

Case No. 17-1306

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

Vanessa Dundon, et al.

Plaintiffs - Appellants,

vs.

Kyle Kirchmeier, et al.

Defendants– Appellees,

**On Appeal from the U.S. District Court for
the District of North Dakota**

Honorable Judge Daniel Hovland, District Judge

APPELLEES' BRIEF

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RESPONSE TO APPELLANT’S SUMMARY OF THE CASE

Contrary to the arguments of Appellants, this case is not about freedom of expression. Law Enforcement have not prevented the protesters from lawfully exercising their constitutional right to free speech. On November 20, 2016, Law Enforcement were simply enforcing the rule of law by preventing Appellants and other protesters from engaging in further criminal trespass and criminal conduct. Once the protesters resorted to violence directed at Law Enforcement, Law Enforcement were fully justified in using intermediate and *less lethal* means to protect themselves, and other emergency responders on the scene, from serious bodily injury or death. The application of force, and the level of force to be applied in the future, must be left to the sound discretion of each individual Law Enforcement officer based upon the totality of the circumstances faced at the moment. This action is about Appellants’ attempt to tie the hands of Law Enforcement in their ability to prevent future unlawful activities by protesters. This action was commenced in furtherance of the protesters ultimate objective of once again gaining access to the Dakota Access Pipeline project site (“site”) to prevent its completion by any means necessary. All relevant factors weigh heavily against Appellants’ requested injunction.

REQUEST FOR ORAL ARGUMENT

Law Enforcement requests 30 minutes oral argument.

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RESPONSE TO JURISDICTIONAL STATEMENT

Appellees' Motion to Dismiss Appeal dated March 6, 2017 requested the Court summarily dismiss the Appellants' appeal herein because such request became moot due to recent events, and because there is no actual case or controversy with respect to Protesters' requested injunctive relief. These bases are jurisdictional in nature. Pursuant to *Order* entered April 24, 2017, the Court denied the motion without explanation.

STATEMENT OF THE ISSUE PRESENTED – APPOSITE CASES

Whether Appellants met their heavy burden of proving the necessity of the requested injunctive relief under the factors established in *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981), considering:

- 1) Appellants are unlikely to prevail on the merits of their claims as Appellants had no constitutional right to exercise their First Amendment rights at the locations where force was allegedly applied against them, and no reasonable juror could conclude the alleged level of force applied by heavily outnumbered and besieged Law Enforcement was objectively unreasonable given the totality of the circumstances;
- 2) there is no threatened immediate and irreparable harm as none of Appellants are any longer located within the jurisdiction of Law

Enforcement and Appellants are merely speculating Law Enforcement may, at some uncertain date, time and location, apply an unknown and allegedly unlawful level of force under uncertain circumstances;

- 3) the harm to the public interest in maintaining law and order, preserving the peace, protecting the lives and safety of law enforcement officers when upholding the rule of law, and preserving private and public property far outweighs Appellants' claim of entitlement to protest in locations where they have no right to be, and while engaging in unlawful behavior; and
- 4) the public interest in preserving and protecting the peace and rule of law strongly outweighs Appellants' alleged interest to protest and trespass upon the Backwater Bridge and Highway 1806.

- *Graham v. Connor*, 490 U.S. 386 (1989)
- *Adderley v. Florida*, 385 U.S. 39 (1966)
- *Cox v. State of Louisiana*, 379 U.S. 536 (1965)
- *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012)

STATEMENT OF THE CASE

Although Appellants assert many politically charged factual allegations, only those allegations pertaining to Appellants' alleged basis for the requested injunction, namely the alleged planned use of excessive force by Law Enforcement

in the future, are relevant to the Appellants' pending motion for injunctive relief. While Appellants attempt to frame the issue in the context of alleged violations of their First, Fourth and Fourteenth Amendment rights, there has in fact been no such infringement. To the contrary, Law Enforcement went out of their way to facilitate the protesters' right to express themselves in a lawful manner and in lawful locations. Unfortunately, protesters openly stated their objective was to stop completion of the Dakota Access Pipeline ("DAPL") project under the Missouri River by any means necessary.

