–16; App.379; R. Doc. 81–2; App.383; R. Doc. 81–3; App.385–386; R. Doc. 81–4; App.391; R. Doc. 81–6; App.416; R. Doc. 81–12; App.426; R. Doc. 81–16; App.443–4; R. Doc. 81–21; App.1679; R. Doc. 269; App.464; R. Doc. 81–25; App.502–503; R. Doc. 81–28; App.449–51; R. Doc. 81–23.) The Long Range Acoustic Device (LRAD) Appellees claim to have used to make audible announcements was broken, or stopped working, at some point that night. (App.1523–6; R. Doc. 266–3; App.1041 at 98; R. Doc. 239–15.) Although law enforcement also had a PA it was not as

loud. (App.1031 at 57–8; R. Doc. 239–15.)

One notice or directive given at an earlier point in the evening to whomever was present at that time cannot constitute effective notice or directive to hundreds of other persons who arrived at other points in time during ensuing hours. Appellants did not hear warnings, particular orders or directives from law enforcement and notably, Appellees have no information or evidence that warnings were given such that they were calculated to be heard by the Appellants. (App.1430–31; R. Doc. 239–16; App.903; R. Doc. 239–10; App.634; R. Doc. 239–4; App.771, 783–4, 788; R. Doc. 239–8; App.534; R. Doc. 239–1; App.379; R. Doc. 81–2; App.383; R. Doc. 81–3; App.385–6; R. Doc. 81–4; App.389; R. Doc. 81–5; App.391; R. Doc. 81–6; App.414; R. Doc. 81–12; App.444; R. Doc. 81–21; App.464–5; R. Doc. 81–25; App.451; R. Doc. 81–23; App.472–3,475,478,488; R. Doc. 81–27; App.973; R. Doc. 239–14.)

G. Evidence Disputing That Appellants Presented a Threat Justifying Use of Force

Appellants did not throw anything at law enforcement officers or threaten law enforcement in any way. (Defendants' depositions at App.1336–7,1410,1439; R. Doc. 239–16; App.885, 895, 899, 916; R. Doc. 239–10; App.989; R. Doc. 239–14; App.1074; R. Doc. 239–15.) Eyewitnesses and over 200 hours of video evidence overwhelmingly depicts peaceful protestors and a lack of widespread aggressive activity,

nor does it show any large group attempting to breach the barricade, or the crowd acting as a unit to break through the barricade. (App.131; R. Doc. 14–9; App.376,380; R. Doc. 81–2; App.385; R. Doc. 81–4; App.388; R. Doc. 81–5; App.416; R. Doc. 81–12; App.418; R. Doc. 81–13; App.420; R. Doc. 81–14; App.426; R. Doc. 81–16; App.429; R. Doc. 81–17; App.431–2; R. Doc. 81–18; App.443; R. Doc. 81–21; App.450–2; R. Doc. 81–23; App.457; R. Doc. 81–24; App.462; R. Doc. 81–25; App.466–7; R. Doc. 81–26; App.475–77, 494; R. Doc. 81–27; App.499,503; R. Doc. 81–28; App.972,994; R. Doc. 239–14; App.888,897; R. Doc. 239–10; App.1392; R. Doc. 239–16; App.1672–2; R. Doc. 267; App.1703; R. Doc. 273.) While a small number of people tried to tow the burned trucks away from the barricade in a discrete incident early in the evening, the video evidence and testimony show that most of the crowd remained a distance away from the barricade, engaged in peaceful activity such as praying, singing, photographing, expressing themselves verbally, or simply standing for various portions of that evening. (App.131; R. Doc.14–9; App.376,380; R. Doc. 81–2; App.385; R. Doc. 81–4; App.388; R. Doc. 81–5; App.416; R. Doc. 81–12; App.418; R. Doc. 81–13; App.419–20; R. Doc. 81–14; App.426; R. Doc. 81–16; App.429; R. Doc. 81–17; App.431–2; R. Doc. 81–18; App.443–4; R. Doc. 81–21; App.450–452; R. Doc. 81–23; App.457; R. Doc. 81–24; App.462; R. Doc. 81–25; App.466–7; R. Doc. 81–26; App.475–77,494; R. Doc. 81–27; App.499, 503; R. Doc. 81–28; App.994; R. Doc. 239–14; App.1672–2; R.

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Doc. 267.) Moreover, the truck towing incident occurred well prior to most of the water protectors, including most of the Appellants, even being physically present on the bridge, and no Appellant participated in trying to tow the trucks or otherwise interfere with the barricade.

The fires that appeared that night were not meant to provoke or threaten, some were in fact set by the implosive devices launched by law enforcement and others set to warm the water protectors and mitigate the effects of the water freezing clothes solid. (E.g.; App.469–70,481,491,493–94; R. Doc. 81–27.)

In over 200 hours of video evidence, no logs or large objects are seen being thrown and no more than ten individuals can be seen throwing munitions fired by law enforcement back in the general direction of the multi-layered barricade. (App.1671; R. Doc. 267; App.1; R. Doc. 286.) There is no documentation of what time an item was allegedly thrown at law enforcement or the number of items claimed to have been thrown, and – as acknowledged by both of the government entity defendants and the Lieutenant in command at the scene – no such items were photographed or collected for evidence. (App.891; R. Doc. 239–10; App.1070; R. Doc. 239–15; App.1362; R. Doc. 239–16.) Appellee Morton County released a statement to the press including photographs of items for which there was no evidence the items were thrown by water protectors and claims regarding water protectors having "Improvised Explosive Devices" later shown to be false. (App.288–368;

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R. Doc. 61–3; App.1629,1631; R. Doc. 266–6; App.1704–21.)

H. Law Enforcement Was Not Overrun by Water Protectors

There were up to 500 water protectors at the Bridge and up to 350 law enforcement officers, who were stationed behind and protected by the multi-layered barricade, their equipment and numerous vehicles. (App.1065; R. Doc. 239–15; App.1685–6; R. Doc. 270; App.1540–1552; R. Doc. 66–5.) Appellees admit that not everyone in the crowd was even allegedly involved in riot-type behavior. (App.888, 897; R. Doc. 239–10.) Defendant Morton County claims only a single officer was struck with an object during the entire event and there is no report that any highway patrol officer hit with an object was hurt or required medical attention. (App.848; R. Doc. 239–10; App.1487; R. Doc. 241; App.1503–4; R. Doc. 242; App.1495; R. Doc. 241–1; App.1510–11; R. Doc. 243; App.971,989; R. Doc. 239–14.)

There were only a small number of persons present on the bridge on November 20–21 whose acts involved challenges to law enforcement authority. The officers were well protected behind their barricade, and the area north of the barricade was under their control; it would have been virtually impossible for water protectors to cross and indeed no one attempted to cross, save one person. Retired Police Commissioner Thomas Frazier concluded that law enforcement's fear and

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characterization of the November 20–21 event as a riot was "overstated and inaccurate." (App.1685–6; R. Doc. 275; App.1678–9; R. Doc. 269.) The chaos and violence of that night was caused and carried out by law enforcement, not by water protectors.

I. Appellees Used a High Level of Force Indiscriminately on All Present on the Bridge

Law Enforcement reported continuously shooting and using numerous rounds, including stinger grenades, shotgun beanbag rounds and other impact munitions, as well as chemical agent devices, expending all of their munitions by the time the officers left the area. Law enforcement shot rubber bullets, exploding munitions and water indiscriminately and without provocation into the crowd, reaching even those who were far south of the barricade and could not possibly pose any threat. Beanbags and other impact munitions are highly dangerous weapons which should never be used indiscriminately in a crowd, as the video evidence shows they were here, striking peaceful people, some standing still near the barricade, some far from the barricade and some walking away. (App.109¶15; R. Doc. 14–3; App.121¶8; R. Doc. 14–6; App.184 ¶¶17–8; R. Doc. 14–19; App.379; R. Doc. 81–2; App.381; R. Doc. 81–3; App.385; R. Doc. 81–4; App.392; R. Doc. 81–6; App.393¶15; R. Doc. 81–6; App.394¶¶4,6; R. Doc. 81–7; App.403¶14; R. Doc. 81–9; App.417–8¶7; R. Doc. 81–13; App.429–30; R. Doc. 81–17; App.432–3; R.

