No. 22-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VANESSA DUNDON, ET AL,

Plaintiffs-Appellants,

v.

MORTON COUNTY SHERIFF KYLE KIRCHMEIER, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
CASE NO. 1:16-CV-406
THE HONORABLE JUDGE DANIEL M. TRAYNOR

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

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

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest national organization comprised of Tribal Nations.[1] NCAI's mission is to protect and preserve the treaty and sovereign rights of Tribal Nations and to promote a better understanding of Native peoples, their cultures, and ways of life. NCAI is uniquely situated to provide critical context to the Court with respect to the movement at Cannon Ball, North Dakota (the "Movement").

NCAI was not alone when it expressed its interest in and support for the Movement with the 2016 passage of Resolution #PHX-16-023, calling upon the U.S. Army Corps of Engineers ("Army Corps") "to deny the easement request to drill under Lake Oahe and do a full Environmental Impact Statement."[2] Indeed, the Movement had broad support from Indian Country—356 separate Tribal Nations sent their flags to fly at the site where the peaceful protestors camped, and nearly 300 Tribal Nations passed resolutions or wrote letters of support for the Standing

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

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

Rock Sioux Tribe's ("Standing Rock" or "SRST") efforts to protect SRST's treaty rights. The President of the United States, in reference to the Movement, said to tribal leaders, "I know many of you have come together, across tribes and across the country, to support the community at Standing Rock and together you're making your voices heard."[3] This Movement was a peaceful protest involving nearly all of Indian Country. It was not the radical protest of a fringe group.

In fact, NCAI's resolution proclaimed "that in carrying out this resolution we remain in peace [as] . . . Indian Country's first concern is for the safety of the peaceful protectors, law enforcement officers, government officials, and workers in Cannon Ball, ND, and any act of violence is unwelcome."[4] And a joint statement on the Movement from the Department of Justice, the Department of the Army, and the Department of the Interior read: "In recent days, we have seen thousands of demonstrators come together *peacefully*, with support from scores of sovereign tribal governments, to exercise their First Amendment rights and to voice heartfelt concerns about the environment and historic, sacred sites."[5]

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[3] Catherine Thorbecke, *President Obama Tells Standing Rock Demonstrators: 'You're Making Your Voice Heard'*, ABCNEWS ONLINE (Sept. 26, 2016, 3:57 PM), https://abcnews.go.com/US/president-obama-tells-standing-rock-demonstrators-youre-making/story?id=42361295.

[4] NCAI Res., *supra* note 2.

[5] Joint Statement from the Department of Justice, the Department of the Army, and the Department of the Interior Regarding *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* (Sept. 9, 2016),

NCAI respectfully submits this *amicus* brief in support of Vanessa Dundon, Crystal Wilson, David Demo, Guy Dullknife, III, Mariah Marie Bruce, and Frank Finan (collectively, "Plaintiffs-Appellants"), and the thousands of other Americans who stood in prayer and objected to the Army Corps's complete abdication of its treaty and trust duties and responsibilities to protect and preserve the drinking water, sacred sites, and graves of Tribal Nations.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Native youth at Standing Rock who began the Movement are familiar with the history of violence inflicted on their people, but they began the Movement with hope by taking a peaceful, prayerful "stand to be the voice for [their] community, for [their] great grandparents, and for Mother Earth."[6] These Native youth inspired Plaintiffs-Appellants, and thousands of others (Native and non-Native) who decided to join them in Cannon Ball, just one mile north of the Standing Rock Sioux Reservation. For six months, they engaged in a peaceful, prayerful protest—all the while demanding that the United States, specifically the Army Corps, uphold the treaty rights of the SRST and refuse to allow a private company, Dakota Access, LLC ("Dakota Access"), to build its pipeline. Plaintiffs-

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https://www.justice.gov/opa/pr/joint-statement-department-justice-department-army-and-department-interior-regarding-standing (emphasis added).

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

Appellants and thousands of other peaceful protestors advocated for the SRST's treaty rights in a clear exercise of their First Amendment rights.