The overwhelming evidence establishes the absolute necessity for Law Enforcement's access to and possible utilization of intermediate and *less-lethal* means to protect Law Enforcement and others from the violence frequently perpetrated by the protesters. All relevant factors weigh heavily against Appellants' requested injunction.

Relevant Geography

During the course of the prolonged DAPL protest protesters' principally occupied three areas: the Sacred Stone Camp and the Rosebud Camp located south of the Cannonball River, and the Seven Council Fires Camp (i.e. Oceti Sakowin) located between the north bank of the Cannonball River and the south bank of the North Branch of the Cantapeta Creek, a tributary of the Cannonball River. The Sacred Stone Camp and Rosebud Camps were located in Sioux County, whereas

the Seven Council Fires Camp was located in Morton County. The Backwater Bridge (“Bridge”) is located in a remote area of rural North Dakota on North Dakota Highway 1806 and crosses the north branch of the Cantapeta Creek, north of the Seven Council Fires Camp. At the Bridge, Highway 1806 is comprised of two lanes with a 65 mile-per-hour speed limit. There are no sidewalks or pedestrian access across the Bridge. A site map depicting the camps and related areas of interest is provided. (Apx 7, 362.)

The United States Army Corps of Engineers (“Corps”) manages lands upon which all three camps were located, as well as additional federal lands in Morton County located along the north bank of the North Branch of the Cantapeta Creek extending from the Bridge and eastward to and then along the north bank of the Cannonball River, all the way eastward to the Missouri River. The Corps-managed land located along said north banks, as well as privately owned property north thereof, encompasses the DAPL project route and the location from which the DAPL project planned to cross the Missouri River¹ via horizontal directional drilling. The DAPL project route was located less than one-mile north of the Seven Council Fires Camp. The protesters openly stated their objective was to prevent completion of the DAPL project under the Missouri River.

¹ The subject pipeline was completed beneath Lake Oahe (i.e. Missouri River) at this location in April of 2017.

The Corps granted protesters a permit to demonstrate on the Corps managed lands where the three camps were located. (Apx 542.) The Corps has not granted anyone any permits or permission with respect to public use of Corps managed lands located north of the Cantapeta Creek or north and east of the confluence of the Cantepeta Creek and Cannonball Rivers, extending to the Missouri River. (Apx 537.) Pursuant to a lease with a private party, said Corps-managed lands located on the north banks are subject to private grazing rights. (Apx 542.)

Escalation in Protesters' Unlawful Activities

Protests in Morton County against the DAPL project had been ongoing since at least April of 2016. A dramatic increase in the number of people involved in these protests occurred on or about August 10, 2016 when protesters began gathering in Morton County, just north of the Standing Rock Sioux Indian Reservation. The unlawful and violent activities of the DAPL protestors was previously noted in orders entered by the District Court's on August 16, 2016 and September 15, 2016 in an action entitled *Dakota Access, LLC v. Archambault, et al.*, Case No. 1;16-cv-296 at docket entries 7 and 45. In that civil action, and in response to the protester defendants' assertion the Court's temporary restraining order had a chilling effect on the exercise of the protesters rights to engage in the protected exercise of their constitutional rights, the District Court stated, in part:

With respect to the assertion the movement has been a peaceful protest, one need only turn on a television set or read any newspaper in North Dakota. There the viewer will find countless videos and photographs of the “peaceful” protestors attaching themselves to construction equipment operated by Dakota Access; vandalizing and defacing construction equipment; trespassing on privately-owned property; obstructing work on the pipeline; and verbally taunting, harassing, and showing disrespect to members of the law enforcement community. The State of North Dakota has estimated the cost for law enforcement to date at \$2 million dollars. The estimated damage to construction equipment and loss of work on the project is far in excess of several million dollars. The Morton County Sheriff reported that 22 protestors were arrested on September 13, 2016, just a few days ago. To suggest that all of the protest activities to date have been “peaceful” and law-abiding defies common sense and reality. Nearly every day the citizens of North Dakota are inundated with images of “peaceful” protestors engaging in mindless and senseless criminal mayhem.