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Doc. 81–18; App.433¶¶17,21; R. Doc. 81–18; App.436–7¶¶9–10; R. Doc. 81–19; App.443–4¶5; R. Doc. 81–21; App.447¶3; R. Doc. 81.22; App.451–2; R. Doc. 81–23; App.456; R. Doc. 81–24; App.462–4; R. Doc. 81–25; App.467; R. Doc. 81–26; App.478, 483; R. Doc. 81–27; App.501–2; R. Doc. 81–28; App.502¶9; R. Doc. 81–28; App.509; R. Doc. 100; App.515 at 33, 576 at 237–8, 581 at 258, 584 at 270–2; R. Doc. 239–1; App.600; R. Doc. 239–2; App.618 at 63, 622 at 76, 632 at 118, 633 at 120, 653 at 202; R. Doc. 239–4; App.888–9; R. Doc. 239–10; App.976; R. Doc. 239–14; App.1365; R. Doc. 239–16; App.1495–1502; R. Doc. 241–1; App.1527–1539; R. Doc. 266–4; App.1691–2; R. Doc. 270; App.1703; R. Doc. 273–1-4; App.1704–9.) This barrage of munitions and water went on from 6:00 p.m. on November 20th through at least 2:00 a.m. on November 21st. There was no basis to assume that any of the individuals who were hit had heard any orders to leave, or had engaged in unlawful activity that ostensibly justified the use of force. (App.888–9, 893; R. Doc. 239–10; App.1365; R. Doc. 239–16; App.1495–1502; R. Doc. 241–1; App.1527–39; R. Doc. 266–4; App.1690,1693; R. Doc. 270.)

The high pressure firefighting equipment misused by Law Enforcement on human bodies, including those of Appellants, was powerful enough to knock walls down. Two of these water cannons were used simultaneously on the crowd, including on those engaged in praying, singing, crying, talking to the police, and not doing anything

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aggressive or threatening. The spray of the water knocked people off their feet or spun them around. (App.377; R. Doc. 81–2; App.384; R. Doc. 81–3; App.386; R. Doc. 81–4; App.388–9; R. Doc. 81–5; App.391; R. Doc. 81–6; App.433–4; R. Doc. 81–21; App.450; R. Doc. 81–23; App.462; R. Doc. 81–25; App.503; R. Doc. 81–28; App.508; R. Doc. 92–2; App.509; R. Doc. 100; App.635, 659; R. Doc. 239–4; App.1703; R. Doc. 273–5; App.1690–1; R. Doc. 270; App.451; R. Doc. 81–23.) The temperature was in the low teens or twenties, and the water formed ice on the Bridge and on individuals struck with the water. (App.628; R. Doc. 239–4; App.796; R. Doc. 239–8; App.905; R. Doc. 239–10; App.995; R. Doc. 239–14; App.1500–1; R. Doc. 241–1). The brute force of the impact of the water used in sub-freezing temperatures served no reasonable law enforcement purpose. (App.377; R. Doc. 81–2; App.384; R. Doc. 81–3; App.386; R. Doc. 81–4; App.388; R. Doc. 81–5; App.391–2; R. Doc. 81–6; App.443–4; R. Doc. 81–21; App.450–2; R. Doc. 81–23; App.456; R. Doc. 81–24; App.462–3; R. Doc. 81–25; App.467; R. Doc. 81–26; App.483; R. Doc. 81–27; App.500–1; R. Doc. 81–28; App.508; R. Doc. 92–1; App.509; R. Doc. 100; App.1690–2; R. Doc. 270; App.628, 635, 659; R. Doc. 239–4; App.796; R. Doc. 239–8; App.905; R. Doc. 239–10; App.976, 995; R. Doc. 239–14; App.1502; R. Doc. 241–1; App.1703, Ex. 5 at 2:33–3:57, 4:32–5:10; R. Doc. 273–5.)

J. Law Enforcement Force Caused Serious Injuries

Medical personnel on site treated approximately 300 water protectors who were injured by law enforcement over the course of the night, including at least 26 seriously injured people who were evacuated by ambulance to area hospitals. (App.1697–99; R. Doc. 271; App.447–48; R. Doc. 81–22; App.400–05; R. Doc. 81–9; App.417 at ¶ 6; R. Doc. 81–13; App.600; R. Doc. 239–2.)

1. Appellant Dundon Shot in Eye Requiring Multiple Surgeries

Vanessa Dundon responded to a cry for help from the Bridge and began smudging sage and cedar to protect individuals from harm. (App.554–55, 558, 561; R. Doc. 239–1.) She never saw a no trespassing sign on the Bridge and heard no orders, directives or warnings. (App.534; R. Doc. 239–1; *see also* App.771, 783–84, 788; R. Doc. 239–8; App.634; R. Doc. 239–4; App.379 at ¶26; R. Doc. 81–2; App.383 at ¶13; R. Doc. 81–3; App.385–86 at ¶¶7,18; R. Doc. 81–4; App.389 at ¶ 5; R. Doc. 81–5; App.391 at ¶ 6; R. Doc. 81–6; App.415 at ¶ 2; R. Doc. 81–12; App.444 at ¶ 6; R. Doc. 81–21; App.464 at ¶ 19; R. Doc. 81–25; App.451 at ¶ 13; R. Doc. 81–23; App. 472–73, 475, 478, 488; R. Doc. 81–27.) As she observed the barricade, law enforcement shot a flaming projectile directly at her face. (App.182 at ¶7; R. Doc. 14–19.) Having no warning or time to move, she was struck in the right eye with enough force to

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knock her down to the ground. (App.183 at ¶8–9; R. Doc. 14–19.) As she attempted to run away she was shot in the back of her leg with a rubber bullet, again knocking her down as her eye was bleeding. (App.183 at ¶ 10; R. Doc. 14–19; *see also* App.150; R. Doc. 14–14; App.394; R. Doc. 81–7; App.461, 463–64; R. Doc. 81–25; App.1704–12.) The injury to her eye caused extreme pain, a detached retina, loss of vision and required her to undergo multiple surgeries. (App.184 at ¶¶17–18; R. Doc. 14–19, *see also* App.525, 576, 581, 584; R. Doc. 239–1; App.618, 622, 632–33, 653; R. Doc. 239–4.)

2. Appellant Demo Shot in Hand Requiring Surgery

David Demo went to the Bridge to peacefully protest and videotape police brutality but did not arrive until after 8:30 p.m. (App.173 at ¶6; R. Doc. 14–17.) Within minutes, law enforcement blasted him with freezing water forceful enough to spin him around and impede his ability to walk away. (*Id.* at ¶7; *see also* App.635, 659; R. Doc. 239–4.) Approximately 30 seconds later, law enforcement shot him with a rubber bullet in his hand that was holding up his GoPro camera; immediately causing him intense, excruciating pain. (App.173 at ¶7; R. Doc. 14–17; App.632–33; R. Doc. 239–4.) The injury caused a compound fracture requiring reconstructive surgery. (App.618, 622, 632–33, 653; R. Doc. 239–4; *see also* App.184 at ¶¶ 17–18; R. Doc. 14–19; App.525, 576, 581, 584; R. Doc. 239–1.) The surgeon reported having to remove

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bits of rubber from the wound. (App.622; R. Doc. 239–4.)

3. Appellant Dullknife Shot in Chest, Stomach and Leg

Guy Dullknife III arrived at the Bridge sometime after 10:00 p.m. (App.145 at ¶8; R. Doc. 14–13.) After seeing an elderly woman who was kneeling and praying knocked down by the water cannon, he held up a board to protect her as she continued to pray, when law enforcement shot him with a rubber bullet and four bean bag rounds. (*Id.*) He suffered bruises to his chest, stomach and leg as a result. (*Id.*) He observed many people being shot and injured and law enforcement officers laughing and celebrating after they hit their targets. (App.146 at ¶10; R. Doc. 14–13; *see also* App.162; R. Doc. 14–15; App.724; R. Doc. 239–7; App.377–80; R. Doc. 81–2; App.1704–12.)