In response to this peaceful protest, law enforcement used force. The question, of course, is whether that use of force was excessive and whether it violated the rights of Plaintiffs-Appellants. Such a determination involves not only issues of law, but also issues of fact. And when Defendants-Appellees filed for summary judgment below, the parties presented very different, disputed facts. However, instead of resolving the disputed facts in the non-movants' favor—as Federal Rule of Civil Procedure 56 ("Fed. R. Civ. P. 56" and "Rule 56") requires— the District Court resolved the disputed material facts exclusively in the movants' favor. A simple read reveals that the District Court's "Undisputed Facts" only recites statements of fact submitted by Defendants-Appellees. (Add. 6-16.) The District Court's wholesale adoption of the movants' version of the facts, without even a nod to the substantial disputes raised in the non-movants' proffered facts, constitutes a violation of Rule 56 and commands reversal.

But more is at stake here than a violation of Rule 56. It is undisputed that Plaintiffs-Appellees suffered serious bodily harm and injury. Their exercise of their First Amendment rights was, in fact, met with serious force and, in some cases, life-threatening force. If the excessive force used to silence Plaintiffs-Appellants' protected speech stands, the ability of all NCAI member Tribal Nations to

peacefully exercise their First Amendment rights—without risking injury from life-threatening, excessive police force—will be greatly undermined. NCAI therefore has a unique interest in advocating for the affirmance of the constitutional rights of Plaintiffs-Appellants to peacefully speak in support of tribal sovereignty, treaty rights, and the protection of Native American sacred sites and burials. For the following reasons, NCAI respectfully requests that this Court reverse the District Court's granting of Defendants-Appellees' Motion for Summary Judgment below.

ARGUMENT

I. The District Court Mischaracterized the Movement at Standing Rock

In concluding that Defendants-Appellees' use of violent force was reasonable and not excessive, the District Court erroneously overlooked contradictory and disputed evidence to conclude that Plaintiffs-Appellants were involved in a violent and dangerous Movement. The District Court did this despite the evidence in the record clearly demonstrating Plaintiffs-Appellants were engaged in a peaceful, prayerful Movement. Instead of resolving factual disputes in Plaintiffs-Appellants' favor, the District Court exclusively, and erroneously, adopted Defendants-Appellees' self-serving statements regarding the events that took place at Standing Rock in 2016.

As the United States Supreme Court has concluded, "a judge's function at summary judgment is not to weigh the evidence and determine the truth of the

matter but to determine whether there is a genuine issue for trial." *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)) (internal quotations omitted); *see also Wealot v. Brooks*, 865 F.3d 1119, 1128 (8th Cir. 2017) ("Disputed factual issues and conflicting testimony should not be resolved by the district court"); *Coker v. Ark. State Police*, 734 F.3d 838, 843 (8th Cir. 2013) ("Making credibility determinations or weighing evidence in this manner is improper at the summary judgment stage, and it is not our function to remove the credibility assessment from the jury."). In doing so, "a court must view the evidence in the light most favorable to the opposing party." *Id.* at 657 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)) (internal quotations omitted).

In response to Defendants-Appellees' Motion for Summary Judgment, Plaintiffs-Appellants presented substantial evidence to demonstrate that law enforcement took an overly aggressive and violent approach to a non-violent, lawful protest at the outset. For instance, in the Declaration of Thomas Frazier, the former Police Commissioner of the Baltimore Police Department, Mr. Frazier reviewed all of the deposition transcripts, affidavits, and video footage evidence that the parties had presented, and based on his substantial experience, concluded that "the 'water protectors'/ protesters were an overall peaceful people, excluding a

small percentage who were prepared to break the law to stop the pipeline." (App. 1685; R. Doc. 270, at 5.) Notably, Mr. Frazier opined that:

> This was a crowd control event, not a riot. Sheriff Kirchmeier's self-serving characterization is inaccurate. Proof of this is the fact that only one Officer was even slightly injured. However, according to the sworn declaration of Dr. Kalamaoka'aina Niheu, M.D., a doctor who was part of the medical response during this incident, approximately 300 protestors were injured by the Law Enforcement force over the course of the night . . . .
>
> This was unconscionable and contrary to contemporary law enforcement standards nationwide.

(App. 1686; R. Doc. 270, at 6.)