The Court fully recognizes the unlawful and violent protestors arrested to date constitute a very small percentage of the entire entourage. The Court also recognizes that many of the troublesome “peaceful protestors” are from out-of-state who have political interests in the pipeline protest and hidden agendas vastly different and far removed from the legitimate interests of Native Americans of the Standing Rock Sioux Tribe who are actually impacted by the pipeline project. But for anyone to suggest the protests have been entirely peaceful and prayerful is less than forthright and ludicrous at best.

(Dakota Access Suit docket 45 at pp. 3-4.) The unlawful and often times violent activities of the DAPL protesters continued well into 2017 when the protest camps were ultimately cleared².

² No protester camps have existed, and no significant protest activities in the vicinity of the Backwater Bridge have occurred, since the camps were cleared at the direction of the Standing Rock Sioux Tribe, U.S. Army Corps of Engineers, and North Dakota Governor Doug Burgum, as discussed in detail in *Appellees Motion to Dismiss Appeal* filed with this Court on March 6, 2017. None of the Appellants reside in North Dakota and it is not believed any of them remain in North Dakota.

State and local public officials took action in attempts to get the mayhem under control. On August 15, 2016, the Morton County Board of Commissioners declared a state of emergency due to the unlawful activity occurring at the DAPL project site which threatened the health, well-being and safety of Law Enforcement and the public, and required additional manpower, resources and other expenditures to protect life and property. (Apx 525.) On August 19, 2016, North Dakota Governor Jack Dalrymple signed Executive Order 2016-04 authorizing total utilization of the North Dakota State Emergency Operations Plan to respond to the situation. (Apx. 346.) On September 8, 2016, Governor Dalrymple activated a military police unit to support Law Enforcement efforts with primary responsibilities to involve traffic control points and administrative duties. (Apx 377.) The state of North Dakota made an Emergency Management Assistance Compact request to other states for law enforcement assistance on October 7, 2016 due to the escalated unlawful tactics by protesters. (Apx 402.)

Known Threats to Law Enforcement

The North Dakota Bureau of Criminal Investigation (“BCI”) observed numerous social media posts on the internet in which the lives and/or physical safety of Law Enforcement, Government Officials, and/or their family members, were threatened (“Internet Threats and/or harassed”). (Apx 355.) BCI received voluminous reports of voice mails and text messages directed to Law Enforcement

or North Dakota law enforcement agencies and Government Officials in which the lives and/or physical safety of Law Enforcement, Government Officials and/or their family members, were threatened (“Voice Mail and Text Threats and/or Harassed”). (*Id.*) These Internet Threats and Voice Mail and Text Threats began at least as early as August 15th 2016, and continued beyond the November 20, 2016 events at issue. (*Id.*) Many Internet Threats include photographs of firearms, and/or persons bearing firearms, and stated expressions of intent to utilize weapons against Law Enforcement, Government Officials and/or their families, and in support of the DAPL protesters. (*Id.*; Apx 469.) Many of the Internet Threats disclose personal identifying information of Law Enforcement, and Government Officials including, among other things: names of Law Enforcement and Government Officials; names of family members of Law Enforcement and Government Officials; home addresses of Law Enforcement and Government Officials; birthdays of Law Enforcement and Government Officials; and photographs of Law Enforcement and Government Officials’ personal residences. (Apx 355, 469.)

Prior to, and since October 27, 2016, Law Enforcement both observed and received reports of deadly weapons in the possession of DAPL protesters, including those located in the protester camps, and including among other things, knives, hatchets, firearms, bows and arrows, and explosive devices. (Apx 263,

285-86, 297.) Law Enforcement officers involved in responding to ongoing DAPL protests were advised in advance of these threats. (Apx 297.) It was generally known body armor utilized by Law Enforcement would not protect the wearer from knives, hatchets, rifles, bows and arrows, or similar weapons, or weapons of area application (i.e. fire, chemical sprays, explosives, etc.). (*Id.*; Apx 263, 288.)