4. Appellant Finan Shot in Abdomen

When 67 year old Frank Finan arrived at the Bridge around 11:10 p.m. he was shot by law enforcement as he raised his camera and began taking photographs. (App.161 at ¶13; R. Doc. 14–15.) The shot to his left abdomen about his waistline knocked him down and he slid along the icy ground. (*Id.* at ¶14.)

5. Appellant Bruce Shot in Genitals

Mariah Marie Bruce was 21 years old when she went to the bridge that evening to peacefully protest. (App.130–32 at ¶1, 6, 7–11, 13–15, 19; R. Doc. 14–9.) She was sprayed with freezing water causing her hair and skirt to freeze. (*Id.* at ¶7–11.) She suffered the effects of tear gas. (*Id.* at ¶13.) When she bent down, a law enforcement officer shot her from behind with a flash bang grenade that struck her genitalia and exploded, causing her extreme pain and to vomit. (*Id.* at ¶14–15, 19.) She worries about whether this will affect her ability to have children. (*Id.* at ¶ 22.)

6. Appellant Wilson Shot in Chest

Crystal Wilson went to the Bridge to peacefully gather and engaged in prayer, was unarmed and not threatening law enforcement. (App.160–70 at ¶10–11; R. Doc. 14–16.) Observing an elder who was singing being sprayed with freezing water, she held up a piece of plastic to shield those behind her, and was sprayed with the water cannon, causing ice on her hair and back. (*Id.* at ¶12.) Then law enforcement shot her in the chest with an impact munition. (*Id.*) Wilson never heard a dispersal order either before or after being shot, gassed and soaked with water, and observed law enforcement continuously shooting tear gas canisters, flash bang grenades and other riot weapons at the water

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protectors. (App.171 at ¶14; R. Doc. 14–16.)

K. Disputed Facts Show Supervisors Kirchmeier, Ziegler and Kaiser Are Liable

Defendants Morton County Sheriff Kirchmeier, City of Mandan Police Chief Ziegler and Stutsman County Sheriff Kaiser were supervisors and policy makers for the law enforcement response to water protectors on November 20–21, 2016. (App.1482–84; R. Doc. 239–17; App.1485; R. Doc. 239–18; App.1690–93; R. Doc. 270.) Kirchmeier was the "overall incident commander," Kaiser was the on-scene incident commander and Ziegler was part of the unified command and all were final decision makers. (*Id.*; *see also* App.996; R. Doc. 239–14.) All officers present at the Bridge reported to Kaiser, who reported to Ziegler, who reported to Kirchmeier. (App.1693–94; R. Doc. 270; *see also* App.1722–95.)

No supervisor intervened in any use of force or tried to stop any law enforcement officer from using force on November 20–21, 2016. (App.1596 at 157, 1599 at 171–2; R. Doc. 266–6; App. 211; R. Doc. 239–16.) In fact, the decision to use water as force was made by Kaiser in consultation with command. (App. 1065 at 193; R. Doc. 239–15; App. 996 at 137–8; R. Doc. 239–14; App. 905–6 at 320–1; R. Doc. 239–10.)

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L. Disputed Facts Show Shooting Occurred without Supervision or Training

Individual officers indiscriminately used force at their own discretion without training, supervision or specific policy guidelines, as the only orders were to arrest anyone who tried to cross the barricade. (App.900–902, 906, 913; R. Doc. 239–10; App.990; R. Doc. 239–14; App.1024, 1027, 1032 1071; R. Doc. 239–15; App.1308, 1320, 1324–25; R. Doc. 239–16; App.1689, 1691; R. Doc. 270.)

Despite the fact that water protectors had been engaging in protest in the area since April 2016, with greater numbers beginning to arrive in August, the Appellees provided officers no training in providing orders to disperse, or in the use of force in a crowd or demonstration context, or particular to weapons that are indiscriminate in nature, including gas and water. (App.1595; R. Doc. 266–6; App.900–902, 906; R. Doc. 239–10; App.1024, 1026–27, 1032; R. Doc. 239–15; App.1308, 1320, 1324–25; R. Doc. 239–16.) Proper training in the use of impact munitions requires that officers aim weapons to avoid striking the head, chest and groin areas of targets and the fact of multiple injuries to these areas of the body reported by water protectors indicates inadequate training. (App.1689, 1694–96; R. Doc. 270.)

M. Conclusions of Police Practices Expert Frazier

Retired Police Commissioner Thomas C. Frazier concluded, based on

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reviewing a substantial amount of the evidence in this case: "It appears that the untrained Law Enforcement officers shot indiscriminately at protesters with no attempt to distinguish which persons were a threat to Law Enforcement and which part of their .body they hit. This could easily have resulted in fatalities." (App.1689; R. Doc. 270)

"It is inappropriate and excessive force to shoot beanbag rounds, or to launch rubber bullets ... into a crowd for the purpose of crowd dispersal. Launched munitions, including explosive grenades and chemical agent canisters which are indiscriminate in nature, ...landed in the farthest reaches of the crowd, as shown by the video evidence. This injured persons who were clearly not advancing on the police. ...[I]ndividuals outside any zone or area that could even remotely be considered to be directly confrontational to law enforcement ... were subject to serious bodily injury.... ¶The brute force of the impact of water jets is a force option that would not be considered appropriate by most modern police chiefs or sheriffs,and not tolerated by their citizenry. . . . This use of water in these temperatures was clearly intentional and punitive, and unnecessary on the part of the law enforcement decision makers. It was cruel and inhumane." (App.1692–1693; R. Doc. 270.)

SUMMARY OF ARGUMENT

Appellants responded to a historic call to express opposition to the construction of a pipeline that would endanger water sources and indigenous land and sacred sites. On November 20-21, 2016, hundreds of law enforcement officers, protected by a barricade and their weapons engaged in a ten hour siege against nonviolent, unarmed Indigenous-led water protectors, shooting Appellants and others in a crowd with impact munitions and blasts of freezing water. The district court below, in granting summary judgment to the Appellees, failed to consider the evidence in the light most favorable to the nonmovants, accepting Appellees' version of events and finding their assertions credible even when disputed. The court improperly usurped the role of the jury and factfinder making determinations as to disputed facts. The court also improperly imputed knowledge and actions to all water protectors and protesters, including Appellants, as an undifferentiated mass based on shared protected beliefs, and attributed responsibility for knowledge or actions that occurred hours and even months apart to all water protectors and Appellants regardless of presence and temporal proximity.

Appellees violated Appellants' clearly established rights under the Fourth and Fourteenth Amendments by shooting Appellants with less lethal munitions and blasts of freezing water. Appellants Vanessa

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Dundon, David Demo, Gul Dullknife II, Frank Finan, Mariah Marie Bruce and Crystal Wilson were unarmed, at most trespassers on unoccupied space, were not attempting to flee, resist arrest or threatening law enforcement and were seriously injured. A jury must determine whether the force that Appellees used that caused serious injuries to the Appellants was objectively unreasonable considering all the facts and the totality of the circumstances.

The individual Defendants-Appellees Kaiser, Kirchmeier and Ziegler participated in and were deliberately indifferent to the violations of Appellants' constitutional rights. Defendants-Appellees Morton and Stutsman Counties and City of Mandan are also liable due to the deliberate indifference of their decision makers and their failure to train or supervise the use of excessive force, particularly with regard to persons gathered for First Amendment activity.