Despite clear factual disputes about the nature of the protest, the District Court adopted Defendants-Appellees' statements that law enforcement's aggressive response was necessary because the Water Protectors were not peaceful and, instead, were dangerous. The District Court adopted the moving parties' version of events leading up to November 20, 2016 as "undisputed facts" and then used those "undisputed facts" to "determin[e] whether an officer acted reasonably on November 20, 2016." (Add. 8 ¶17.) In some instances, the District Court even employed the Defendants-Appellees' exact phrasing. *Compare* R. Doc. 283, at 39 ("The NDHP aerial surveillance video . . . establishes there were hundreds, if not more than one thousand protesters involved in the riot on November 20, 2016.") *with* (Add. 42 at ¶86) ("the Court has trouble relying solely on *Atkinson* . . . in determining whether a group of hundreds, if not over a thousand, of individuals . . .

were clearly seized"), (Add. 46 ¶95) (stating a reasonable officer would not have known "using less-lethal munitions in a crowd of hundreds, if not a thousand, protestors . . . would constitute a seizure"), (Add. 72 ¶143) ("Aerial footage of the protest . . . shows hundreds of, if not a thousand, protestors standing on the Bridge. . . ."), (Add. 75 ¶148) (situations with smaller crowds not instructive for how "a reasonable officer may view . . . actions involving a large-scale protest with hundreds, if not over a thousand, protestors"), (Add. 77 ¶153) ("the events of November 20, 2016, took place in rural North Dakota, with hundreds, if not a thousand protestors.").[7] The District Court's weighing of the evidence is not only contrary to the law under Fed. R. Civ. P. 56, it is contrary to the record; and the District Court's recounting of events is contrary to how the Movement actually unfolded.

The Movement began on March 26, 2016, when a group of Standing Rock youth ran from Wakpala, South Dakota to Mobridge, South Dakota to raise

[7] The District Court's adoption of Defendants-Appellees' arguments in their motion for summary judgment should be compared with contemporaneous reports from Morton County stating that there were only 400 Water Protectors on the bridge, *not a thousand*. (App. 321; R. Doc. 61-3, at DEF116); Alleen Brown, *Medics Describe How Police Sprayed Standing Rock Demonstrators with Tear Gas and Water Cannons*, THE INTERCEPT (Nov. 21, 2016, 5:52 PM), https://theintercept.com/2016/11/21/medics-describe-how-police-sprayed-standing-rock-demonstrators-with-tear-gas-and-water-cannons/ (reporting that the Morton County Sheriff's Department estimates that 400 people were involved in the protest).

awareness about the proposed pipeline.[8] Their tribal leadership had provided comments to the Army Corps regarding the significant damage the pipeline would cause to sacred sites and the graves of their relatives if the pipeline were constructed along its proposed path just one mile north of the Standing Rock Sioux Reservation border.[9] In addition to their run, several Native youth created a petition in opposition to the pipeline that ultimately garnered over half a million signatures. In their petition, the Native youth explained why they were exercising their constitutional right to free speech in opposition to the Dakota Access Pipeline:

> I'm 13 years-old and as an enrolled member of the Standing Rock Sioux Tribe, I've lived my whole life by the Missouri River. It runs by my home in Fort Yates North Dakota and my great grandparents' original home was along the Missouri River in Cannon Ball. The river is a crucial part of our lives here on the Standing Rock Reservation . . . .
>
> In Dakota/Lakota we say "mni Wiconi." Water is life. Native American people know that water is the first medicine not just for us, but for all human beings living on this earth . . . . So we, the Standing Rock Youth, are taking a stand to be the voice for our community, for our great grandparents, and for Mother Earth.[10]

The youth decided to open a prayer camp in Cannon Ball, North Dakota, where Dakota Access was planning to construct the pipeline across the Missouri

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

[9] *Id.*

[10] Anna Lee et al., *supra* note 6.

River ("River") and where their relatives were buried, in burials located in the pipeline's proposed path.[11] The organizers of this Movement were not rioters or terrorists; they were young citizens of the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, fighting to ensure a livable homeland for present and future generations and to protect the graves of their ancestors.

The youth named their camp "Sacred Stone,"—recognizing, before the Army Corps's damming of the Missouri River in the 1950s, how the River's natural current produced perfectly spherical stones that looked like cannon balls. From the beginning, the youth focused on prayer. "Days began with a water ceremony; the sacred fire had to be regularly fed; meals began with prayer and a 'spirit plate' served for the ancestors; alcohol and drugs were strictly forbidden."[12]

On April 26, 2016, when it was clear the Army Corps was moving toward granting Dakota Access an easement to construct the pipeline across the River, Standing Rock and Cheyenne River Sioux youth ran from Cannon Ball to Omaha, Nebraska, to deliver a petition to the Army Corps.[13] When the Army Corps ignored their request, the youth ran from their camp at Cannon Ball all the way to

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

[12] *Id.*

[13] Nagle, *supra* note 8, at 7.