October 27, 2016 Riot

Prior to October 27, protesters had unlawfully re-established the camp (“North Camp”) on private property (i.e. Cannonball Ranch) located north of the Bridge, without permission to do so (trespass), in the direct path of the DAPL project. (Apx 263, 297-98.) This camp was located principally east of Highway 1806 and extended eastward and south along Highway 1806 from a point where the DAPL was planned to cross beneath Highway 1806. (Apx 263, 297-98.) The North Camp included teepees, tents and other structures. (Apx 263, 283, 298, 322.) Protesters also took over a privately owned shop and home located on the property. (Apx 298.) All of this occupation was without permission, and against warnings by Law Enforcement, and constituted criminal trespass. (Apx 298, 316-17.)

It was estimated several hundred protesters were occupying this North Camp and private property, with an additional approximate 80 protesters with a dozen

horses located at the County Road 134 site. (Apx 264, 283, 299.) Protesters had also established road blocks on County Road 134 and on Highway 1806, including at the Bridge. (Apx 263-64, 282-83, 299, 317.) Protesters refused commands by Law Enforcement and Government Officials on October 26, 2016 to vacate the private property and remove protester-built road blocks, despite repeated assurances by Law Enforcement to protesters they were “free to go” and would not be arrested if they simply walked south to the Seven Council Fires Camp, located south of the Bridge. (Apx 317-18.)

On October 27, 2016, Law Enforcement’s efforts to remove the blockades and protesters from the private property located north of the Bridge was met with violence – a riot ensued. (Apx 264-66, 284-87, 299-301, 320-23.) Protesters threw rocks, logs, bottles, feces, and other debris at officers and one woman pulled a weapon and fired three rounds at the police line. (Apx 264, 285-86, 299, 321-22, 526-31.) Some of the protesters wore ear plugs, goggles or gas masks and wore bandanas over their face to conceal their identities. (Apx 265, 283-84, 299, 320.) Protesters burned heavy construction equipment used on the DAPL project, set fire to a vehicle on Highway 1806, set a fire on a bridge on County Road 134, tried to set a vehicle on fire under an electrical transmission tower located along Highway 1806. (Apx 265-66, 284, 287, 299-301, 321-23.) As the police line proceeded south toward the Bridge, protesters threw Molotov cocktails (homemade

explosives) at Law Enforcement. (Apx 287, 301, 322-23.) Protesters secured themselves to buried anchors located in structures and to vehicles located on Highway 1806 with devices called sleeping dragons. (Apx 285, 300.) Another protester attempted to secure himself with a sleeping dragon to the Mine Resistant Ambush Protected (“MRAP”) vehicle utilized by Law Enforcement on Highway 1806 in an attempt to immobilize it. (Apx 300.) Protesters on horseback intentionally stampeded several hundred bison toward Law Enforcement and other protesters – twice, which were diverted by the intervention of a nearby helicopter which moved the bison away from people. (Apx 265, 286, 300, 321-22.) Protesters also attempted to flank the police line. (Apx 265, 286, 321.)

Protesters strongly resisted Law Enforcement’s commands, and it frequently took three or four Law Enforcement officers to restrain and cuff a single protester. (Apx 265, 285, 300, 321.) Law Enforcement reported observance of numerous weapons on the protesters during this incident, including firearms, hunting knives, hatchets, large logs, large rocks, and other weapons. (Apx 264, 285-86, 299-300, 318-19, 321-23.) One or more protesters drove a vehicle beneath an electric power line tower and placed a rag in its gas tank, and tried to set it on fire. (Apx 266, 287.)

After Law Enforcement moved protesters onto or south of the Bridge, Law Enforcement placed and disabled two large military surplus dump trucks across the

Bridge as a barricade. (Apx 287, 301, 322-23.) Within roughly 10 to 15 minutes of these vehicles being placed by Law Enforcement, protesters set both vehicles on fire. (Apx 266, 287, 301, 322-23.) Protesters also set a third vehicle and a North Dakota Department of Transportation (“NDDOT”) electronic sign on fire toward the north end of the Bridge. (Apx 266, 287, 301.) Protesters gathered on the Bridge and refused commands to leave the active crime scene. (Apx 301.)

The Bridge was deemed unsafe and closed to access on October 28, 2016 by the NDDOT due to a large fire the protesters had started on the Bridge on October 27, 2016, including the burning of a vehicle (in addition to the two burned out dump trucks), and under the authority granted pursuant to N.D.C.C. § 24-03-05 and the Governor’s Executive Order 2016-04, signed August 19, 2016. (Apx 340-41, 343-47 and Exh. 1 and 2, 352-53 at Exhs. 2 and 3.)