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ARGUMENT

I. STANDARD OF REVIEW

In ruling on a motion for summary judgment, courts must view the evidence in the light most favorable to the nonmovant and may not weigh the evidence and resolve disputed issues in favor of the moving party. *Tolan v. Cotton,* 572 U.S. 650, 657 (2014). A grant of summary judgment is reviewed *de novo* and all reasonable inferences from the evidence must be taken in favor of the non-moving party. *Atkinson v. City of Mt. View,* 709 F.3d 1201, 1207 (8th Cir. 2013). Summary judgment is only appropriate when there is no genuine issue in dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.*

II. The District Court Erred in Failing to Consider the Evidence in Light Most Favorable to Appellants.

The district court below accepted Appellees', the moving parties', version of the facts, and disregarded Appellants' evidence which showed material disputes of fact as to each of the key issues in this case. In doing so, the court violated the fundamental principle that in ruling on a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Tolan v. Cotton*, 572 U.S. at 651.

The district court order begins with a statement of purported undisputed facts, but this recitation of the facts is almost entirely from Appellees' perspective. For example, the court devotes five pages to recounting law enforcement's many arrests of water protectors in the months prior to the event at issue (Add. 8–11); but fails to mention that these arrests were accompanied by escalating law enforcement violence against water protectors, which water protectors understood as attempts to chill their First Amendment rights; or that the majority of arrests were unlawful as evidenced by the tiny percentage that resulted in convictions. The district court also seems to overlook that in its extensive description of these prior events leading up to November 20th, there was absolutely no evidence that any law enforcement officer was ever injured by a water protector. (Add. 6–14.)

Despite this, the district court construed the prior events as supporting a reasonable fear by the officers toward ALL water protectors on November 20–21. In doing so, the court inexplicably disregarded the evidence that the prior conduct of water protectors had been generally peaceful, reflecting their resolve to express their opposition to DAPL nonviolently and not to target law enforcement. If the court had properly viewed the facts in the light most favorable to Appellants and made all reasonable inferences in Appellants' favor, this should have led to the contrary conclusion – that it was unreasonable for the officers to feel their safety was threatened by water protectors.

Further the court improperly premised its ruling on an assertion that law enforcement could unleash maiming force against Appellants based on allegations that some other persons, at some other point in time, including months earlier, had engaged in allegedly unlawful conduct. The only link between these alleged events is the shared political and spiritual beliefs of the persons in opposition to DAPL. The Constitution forbids guilt or punishment by association. The allegations of misconduct at other points in time, even if true, cannot justify the violence unleashed upon unarmed, nonviolent water protectors present on November 20–21, 2016.

The district court devoted an entire eight pages of its decision to "Defendants' version of events". (Add. 24–31.) In this section, the court detailed alleged violence that occurred on a completely different day almost a month before. (Add. 24–26.) The court overlooked that there was no evidence that on November 20th, any of the officers present knew whether any of the water protectors present had been at, let alone involved in any unlawful activity at, those prior alleged events. The court recites numerous contentions of Appellees without ever mentioning that Appellees admitted in depositions that they have no evidence supporting these claims. For example, the court refers to photographs purporting to show various objects that water protectors threw at law enforcement (Add. 28), but fails to mention that Appellees acknowledged in deposition testimony that there was no attempt to

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collect or photograph any items that they claim had been thrown. The photographs the district court referred to were part of a press release by Appellee Morton County; there was no evidence these had been thrown by water protectors. Appellee's claims, in this same press release, regarding water protectors having "Improvised Explosive Devices" have been shown to be false.

Throughout the district court's recitation of the facts, the court adopts the Appellees' unsupported view that all of the water protectors and observers who came to the bridge at any point during the night of November 20–21 were acting as a single group, and imputing the knowledge and actions of some, to all, including persons who were in no physical or temporal proximity to each other. The court reiterated Appellees' claim that "protestors appeared to be prepared for an assault" on law enforcement and were "organized" in two groups – a "forward staged siege group" [sic] and a "larger group which remained further back south" on the Bridge. (Add. 27–28.) Appellants disputed whether any water protectors were trying to get through the barricade, other than the one man who was immediately arrested. Viewing the evidence in the light most favorable to Appellants, a reasonable inference from the fact that most of the water protectors and observers remained further south at a distance from the barricade is that they were not trying to cross the barricade and were trying to avoid the law enforcement barrage of munitions and water while continuing to

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peacefully express their views against DAPL.

Similarly, the court seems to have accepted Appellees' view that the fires during that night were set by water protectors as provocative and threatening acts – and ignored the evidence proffered by Appellants that some of the fires were caused by the law enforcement's shooting of burning chemical agent munitions into the grass, and others were controlled fires water protectors built simply to warm themselves in subfreezing temperatures. (Add. 55 at ¶109; Add. 59 at ¶116.)

Appellants presented evidence disputing the allegations that law enforcement gave repeated warnings over a Long Range Acoustic Device (LRAD), including that the LRAD was broken, and disputing that water protectors threw "large rocks" and other objects at law enforcement. (Add. 28.) Yet again, the district court adopted Appellees', rather than Appellants' view of these disputed facts, concluding that "the record reveals law enforcement officers feared for their physical safety due to imminent threats of serious bodily injury or death they were encountering." (Add. 28) Appellants' evidence disputed that warnings or dispersal orders were given, save one amplified announcement at 6:22 p.m. Despite hundreds of hours of video and audio, Appellees were unable to support their claims of constant and repeat warnings. Such amplified warnings could not have issued without being captured therein. Appellants' evidence showed that Appellees' unsupported claims of an onslaught of large rocks, burning

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logs, etc. was at best greatly exaggerated if not entirely fabricated.

Appellants presented ample evidence disputing that the crowd as a whole was threatening or acted as a threatening group, and importantly, there was *no* evidence that any of the Appellants engaged in any threatening conduct whatsoever. The district court accepted that everyone who came and went from the bridge over the ten hours of the event, standing, praying, or protesting without actions against or towards law enforcement, unabatedly posed a threat in the face of the undisputed continuous barrage of freezing water, explosives and impact munitions fired by law enforcement during this same period of time. In doing so, the court failed to view the facts in the light most favorable to Appellants, instead disregarding the evidence showing that Appellees' depiction of the events is highly disputed. As another example, the district court characterized the event as "a group of hundreds, if not over a thousand, of individuals facing off with a clearly outnumbered presence of law enforcement in a rural, open area" (Add. 42; Add. 86.) But law enforcement's own testimony and documents show that at maximum, there were 400–500 protestors over the course of many hours, and up to 350 law enforcement officers present at the Bridge, which if properly viewed in the light most favorable to Appellants is not a scenario in which law enforcement, ensconced behind the massive barricade with all their weapons and gear, were about to be overrun. Demonstrations usually involve more participants than law

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enforcement officers; this alone cannot provide a basis for unleashing massive force on all those present. Nor can the failure to properly train personnel in crowd control bootstrap legitimizing using excessive force.

Moreover, the district court failed to recognize that Appellants and others arrived and departed at different times, engaged in disparate peaceful activities, were not there throughout the ten hours of activity, and were not acting in unison with others. Law enforcement may not use force on individuals due to activity or crimes suspected of others. As explained in Section II.B.1 below, the rights under the Fourth and Fourteenth Amendments are individual rights, and force targeted at an individual must have an individualized basis or rationale to be constitutionally imposed.

As the Supreme Court stated with regard to similar error in an excessive force case, "[T]hese facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan v. Cotton*, 572 U.S. at 659. The Supreme Court took the unusual step of vacating the Fifth Circuit decision in *Tolan* because – as here – "the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." (*Ibid.*)

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in

> part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to [the plaintiff's] competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

(572 U.S. at 660.)

III. A Jury Must Determine Whether the Force Used Against Appellants was Objectively Unreasonable

The District Court below misapplied the law as well as the facts. It must be up to a jury to decide whether the use of impact munitions and water cannons for alleged crowd control against unarmed individuals violates constitutional rights under the Fourth and Fourteenth Amendments.

A. Law Enforcement Seized Each Appellant under the Fourth Amendment the Moment They Shot Them With Impact Munitions and Freezing Water

The District Court below erred in finding that the Appellants were not subject to a seizure when Appellees' agents shot them with impact munitions and sprayed them with high pressure water cannons. (Add. 48.)