Washington, D.C.[14] In July 2016, thirty young runners ran over two thousand miles to the White House and demanded that President Obama stop the pipeline.[15] While in Washington, D.C., they delivered a petition with more than 160,000 signatures to the Army Corps asking that the pipeline not be built next to their Reservation.[16]

Less than two weeks after the Native youth ran to the White House, the Army Corps issued a Final Environmental Assessment ("EA") and "finding of no significant impact," thereby granting Dakota Access an easement to construct the pipeline under Lake Oahe and the Missouri River.[17] Two days after the issuance of the EA, the SRST filed a complaint in the United States District Court, District of Columbia, alleging that the EA violated federal law (the "Standing Rock Complaint"). In the Standing Rock Complaint, the Tribe incorporated the youth's arguments, averring that the Army Corps did not have the authority to grant Dakota Access the easement.[18] The SRST filed a motion for preliminary injunction, seeking to stop construction before irreversible damage was done to the burials located in the pipeline's proposed path.[19]

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[14] *Id.*

[15] *Id*. at 10.

[16] *Id.* at 18.

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

[18] *Id.* ¶3.

[19] *Id*. ¶¶1, 51.

On August 12, 2016, despite SRST's lawsuit and its pleas not to desecrate the burial grounds of tribal ancestors, Dakota Access began constructing the pipeline. In response, the Chairman of the SRST, David Archambault II, along with many other tribal citizens, walked to the construction site and engaged in a peaceful protest, asking Dakota Access to stop its construction because the construction would destroy Dakota and Lakota cultural resources.[20]

In response, Morton County law enforcement arrested them.[21] The arrest of Chairman Archambault on August 12 marked the beginning of an excessive response to peaceful protest. In an Official Statement released six days after his arrest, Chairman Archambault stated that Standing Rock "supports the right of our citizens and supporters of [the SRST] to engage in peaceful, non-violent expressions of their opposition to the Pipeline."[22] He further expressed:

> We gather near Cannonball River in prayer. We emphasize that these demonstrations are non-violent actions that are grounded in the shared belief that we must protect current and future generations that rely on our rivers and aquifer to live. We insist on peaceful action and we

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

[21] *Id.*

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

> have asked those coming to join us in solidarity come in a peaceful, safe, and prayerful manner.[23]

Chairman Archambault's arrest and prayerful response inspired thousands to travel to Cannon Ball, North Dakota to stand with Standing Rock.[24]

The Movement's guiding principles were clear from the beginning; the protestors (also known as "Water Protectors") were peaceful and focused on prayer. Chairman Archambault wrote: "Any act of violence hurts our cause and is not welcome here. We invite all supporters to join us in prayer that, ultimately, the right decision—the moral decision—is made to protect our people, our sacred places, our land and our resources."[25]

After Morton County made sweeping, indiscriminate arrests in October 2016, the SRST reminded the then-thousands of individuals at the camp that they would not be permitted to stay if they reacted to law enforcement's aggression with violence: "We have stood side by side in peaceful prayer and will continue to do so as we fight to permanently protect that which is sacred to all of us."[26] In one statement, Chairman Archambault said: "We're asking everybody to remain

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[23] *Id.*

[24] Nagle, *supra* note 8, at 8.

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

[26] *Id.*

prayerful and peaceful and not to react to any form of aggression that law enforcement brings."[27] He also reiterated that the SRST did not want to see pipeline construction workers, law enforcement, or Water Protectors injured.[28] As one public figure observed: "They spend basically the entire day doing prayers, chanting. I've never been around so peaceful a stand."[29]

Because the District Court improperly chose to view the facts in the light most favorable to the moving parties, evidence reflecting the peaceful nature of the protest was given a sinister or doubtful cast in the District Court's opinion. For example, controlled fires created for warmth in sub-freezing temperatures somehow become justification for subjecting hundreds of people to hypothermia by dousing them with water to "contain the fire and prevent the spread." (Add. 55-56 ¶109); *cf.* (Add. 97) ("Sheriff Kaiser testified that the use of water to target protestors (as opposed to claimed attempts to douse fires) was specifically discussed, requested, and authorized by the commanders."); (Add. 1698 ¶7; R. Doc. 271 ¶7) (law enforcement's use of water cannons "in subfreezing

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[27] NPR Staff, *In Fight Over N.D. Pipeline, Tribe Leader Calls For Peace And Prayers*, NPR (Oct. 27, 2016, 4:44 AM), https://www.npr.org/2016/10/27/499479185/in-fight-over-n-d-pipeline-tribe-leader-calls-for-peace-and-prayers.