The use of force against Appellants meets the definition of a Fourth Amendment seizure set out in *Torres v. Madrid*, 141 S.Ct. 989, 991

(2021) and *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

In *Torres*, the Supreme Court addressed the issue of whether the application of physical force to a suspect the police are trying to arrest is a seizure if the force fails to stop them. *Id.* at 995. "The application of physical force to the body of a person with the intent to restrain is a seizure, even if the force does not succeed in subduing the person." *Id.* at 993. Thus, in *Torres*, a woman was seized when officers shot her, despite her failure to yield to that force, as it amounted to a seizure by force given the officers' intent to restrain. The appropriate inquiry with regard to a seizure by force is whether the challenged conduct objectively manifests an intent to restrain. *Id.* at 998.

Courts addressing similar facts post-*Torres* have concluded that a constitutionally redressable seizure can occur where, as here, officers use physical force to try to prevent protestors from coming any closer, such as by herding protestors, forming a skirmish line, or failing to provide a means of egress—where such governmental action is intentional and restricts the demonstrators' freedom of movement. *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216, 262–263 (S.D. Ohio 2021), modified sub nom. *Alsaada v. City of Columbus, Ohio, No. 2:20-CV-3431*, 2021 WL 3375834, at *1 (S.D. Ohio June 25, 2021).

The district court below's conclusion that there was no seizure in the instant case was based on its finding that the evidence established that "*almost* all named-Plaintiffs, moved freely upon and off the Bridge or in

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the area after force was used against them." (Emphasis added, Add. 46.) Even disregarding the court's erroneous adoption of the defendants' version of the facts, the court confused the test for seizure as based on the *plaintiffs'* objectively manifested intent, rather than the *defendants'* objectively manifested intent. The district court conflated a show of force and/or show of authority with an *actual* use of force, and concluded that a person subjected to the force would need to subjectively believe that they were not free to leave as a result of the application of force. But "[E]ven if a "citizen is able to walk or hobble away," a seizure still lies, so long as there was an intentional application of physical force." (*Alsaada*, 536 F. Supp.3d at 264, citing *Jennings v. City of Miami, No. 07–23008-CIV*, 2009 WL 413110, at *7 (S.D. Fla. Jan. 27, 2009).) Indeed, the Supreme Court has made clear, "(t)he application of physical force to the body of a person with the intent to restrain is a seizure, even if the force does not succeed in subduing the person." *Torres*, 141 S.Ct. at 993. *California v. Hodari D.,* supra, 499 U.S. at 626. Supreme Court precedent rejects the district court's contention here that the Fourth Amendment is not offended by the intentional use of force that physically injures a citizen but only reduces, rather than completely eliminating, their freedom of movement. The subjective intent of the officers deploying the force, whether they meant to move, repel or hurt the water protectors by striking them with impact munitions,is irrelevant. An objective standard applies, and free persons

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may not be subjected to punishment of any kind through the use of force.

The district court distinguished *Nelson v. City of Davis*, 685 F.3d 867, 872 (9th Cir. 2012), *Coles v. City of Oakland, No. C03–2961 TEH*, 2005 WL 8177790 (N.D. Cal. Apr. 27, 2005); *Rauen v. City of Miami, No. 06–21182-CIV*, 2007 WL 686609 (S.D. Fla. Mar. 2, 2007); and other cases finding use of "less lethal" munitions on protesters to constitute seizure, because in the instant case, the "officers objectively manifested an intent to move protestors away from the Bridge." (Add. 44 at ¶ 89.) But the same is true in most of these cases. For example, in *Alsaada,* the impact of pepper spray impacted many of the protestors, but they were not arrested and were able to leave. Impact projectiles affected protestors' freedom of movement, as in the instant case, by knocking some of them down and making them unable to stand independently. The court found a Fourth Amendment seizure. (*Alsaada*, 536 F.Supp.3d at 264–265). In *Coles*, police intentionally applied force – including wooden bullets and bean bags – to push plaintiffs from the port toward the transit station. Like Appellees here, the *Coles* defendants argued that they were only trying to disperse the crowd, but the district court found the intentional application of force to restrain their movement a Fourth Amendment seizure. (*Coles v. City of Oakland,* 2005 WL 8177790, at *4–5.)

In *Atkinson v. City of Mountain View*, this Court addressed and

dismissed an argument similar to the district court's here: "It would make little sense to ask whether a person felt 'free to leave' while an officer restrained the person's freedom of movement through physical force because the force itself necessarily—if only briefly— restrained [the person's] liberty." *Atkinson v. City of Mt. View*, 709 F.3d at 1208–1209 (internal quotations omitted).

The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. See, e.g., *Ashcroft v. al–Kidd*, 563 U.S. 731, 736 (2011); *Brendlin v. California*, 551 U.S. 249, 261 (2007); *Whren v. United States*, 517 U.S. 806, 813 (1996). "The intent that counts under the Fourth Amendment is the intent that has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." *Brendlin,* 551 U.S. at 260–261 (internal quotation marks and citation omitted).

Here, the officers restricted plaintiffs' freedom of movement when they fired "less lethal" munitions, explosive grenades, and chemical weapons at plaintiffs and sprayed plaintiffs with water cannons, similar to the officers in *Nelson v. City of Davis*, who, responding to an unruly party involving 1,000 university students, launched pepper balls into the crowd, and a student was shot in the eye. The Nelson defendants argued that their actions could not constitute a seizure because their intent was to disperse the crowd, not to make arrests, but the Court of

Appeals rejected this argument. "Whether the officers intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates." Noting that "the Fourth Amendment regulates conduct rather than thoughts," the court held that regardless of the officers motives, their application of force "unquestionably constituted a seizure under the Fourth Amendment." *Nelson v. City of Davis*, 685 F.3d at 877–878; and see, e.g., *Johnson v. City of San Jose*, No. 21-CV-01849-BLF, 2022 WL 799424, at *5 (N.D. Cal. 2022) (shooting protester with projectile can constitute seizure with intent to restrain movement).

The facts of the instant case are not like those which led to the decision in *Black Lives Matter D.C. v. Trump*, where the plaintiffs alleged the purpose of the officers' use of force was to clear the street to make way for the president. *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 32 (D.D.C. 2021). That decision rested on the authority of police to clear the space in front of the White House for security purposes in urgent circumstances.

Quraishi v. St. Charles Cnty., 986 F.3d 831, 840 (8th Cir. 2021); *Buck v. City of Albuquerque*, 2007 WL 9734037, at 31 (D.N.M. 2017); and *Molina v. City of St. Louis*, 2021 WL 1222432, at *11 (E.D. Mo. 2021) are inapposite in that in each of those cases, the plaintiffs were only affected by tear gas or pepper spray, which disperse through the air,

rather than by being directly shot with a munition which knocked them down, hobbled them, or tore open their skin. None of the Appellants were solely and only affected by chemical agents. Moreover, those cases predate *Torres*.

The force of the water and munitions knocked most of the Appellants and many of the other assembled persons off their feet or otherwise restricted their freedom of movement by stopping them in their tracks and causing serious injuries. Appellants were subjected to force while moving south, away from the barricade as well as while near the barricade or standing still. Such restraint on movement amounts to a seizure. *Nelson*, 685 F.3d at 882–883.

The striking of Appellants with munitions and freezing blasts of water unquestionably constituted seizure under the Fourth Amendment.

B. A Jury Should Decide the Reasonableness of the Use of Force.

Excessive force claims under the Fourth Amendment are governed by a reasonableness standard. *White v. Jackson*, 865 F.3d 1064, 1074 (8th Cir. 2017), citing *Graham v. Connor*, 490 U.S. 386, 396 (1989). A determination is made based upon the totality of the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985). Whether the force used is reasonable requires a careful balancing of the intrusion on the

individual and any countervailing governmental interests particularly warranting careful attention to the facts and circumstances of each particular case. *Id.*

To decide whether the force used to seize a suspect was excessive and thus "unreasonable" for purposes of the Fourth Amendment, relevant factors include (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others," and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022). "Applying these factors, we have held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." *Ibid.* See also, *Baude v. City of St. Louis*, 476 F. Supp. 3d 900, 913 (E.D. Mo. 2020) (Viewing the facts in the light most favorable to the plaintiff the deployment of pepper spray against him was not objectively reasonable.)

The *Mitchell* incident took place in the same location as the instant case, Backwater Bridge near the law enforcement barricade, also late at night, approximately two months later. Having heard that law enforcement officers were shooting unarmed protestors, including elders and women, Mitchell decided to go to the bridge, and observed from a distance that law enforcement officers were indeed shooting people.

Mitchell positioned himself in front of the crowd and several officers fired lead-filled bean bags from their shotguns at Mitchell. Mitchell was hit in three places, including his head. Mitchell was arrested and charged with criminal trespass and obstruction of a government function. *Mitchell v. Kirchmeier,* 28 F.4th at 894.

This Court reversed the district court's order dismissing Mitchell's Fourth Amendment claim because "the complaint did not suggest that Mitchell was suspected of anything more than trespassing and obstructing a government function, both nonviolent misdemeanors. *See* N.D. Cent. Code §§ 12.1–22–03, 12.1–08–01. Nor did the complaint suggest that Mitchell threatened anyone, fled or resisted arrest and this Court recognized that "gentler treatment" has been found to constitute more than *de minimus* force. *Mitchell,* 28 F.4th at at 898. It is 'clearly established' that the use of more than *de minimis* force in circumstances like these violates the Fourth Amendment. *Ibid.*

A similar application of the G*raham* factors to the circumstances of the instant case leads to the conclusion that a jury could certainly find that the law enforcement conduct here was objectively unreasonable.

1. Severity of Crime at Issue

Although the instant case was decided on summary judgment, rather than on a motion to dismiss, the district court failed to view the facts in the light most favorable to Appellants, ignoring the disputes of fact, as

argued fully above. It is undisputed that Appellants, who were never arrested or charged, at the most were nonviolent misdemeanants just like Mr. Mitchell, who had gathered in the same location for a similar purpose. Appellees themselves admit not everyone in the crowd was engaged in allegedly riotous conduct.

The court found that Appellants were trespassing and that they were given notice of such, in particular by the two No Trespassing signs. (Add. 54; Add. 107.) Yet each of the named plaintiffs testified that they did not see the signs, which were off to the sides on the embankment behind the concertina wire, one of which was removed by law enforcement during the incident. Law enforcement had been allowing pedestrians to walk on the bridge in the weeks before this incident. The district court also found that some of the water protectors were committing misdemeanors such as removing part of the barricade or rioting, but there was no evidence that any of the Appellants participated in these acts.

Law enforcement fired indiscriminately and repeatedly into the crowd and made no effort to identify a specific threat when the force was used. Appellants who were struck were not throwing anything at law enforcement or threatening law enforcement in any way. The evaluation of whether a use of force was reasonable is determined by "looking primarily at the threat present at the time" law enforcement deployed the force. *Banks v. Hawkins,* 999 F.3d 521, 525–26 (8th Cir.

2021).

The court attributed acts allegedly taken by a handful of individuals at particular moments in time to all Appellants and the entirety of the hundreds of people who came and went from the Bridge over many hours, regardless of whether they participated or were even at the Bridge when acts by others occurred. Allegations of unlawful acts were summarily attributed collectively to protestors as a group, regardless of any persons' temporal or physical proximity, to justify the indiscriminate use of massive force against hundreds of different people for hours.

Appellants may not be punished for the acts of others and law enforcement may not reasonably shoot individuals simply because others may have engaged in unlawful acts. *See, e.g.*, *Fogarty v. Gallegos*, 523 F.3d 1147, 1158 (10th Cir. 2008) (police cannot arrest plaintiff because "some [other] individuals may have broken the law"); *Barham v. Ramsey*, 434 F.3d 565, 574 (D.C.Cir. 2006) (police cannot justify arresting individuals based on "refer[ences] generically to what 'demonstrators' were seen doing"); *Papineau v. Parmley*, 465 F.3d 46, 59 (2d Cir. 2006) (police cannot seize or arrest indiscriminately where a few within a protesting crowd had violated the law at an earlier time and desisted). See also, *Claiborne Hardware v. NAACP*, 458 U.S. 886 (1982) (First Amendment requires precision in distinguishing between those who are engaging in unlawful conduct and those who are not.)

There was no evidence that the entire crowd was acting in concert or as a unit to violate the law. Videos and testimony of the Appellants and others do not show any unified surging toward the police line. Appellees failed to offer any evidence that the water protectors had a single minded purpose or acted as a group to breach the police line, and importantly, there was no pipeline construction going on north of the barricade at that time. These facts are distinguished from the situation in *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012). In *Bernini,* protestors were trying to get to the downtown Saint Paul site where the Republican National Convention was being held, despite an existing order that no one was allowed to enter the downtown area. The *Bernini* plaintiffs challenged their arrests, rather than use of force against them. *Bernini,* 665 F. 3d at 1006 ("The record does not show that any of the defendants directly used force against any of the plaintiffs.") See also, *Baude v. City of St. Louis*, 476 F.Supp.3d at 910 (defendants failed to establish it was objectively reasonable to believe plaintiffs were acting as a unit when they were milling about and allowed to come and go from the area).

Here, there was no individualized justification for using force on the Appellants, each of whom was injured as a result of law enforcement's application of force. An individual may not be seized without particularized probable cause and cannot be subjected to force simply by being in proximity to those who may be suspected of criminal activity.

This is particularly so in a situation like this one with a fluid crowd in which individuals are coming and going. *Barham v. Ramsey, supra,* 434 F.3d 565 [An officer may not predicate a seizure on an individual's "mere propinquity to others independently suspected of criminal activity,"] quoting *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979)); *Vodak v. City of Chicago*, 639 F.3d 738, 745 (7th Cir. 2011) [mass arrest could not be justified based on dispersal orders where it was not reasonable for police to believe people who arrived at different times had heard dispersal order].

2. No Active Resistance, Attempts to Flee or Immediate Threat to Safety of Officers or Others

It is undisputed that none of the Appellants actively resisted or attempted to flee or evade arrest. At most, the allegations are that some of the Appellants engaged in passive resistance by continuing to engage in protest and failing to leave while Appellees continued to fire upon the crowd. In fact no one in the crowd actively resisted arrest, and the single individual who attempted to climb over the barricade was immediately taken into custody.

The district court relied most heavily on its finding that the law enforcement officers perceived the protectors as a threat. (Add. 58–59, 114–118.) But the reasonableness of this belief was contested by Appellants' declarations, Appellees' depositions, and the video evidence.

There was no evidence that any of the Appellants threw any object at, or otherwise threatened, law enforcement in any way. There was no evidence that any Appellant engaged in, or planned to engage in, conduct that was unlawful nor is there any evidence that would justify the use of force against any particular Appellant.

Taking the video evidence in the light most favorable to the Appellants, as this Court must, overwhelmingly depicts peaceful protestors and debunks Appellees' claim that there was widespread aggressive activity in the crowd. The crowd is generally depicted in the video evidence a distance away from the barricade, engaged in peaceful activity such as praying, singing, photographing, expressing themselves verbally, or simply standing. The video evidence does not support Defendants' claim that law enforcement was under attack by a "constant barrage of objects being thrown at law enforcement" (Add. at 73) or that a large group was trying to get through the barricade. In fact, in 200 hours of video, there are only approximately ten instances of individuals throwing objects in the direction of the barricade, not a constant barrage or substantial portion of the crowd. There is no video evidence of anyone throwing logs or other large objects. There is no documentation of what time an item was thrown at law enforcement, or the number of items thrown, and no such items were photographed or collected for evidence.