[28] *Id.*

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

temperatures . . . caus[ed] hypothermia in the majority of patients treated."). The District Court even appears to reject the veracity of Ms. Bruce's own statements concerning the extent of her injuries, stating "she claims" and "she believes," emphasizing that she stayed at the protest "for a long period of time" and "for another 20-30 minutes," while failing to observe that Ms. Bruce, whom law enforcement had tear-gassed, drenched with water and covered with ice before hitting with a flashbang, began feeling pain as soon as the bitter cold was no longer numbing it. (Add. 21 ¶45); *compare with* R. Doc. 129 ¶¶105-106. In fact, Ms. Bruce's pain grew so severe as she regained sensation in her body that she vomited and had to be transported to the hospital. R. Doc. 129 ¶106.

There is no question that the District Court uncritically adopted Defendants-Appellees' version of events as undisputed, most obviously evidenced by the District Court's decision to cite *only* Defendants-Appellees' filings in its "undisputed facts" section. Thus, the District Court has "neglected to adhere to the fundamental principle that . . . reasonable inferences should be drawn in favor of the nonmoving party" and committed reversible error. *Tolan*, 572 U.S. at 660. The District Court erred when it mischaracterized Plaintiffs-Appellants' actions in exercising their First Amendment rights as violent and dangerous thus warranting law enforcement's use of violent, excessive force.

II. North Dakota's Unjustified Violence in Reaction to the Peaceful Movement Threatens the First Amendment Rights of All Americans

If allowed to stand with no consequence, the level of violence used by Morton County, Stutsman County, and City of Mandan law enforcement against peaceful protesters will threaten the First Amendment rights of, not only Native Americans, but all Americans. The District Court's Order sets a precedent of granting impunity to governments and law enforcement officials who deliberately trample on the civil liberties of Americans when those civil liberties are exercised in support of locally, or historically, unpopular views or beliefs. That is not what the United States Constitution stands for.

Beyond violating the Rule 56 standard, the District Court's credulous adoption of law enforcement's self-serving representations of what took place threatens to undermine the First Amendment rights of Americans who seek to speak out against governmental actions that violate federal law. From the beginning, law enforcement took an aggressive and violent approach to peaceful protest. For instance, on August 17, 2016, five days after Morton County arrested Chairman Archambault and 17 other peaceful protestors,[30] Morton County law

[30] Lauren Donovan, *Standing Rock Sioux chairman arrested at Dakota Access Protest*, THE DICKINSON PRESS (Aug. 12, 2016, 10:04 PM), https://www.thedickinsonpress.com/news/4093752-standing-rock-sioux-chairman-arrested-dakota-access-protest. Chairman Archambault was subsequently acquitted by a Morton County jury. ICT Staff, *Archambault Acquitted on DAPL Charges*,

enforcement set up a roadblock approximately 25 miles north of the Sacred Stone Camp,[31] making it all the more difficult for individuals travelling from across the country to support the peaceful protest. Despite no violence, two days later, the Governor of North Dakota declared a "state of emergency."[32] As the University of Arizona Rogers College of Law, Indigenous Peoples Law and Policy Program noted to the Inter-American Commission on Human Rights, the overly aggressive nature of law enforcement's response was undeniable: "During the seven months from September 2016 to February 2017, at least 76 different law enforcement agencies, federal agencies, and private security firms hired by [Dakota Access] were present at some time."[33]

INDIAN COUNTRY TODAY (Sept. 13, 2018), https://indiancountrytoday.com/archive/archambault-acquitted-dapl.

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

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

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

The use of violence and force to intimidate peaceful protestors escalated over Labor Day weekend 2016. On Friday, September 2, 2016, SRST's former Tribal Historic Preservation Officer, Tim Mentz, filed an affidavit in the United States District Court, District of Columbia, identifying 27 burials and 82 stone features, including 16 stone rings and 19 effigies, none of which were included in the pipeline company's archaeological survey, and all of which would be destroyed if construction moved forward.[34]

On Saturday, September 3, 2016, less than 24 hours after Mr. Mentz filed his Declaration in federal court, Dakota Access bulldozed through the burials and sacred sites Mr. Mentz had identified.[35] Mr. Mentz subsequently stated to the District Court: "It appears that DAPL drove the bulldozers [through] approximately 20 miles of uncleared right of way to access the precise area that we surveyed and described in my declaration."[36]

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[34] Supplemental Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction at 3, 7-8, *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 205 F. Supp. 3d 4 (D.D.C. 2016) (No. 1:16-cv-01534-JEB).

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

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

When unarmed, peaceful Americans began to assemble to protest the intentional and unlawful destruction of human graves by raising signs and their voices along a public highway, a private security force hired by Dakota Access was deployed, complete with attack dogs leashed by unlicensed and incompetent handlers from an unregistered security company.[37] Relying solely on a press release from the Morton County Sherriff's Department, the District Court cursorily describes this incident in its "undisputed facts" section as a "confrontation between protestors and private security officers," which "protestors left . . . without further incident" after "[l]aw enforcement responded." (Add. 8 ¶19.) However, in an October 25, 2016 public statement, Reverend Jesse Jackson described it as "a scene reminiscent of the attacks on nonviolent rights marchers in Birmingham."[38] "A number of [I]ndigenous people, including a pregnant woman, were bitten and sprayed and one person was deliberately struck with a truck. Law enforcement, including Morton County Sheriff personnel, failed to intervene in the unwarranted attacks on peaceful protestors."[39] As Waste Win Young noted in her declaration that Plaintiffs-Appellants submitted to the District Court: "I was there when DAPL

[37] Levin, *supra* note 35.

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

[39] Rep't to IACHR, *supra* note 33 at 4.

security attacked Water Protectors, elders, women and children protesting the destruction of those burial sites and prayer sites with pepper spray and guard dogs. Still, we did not change our stance of nonviolence." (App. 1677 ¶17; R. Doc. 269 ¶17.) Morton County law enforcement did nothing to apprehend the individuals responsible for the unlawful desecration and destruction of Native American graves, nor did law enforcement attempt to stop the privately-sponsored physical assault on nonviolent demonstrators armed only with their voices.

Despite the fact that the Movement remained peaceful and focused on prayer, North Dakota and Morton County continued to escalate the already excessively aggressive law enforcement presence. On September 8, 2016, North Dakota Governor Jack Dalrymple activated the National Guard to aid in suppression of the protests and further intimidate U.S. citizens exercising their First Amendment rights.[40] As more and more individuals travelled to Cannon Ball to participate in this peaceful protest, law enforcement amplified its:

> [U]se of force and arrests of water protectors, responding to nonviolent expression in an increasingly militarized and violent fashion. On multiple occasions in October 2016, law enforcement conducted indiscriminate and unlawful mass arrests of people who were expressing opposition to the pipeline, accompanied by unjustified violence against nonviolent protesters.[41]

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[40] Rebecca Hersher, *Key Moments In The Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017, 4:28 PM), https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight.

[41] Rep't to IACHR, *supra* note 33 at 4–5.

The behavior of law enforcement was so reprehensible that Chairman Archambault sent a letter to the U.S. Attorney General on October 24, 2016, calling for an investigation into law enforcement's actions in order "to protect civil rights" of protesters in response to the "overall militarization of law enforcement response."[42]

On October 27, 2016, Native Water Protectors on horseback were confronted by law enforcement equipped with military vehicles and riot gear. Heavily armed law enforcement officials shot pepper spray, tear gas, and a sound cannon, or long range acoustic device,[43] at the peaceful protesters.[44] Law enforcement initiated the incident, moving toward one of the Water Protector camps located on Lakota and Dakota treaty lands that morning "in riot gear, some [] armed and they arrived with soldiers driving trucks and military Humvees."[45] Law enforcement then fired bean bag rounds, pepper spray, and a sound cannon at the Water Protectors.[46] In violation of Fed. R. Civ. P. 56, the District Court relied

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[42] Hersher, *supra* note 40.