Moreover, the fact that this event occurred over the course of ten

hours gave law enforcement many opportunities to halt or rethink its constant barrage of munitions and freezing water directed at protectors. There was no evidence that any officer was seriously injured at any time. It is hard to imagine that a reasonable law enforcement officer could feel objectively threatened with serious injury for ten hours when armed behind a heavily fortified barricade and supported by hundreds of other law enforcement as well as armored and fire department vehicles when facing an unarmed, largely peaceful crowd. Even if a law enforcement officer believed a person was about to attack him that belief could be deemed unreasonable. *Banks v. Hawkins,* 999 F.3d 521, 526 (8th Cir. 2021) (*citing Ribbey v. Cox*, 222 F.3d 1040, 1043 (8th Cir. 2000). Moreover, whether an officer reasonably interpreted the suspect's actions as a real threat to his personal safety is a matter for a jury to decide. *Banks v. Hawkins*, 999 F.3d at 528 n. 6 *(citing Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009).)

3. Other Factors: Warnings and Extent of Injury

The existence, extent and nature of warnings given to the water protectors are disputed facts. Appellants did not see or hear warnings. There is no contrary direct evidence. Warnings were not given throughout the 10 hour continuous deployment of impact munitions. The district court below accepted and credited, contrary to the standard of review on summary judgment, law enforcement claims that

"warnings were 'constantly' being given either by officers personally, or through amplified means." (Add. 64.) Defendants admit that amplified orders were at best limited. The nature and extent of warnings and whether they were calculated by law enforcement to be heard by all who were subsequently shot and injured is hotly contested. (Sheriff Kaiser, e.g., admitted he did not know whether everyone in the crowd could hear the announcements. (App.973 at 44; R. Doc. 239–14.)

Warnings must be given by law enforcement whenever feasible. See e.g., *Loch v. City of Litchfield,* 689 F.3d 961, 967 (8th Cir. 2012) (law enforcement should give warning before employing deadly force); *Procknow v. Curry*, 826 F.3d 1009 (8th Cir. 2016) (warnings prior to use of taser); *Deorle v. Rutherford,* 272 F. 3d 1272, 1284 (9th Cir. 2001) (warnings prior to less-than-deadly force should be given if feasible especially in crowd-control situations). This Court recently recognized disputes of fact regarding the number of orders and who heard them in the context of alleged announced dispersal orders provided personally and via public address. *Baude v. Leyshock*, 23 F.4th 1065).

Additionally, Appellants received painful and often permanent injury. Dundon, shot in the eye, and Demo, shot in a hand raised shoulder height, had to undergo surgery. Dullknife and Wilson were shot in the chest and Bruce in the genitals. Firing "a shotgun loaded with a lead-filled bean bag at a person, regardless of whether one is aiming at the person's face, is to use more than *de minimis* force against

the person." *Mitchell v. Kirchmeier*, 28 F.4th 888, 898-899; *and see Montoya v. City of Flandreau*, 669 F.3d 867, 872 (8th Cir. 2012) [explaining that "the severity of the injuries [the plaintiff] sustained is a relevant factor in determining the reasonableness of the force used".]

Retired Police Commissioner Thomas C. Frazier concluded that the use of water in freezing temperatures was punitive, unnecessary, cruel and inhumane. The use of water cannons in crowd contexts can lead to serious injury or death. (App.244; R. Doc. 14–20; Anna Feifenbaum, <https://www.opendemocracy.net/en/opensecurity/white-washing-water-cannon-salesmen-scientific-experts-and-human-rights/> Open Democracy (Feb. 25, 2014.).) Commissioner Frazier also concluded that officers shot indiscriminately at protesters making no attempt to either distinguish which persons were actually a threat or to target less vulnerable parts of the body. Moreover, the Commissioner further found that individuals outside of any area that remotely could be considered as threatening to law enforcement were targeted and subjected to serious bodily injury.

Viewing the totality of the circumstances in the light most favorable to Appellants, including that at most minor misdemeanors were at issue, the lack of immediate threat to law enforcement, no active resistance or attempts to flee, the failure to provide adequate warnings, and the resulting serious injuries suffered by Appellants, a jury could certainly find law enforcement's uses of force here were objectively

unreasonable.

IV. Alternatively, Appellants Are Protected From Unreasonable Force by the Fourteenth Amendment

Even if this Court were to find that no seizure occurred, Appellants would still be protected by the substantive due process protections of the Fourteenth Amendment against arbitrary governmental action or the exercise of power without reasonable justification. *Cty of Sacramento v. Lewis*, 523 U.S. 833, 844–845 (1998)

A pretrial detainee can prevail on an excessive force due process claim under the Fourteenth Amendment by showing a defendant's conduct was objectively unreasonable. *Kingsley v. Hendrickson, 576 U.S. 389* (2015). See also, *Whitney v. City of St. Louis, Mo,* 887 F.3d 857, 860 n.4 (8th Cir. 2018) (*Kingsley* confined to excessive force claims for pretrial detainees.) See also, *Edrei v. Maguire*, 892 F.3d 525, 537 (2d Cir. 2018) (*Kingsley* provides the appropriate standard for all excessive force claims brought under the Fourteenth Amendment.) A person not in custody and out on a roadway, must have at least as much protection from being subjected to excessive force as a pretrial detainee.

V. Defendants Are Not Entitled to Qualified Immunity

A. Standard of Review

In reviewing *de novo* a district court's summary judgment ruling

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regarding qualified immunity, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan v. Cotton*, 572 U.S. at 656; *Williams v. City of Burlington*, 27 F.4th 1346, 1351 (8th Cir. 2022).

B. Clearly Established Right to Be Free From Excessive Force

Public Officials are personally protected from liability by qualified immunity when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Williams v. City of Burlington,* 27 F.4th at 1350, citing *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Whether officials are owed qualified immunity involves two questions: (1) if the facts alleged show the officer's conduct violated a constitutional right when taken in the light most favorable to the party asserting the injury; and (2) whether that right was "clearly established" at the time of the defendants' alleged misconduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

There does not have to be a previous case with exactly the same factual issues, rather the right is clearly established if a reasonable officer would be on notice from prior cases that the use of force in the circumstances presented would violate the law. *Williams v. City of Burlington,* 27 F.4th at 1352, and cases cited therein. If a person is not

suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, "we have held time and again" that it is "unreasonable for an officer to use more than *de minimus* force against him." *Mitchell v. Kirchmeier*, 28 F.4th at 898 and cases cited therein.

As this Court noted in *Mitchell,* "(o)ur cases clearly establish that gentler treatment than [being shot with a "less lethal" munition] constitutes more than *de minimus* force. *See, e.g.*, *Small*, 708 F.3d at 1005–06 (holding that it was clearly established that tackling from behind without warning constitutes more than *de minimis* force); *Montoya*, 669 F.3d at 870, 872–73 (holding that it was clearly established that causing a person to trip by "sweeping her . . . leg" constitutes more than *de minimis* force); *Shannon*, 616 F.3d at 858, 863–64 (holding that it was clearly established that a takedown constitutes more than *de minimis* force). *Mitchell,* 28 F.4th at 898-899. See also, *Baude v. Leyshock*, 23 F.4th 1065 (Baude's right to be free of kettling, pepper spray and application of zip ties clearly established); *Johnson v. Carroll*, 658 F.3d 819, 828 (8th Cir. 2011) ("throw[ing] to the ground and mac[ing] a nonviolent, suspected misdemeanant who was not fleeing or herself resisting arrest" is unlawful).)

Further, "[a]s of June 2007, it was clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment." *Nance v. Sammis*, 586 F.3d 604, 611–612 (8th Cir. 2009).

Appellants here were subjected to freezing water blasts and impact munitions, far from *de minimus* force, and directly dispute they were threatening, fleeing or resisting and that at most they were trespassers. Law enforcement officers are not protected by qualified immunity.