[43] *See* R. Doc. 54 ¶11. "The use of [a long rage acoustic device] as a projector of powerfully amplified sound is no different than other tools in law enforcement's arsenal that have the potential to be used either safely or harmfully . . . some courts have held their usage 'to be excessive force where the police used clear disregard for the safety of [those in the vicinity.]'" *Edrei v. City of New York*, 254 F. Supp. 3d 565, 575 (S.D.N.Y. 2017) (quoting *Ramage v. Louisville/Jefferson Cnty. Metro. Gov't,* 520 F. App'x. 341, 346–47 (6th Cir. 2013)).

[44] Rebecca Hersher, *Police Evict Dakota Pipeline Protesters*, NPR (Oct. 27, 2016, 5:10 PM), https://www.npr.org/sections/thetwo-way/2016/10/27/499614734/police-reportedly-arrest-dakota-pipeline-protesters.

[45] *Id.*

[46] *Id.*

solely on affidavits from Morton County Special Deputies to conclude that law enforcement "requested protestors to vacate" and were successful at removing them after "extensive effort," (Add. 11 ¶25.) Although the District Court later describes this incident as "chaotic and dangerous," (Add. 57 ¶112), the District Court adopted *only* the movant's version of October 27, 2016, concluding that "law enforcement . . . reported seeing numerous weapons . . . including . . . hunting knives, hatchets, large logs, and large rocks" in an area where people had been camping, ignoring facts presented by Plaintiffs-Appellants that these are tools ordinarily used for camping. *See* (Add. 24-26 ¶¶52-55); *cf.* R. Doc. 53 ¶4 ("The protestors were occupying this area with teepees, tents, and other structures"); *cf.* (App. 372; R. Doc. 81-1, 3.) (describing "knives, hatchets, and propane cannisters" as "appropriately used for camping.").

At least 141 protesters were arrested, bringing the total count of arrests to over 400 since the start of the Sacred Stone Camp in Cannon Ball.[47] Many of the individuals whom Morton County arrested were inhumanely confined to "dog kennel-like holding cells."[48] Violent, dehumanizing treatment like this for

[47] Catherine Thorbecke, *Officials Defend Use of Alleged 'Dog Kennel' Cells in Dakota Access Pipeline Protest*, ABC NEWS (Oct. 31, 2016, 6:32 PM), https://abcnews.go.com/US/officials-defend-alleged-dog-kennel-cells-dakota-access/story?id=43203236.

[48] *Id*.

exercising constitutionally protected First Amendment rights stifles, if not completely suffocates, free speech.

In response to the use of excessive force and arrests on October 27, 2016, Chairman Archambault remarked that, "North Dakota law enforcement continues to engage in unlawful and dehumanizing tactics to subdue peaceful water protectors with tear gas and water cannons."[49] "We have repeatedly seen a disproportionate response from law enforcement to water protectors' nonviolent exercise of their constitutional rights. Today we have witnessed people praying in peace, yet attacked with pepper spray, rubber bullets, sound and concussion cannons."[50] One Water Protector said: "I feel like Morton County law enforcement is experimenting on us . . . . It's like they received all this free military equipment and they're just itching to try it out."[51]

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[49] Catherin Thorbecke, *Leader of the Standing Rock Sioux Tribe Calls On Obama to Halt Pipeline After Violent Clash*, ABC NEWS (Nov. 21, 2016, 3:17 PM), https://abcnews.go.com/US/leader-standing-rock-sioux-tribe-calls-obama-halt/story?id=43690859.

[50] Catherine Thorbecke, *141 Arrested at Dakota Access Pipeline Protest as Police Move In,* ABC NEWS (Oct. 27, 2016, 12:39 AM), https://abcnews.go.com/US/tensions-mount-protesters-police-controversial-pipeline/story?id=43078902.

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

Following the October 27 mass arrest, Morton County prosecutors brought felony charges against 139 of the approximately 141 Water Protectors arrested that day.[52] However, the Court dismissed the majority of those charges because prosecutors lacked any evidence. One attorney who represented several Water Protectors against similar frivolous charges "estimated that more than 130 people have had charges dropped, signaling the 'unprecedented' nature of Morton County pursuing baseless cases."[53] According to that attorney, the charges were dropped because "[t]here's no evidence" to support the notion that actual crimes have been committed.[54] Nevertheless, the District Court cited the fact of these arrests as relevant to "the possible effect they had upon a reasonable officers' [sic] view of the situation." (Add. 57 at n.7.)

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

> [P]eacefully praying, chanting, singing and protesting the road block and the pipeline construction, [law enforcement arrived in armored vehicles] and used high pressure fire hoses to spray water protectors despite the below freezing weather. They shot [Specialty Impact Munitions], chemical agent canisters, explosive flashbangs and 'stinger' grenades indiscriminately into the crowd over a period of more

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

[53] *Id*.

[54] *Id.*

> than eight hours, without justification, and without providing any clear warnings or opportunity to disperse.[55]

As Reverend Jackson noted, the North Dakota Governor's tactics were:

> [U]nnervingly similar to those used by Alabama Governor George Wallace a half-century ago. Just as Governor Wallace militarized his state to create a climate of fear and violence, Governor Darlymple has declared a 'state of emergency' and taken actions designed to intimidate Standing Rock and the Tribe's supporters into silence.[56]

Defendants-Appellees' conduct calls into question the validity of the constitutional rights of all Americans to peacefully protest and speak out against the unlawful actions of our federal government. It is not "free speech" when you must risk your life, limb, or lose your eye, in order to peacefully participate.

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

The Movement at Standing Rock stood for the simple proposition that the United States should keep its promises—in this case, promises made in the 1851 and 1868 Treaties of Fort Laramie. The Constitution of the United States unequivocally states that "all Treaties made, or which shall be made, under the Authority of the United States shall be *the supreme Law of the Land*." U.S. CONST. art. VI (emphasis added). Moreover, the treaties the United States has entered into with Tribal Nations and the promises therein provide the backbone for the United

[55] Rep't to IACHR, *supra* note 33 at 13–14.
[56] *Statement of Rev. Jackson*, *supra* note 38.

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

If anything, the fact that treaties constitute the "supreme Law of the Land" under the U.S. Constitution should only serve to elevate protections afforded to those who speak out when the United States violates the treaties it has signed with Tribal Nations. In this case, the United States District Court, District of Columbia, agreed with the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, the Yankton Sioux Tribe, the Oglala Sioux Tribe, Plaintiffs-Appellants, and all of the other individuals who took a stand in Cannon Ball, North Dakota, when the District Court concluded that the Army Corps' failure to consider treaty rights violated federal law. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 132 (D.D.C. 2017) (agreeing in part that the Army

Corps's "EA never examined the impacts of spills on the Tribe and its Treaty rights.") (internal quotation marks and citation omitted).[57]

As the United States Supreme Court has held, speech and assembly regarding "matters of public concern . . . occup[y] the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). And public streets, like the bridge where Plaintiffs-Appellants were assaulted, "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).[58] So long as the U.S. Constitution continues to refer to treaties as the "supreme Law of the Land," local, state, and county law enforcement *cannot* resort

[57] On appeal, the D.C. Circuit Court of Appeals affirmed the lower court's determination that the Army Corps must undertake a full Environmental Impact Statement. *See Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032 (D.C. Cir. 2021). The D.C. Circuit affirmed the District Court's conclusion that the Army Corps had acted arbitrarily in granting Dakota Access the easement. *See id.* On February 22, 2022, the United States Supreme Court denied Dakota Access's petition for *certiorari*, *see Dakota Access, LLC v. Standing Rock Sioux Tribe*, 142 S. Ct. 1187 (2022), rendering the Court of Appeals' and District Court's determinations final and conclusive.

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

to excessive force to silence those who exercise their First Amendment right to advocate that the United States uphold its treaty and trust duties and responsibilities to Tribal Nations and their citizens.

CONCLUSION

NCAI respectfully requests that this Court reverse the District Court's granting of Defendants-Appellees' Motion for Summary Judgment.

Dated: April 29, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of 6,500 words of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(B)(i). This brief contains 6429 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style. This brief has been scanned for viruses and is virus free in compliance with 8th Cir. R. 28A(h).

/s/ Mary Kathryn Nagle

Dated: April 29, 2022 Mary Kathryn Nagle

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 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 CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Mary Kathryn Nagle

Dated: April 29, 2022 Mary Kathryn Nagle