VI. A Jury Must Determine Whether Defendants Have Supervisory Liability or Liability Pursuant to *Monell*

Individual Appellees Kirchmeier, Ziegler and Kaiser are subject to supervisory liability and governmental entity Appellees Morton County, City of Mandan and Stutsman County are subject to liability pursuant to *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

A. Defendant Supervisors Were Direct Participants and Failed to Intervene

Supervisors can be held liable under §1983 (1) if the supervisor directly participated in the constitutional violation; (2) if the supervisor failed or refused to intervene when a constitutional violation took place in his presence; (3) if the supervisor's failure to train or supervise the employee caused the constitutional violation; or (4) if the supervisor created a policy or custom under which the constitutional violation occurred. See, e.g., *B.J.G. ex rel. McCray v. St. Charles City Sheriff, No. 4:08-CV-1178-CDP*, 2010 U.S. Dist. LEXIS 44205, 2010 WL 1838414, at *3 (E.D. Mo 2010), *aff'd sub nom. B.J.G. ex rel McCray v. St. Charles*

City Sheriff, 400 F.App'x 127 (8th. Cir. 2010).

Supervisory officers who act with "deliberate indifference toward the violation," *Wagner v. Jones,* 664 F.3d 259, 275 (8th Cir. 2011) (quoting *Ottman v. City of Independence*, 341 F.3d 751, 761 (8th Cir. 2003)), or, in other words, are aware that their subordinates' actions create a "substantial risk of serious harm," may be liable if they fail to intervene to mitigate the risk of harm, *Wagner v. Jones*, 664 F.3d 259 (quoting *Kahle v. Leonard*, 477 F.3d 544, 551–52 (8th Cir. 2007)) (internal quotation marks omitted); *Baude v. Leyshock*, 23 F.4th at 1074. Deliberate indifference may be shown when a supervisor knows about the violation and facilitates it, approves it, condones it or turns a blind eye to it. *Wagner, supra.*

Defendant-Appellant Kaiser, who was on scene, as well as Defendants-Appellants Kirchmeier and Ziegler were directly involved in supervising the individual law enforcement officers called to the bridge with impact munitions, who then began indiscriminately firing at the crowd. Kirchmeier and Ziegler were direct supervisors of those on the scene who reported to them. The three knew that impact munitions were being fired and that freezing water was being used as force against the protectors. None of these supervisors intervened in or attempted to mitigate these uses of force. All were specifically involved in the decision to use water as force with Kaiser making this decision on the scene after consultation with command. They certainly condoned

these violations and turned a blind eye to the harm being perpetrated on the water protectors. These supervisors are individually liable to Appellants.

B. A Jury Could Find the Government Entities Liable Under *Monell*

Appellees Morton County, Stutsman County and City of Mandan are liable for the acts of their policy makers as well as for their policies of failing to train and supervise these law enforcement officers. *Canton v. Harris,* 489 U.S. 378 (1989). Importantly, in the unlikely event that qualified immunity is found to protect individuals, a governmental entity may not avail itself of a qualified immunity defense. *Owen v. City of Independence*, 445 U.S. 622, 650 (1980).

Even if a plaintiff is unable to identify an individual defendant, policy liability may be found. *Wilson v. Town of Mendon*, 294 F.3d 1, 7 (1st Cir. 2002) (A plaintiff may fail to name the correct individual defendants, or any individual defendants, but could still recover against the municipality if injured by a municipal policy.) See also, *Hopkins v. Andaya*, 958 F.2d 881, 888 (9th Cir. 1992) (city could be liable for improper training and procedure even if the officer was found not liable for excessive use of force); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985) (A municipality's failure to provide adequate jail funding or staffing may cause a constitutional violation even if the

individual staff members involved are doing the best they can in a bad situation.); *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) (A municipality may be liable where the plaintiff's injury results from improper police training or procedure even if the individual officer is exonerated).

1. Acts of Policy Makers

"Municipal liability may attach based on the single act or decision of a municipal decision-maker if the decision-maker possesses final authority to establish municipal policy over the subject matter in question." *Speer v. City of Wynne*, 276 F.3d 980, 985–87 (8th Cir. 2002) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988)). *See also Vodak v. City of Chi.,* 639 F.3d 738, 747 (7th Cir. 2011) (Liability may be imposed on a government entity for a constitutional tort when the tort was authorized or directed at the policymaking level of government.) (citing *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 402–04 (1997); *Jett v. Dallas Independent School District*, 491 U.S. 701, 736–38 (1989)).

These commanders directed, authorized and ratified the use of force on peaceful protestors at the Bridge on November 20, 2016, including the use of the water cannons. Even if some decisions were made by subordinates, the issue of whether a final policymaker ratified a subordinate's decision is a question of fact for the jury to decide. *Soltesz*

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v. Rushmore Plaza Civic Ctr., 847 F.3d 941, 947 (8th Cir. 2017).

2. Policy Failure to Train and Supervise

The Supreme Court decades ago acknowledged that an entity may be liable under *Monell* for failure to adequately train, supervise or control individual law enforcement officers who violate a plaintiff's rights. In *City of Canton v. Harris*, 489 U.S. 378, 389 (1989) the U.S. Supreme Court defined the contours of an actionable *Monell* failure to train claim as when the failure to train evidences deliberate indifference, such as when the need for more or different training is obvious and the entity fails to take reasonable steps to train its employees. *City of Canton*, 489 U.S. at 390.

Although as Appellees acknowledge, water protectors had been engaging in protests and marches for months prior to November 20, 2016, it is undisputed that Appellees provided the officers with no training whatsoever regarding orders to disperse or to the use of force in a crowd or demonstration context. No training was given particular to the weapons used that were indiscriminate in nature, including gas and water cannons. Impact munitions were fired indiscriminately without any training as to the standard for such a high level of force, what area of the body may be appropriately targeted or how that force should be utilized to direct a crowd.

Additionally, there was no effort to supervise or control the line

officers in their firing of the impact munitions that subjected Appellants to injury. Absolutely no effort was made to prevent or even mitigate the uses of force that continued unabated for hours, and there was no direction to pause and reassess when the force, asserted to be used to disperse people from the bridge, was not successful in doing so. A jury could find these governmental entities liable for a policy of completely failing to undertake any training or supervision at all of these law enforcement officers who were let loose to fire away with massive and maiming force at the water protectors.

CONCLUSION

For the foregoing reasons, the district court's decision granting summary judgment to Defendants-Appellees should be reversed.

Respectfully submitted,

Dated: April 22, 2022 By: /s/ Rachel Lederman

One of the Attorneys for Appellants
Vanessa Dundon, Crystal Wilson, David Demo, Guy Dullknife, III, Mariah Marie Bruce, and Frank Finan

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **12,741 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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, **14-pt Century Schoolbook**, using TypeLaw.com's legal text editor.

Dated: April 22, 2022 By: /s/ Rachel Lederman

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus free.

Respectfully submitted,

Dated: April 22, 2022 By: /s/ Rachel Lederman

One of the Attorneys for Appellants
Vanessa Dundon, Crystal Wilson, David Demo, Guy Dullknife, III, Mariah Marie Bruce, and Frank Finan

Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and 8th Cir. Rule 26.1A, the undersigned counsel for Appellants hereby certifies that all Appellants are individuals and no nongovernmental corporation is a party to this proceeding.

Respectfully submitted,

Dated: April 22, 2022 By: /s/ Rachel Lederman

One of the Attorneys for Appellants
Vanessa Dundon, Crystal Wilson, David Demo, Guy Dullknife, III, Mariah Marie Bruce, and Frank Finan

Attorney's Fees

Plaintiffs intend to seek attorney's fees and costs for this appeal, pursuant to 42 U.S.C. §1988.

Respectfully submitted,

Dated: April 22, 2022

By: /s/ Rachel Lederman

One of the Attorneys for Appellants
Vanessa Dundon, Crystal Wilson, David Demo, Guy Dullknife, III, Mariah Marie Bruce, and Frank Finan

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2022, 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 appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Respectfully submitted,

Dated: April 25, 2022 By: /s/ Rachel Lederman

One of the Attorneys for Appellants
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