During the October 27 riot, protesters also assaulted a DAPL construction worker north and east of the Bridge, by forcing the worker’s vehicle off the road and chasing him while bearing weapons, firing a flare gun at him, and then burning the worker’s vehicle. (Apx 532-36.) The worker was ultimately extricated by Bureau of Indian Affairs officers near the Bridge where he had been surrounded by protesters along the shoreline. (*Id.*; Apx 454.)

Law Enforcement arrested 141 protesters on October 27 alone – a majority for conspiracy to endanger by fire/explosion, engaging in a riot and maintaining a

public nuisance. (Apx 301.) As of October 28, Law Enforcement had made 411 arrests in relation to the DAPL protest. (Apx 430.) As of 12:00 a.m. Friday morning (October 28), Law Enforcement were holding a line north of the Bridge to prevent protesters from moving north – the same location Law Enforcement would hold the line again during the subsequent November 20 riot. (Apx 301.) Again, the protesters’ stated objective was to stop completion of the DAPL project across the Missouri River by any means possible. Photographs of the riot and damage caused by protesters are in the record. (Apx 431-51.)

Corps Requests Law Enforcement Remove Trespassing Protesters

Pursuant to correspondence dated November 1, 2016 from the Corps to the Morton County Sheriff’s Department, the Corps formally requested the assistance of Law Enforcement in removing protesters from the Corps-managed lands located north and east of the Bridge, as depicted in a map attached to the Corps’ November 1 correspondence. (Apx 455-57, 537-38.) The Corps advised isolated groups had been observed on October 31, 2016 using small boats to travel from the Seven Council Fires Camp, up the North Branch of the Cantapeta Creek, to land and encamp upon Corps-managed federal lands located north of the Bridge. (*Id.*) The Corps advised it had not provided any permits or permission for anyone to access that area, and advised said area had not been opened for use by the public for

recreational or camping purposes, and the Corps considered such individuals to be trespassers. (*Id.*)

Mayhem Continues

Law Enforcement investigated the Corps' report and discovered the protesters were building an illegal, man-made, wooden bridge across the Cantapeta Creek east of the Bridge near the confluence of the Cannonball River. (Apx 266-67.) The wooden bridge violated numerous federal and state laws including the Clean Water Act and the Safe River and Harbors Act and provided protesters access to the Corps-managed land on the north shore, and direct access to the nearby DAPL project site located immediately north thereof. (Apx 7, 362.) Protesters attempted to cross the creek at this location (i.e. Turtle Island to Turtle Hill) via man-made structures, boats, kayaks, canoes, swimming and wading, and in contravention of ongoing warnings by Law Enforcement not to do so, on several occasions. (Apx 266-67.) Protesters at this location threw rocks, bricks, a paddle, and other objects at Law Enforcement located on the north shoreline and in boats utilized by Law Enforcement to dismantle the illegal structures, threatening Law Enforcement with serious bodily injury or death. (Apx 267-68.) During these incidents, Law Enforcement were wearing body armor which is heavy and not easily removed, and subjected Law Enforcement to the very real additional risk of

drowning had protesters been successful in capsizing boats utilized by Law Enforcement, or in pulling Law Enforcement into the water. (*Id.*)

As stated by Cass County Sheriff Paul Laney:

In my 27 years in law enforcement, I have never seen such an absolute disregard for the law, or other people's rights because of someone else's ideology. The idea that because you have a strong opinion about something means you can threaten, harass and intimidate other American citizens is just plain wrong. I took an oath to protect the first amendment, but I also took an oath to protect citizens from this continual harassment and intimidation.

(Apx 456.)

Between October 27 and the November 20 riot, protesters also engaged in numerous unlawful activities at other locations throughout Morton and Burleigh Counties, including, among other things: creating illegal roadblocks on Highway 6; creating illegal roadblocks on County Road 135 and County Road 81; trespassing on private property; attacking an officer with a stake; slashing tires on six Law Enforcement vehicles; damaging construction equipment used on the DAPL project; blocking a BNSF railway by attempting to set a disabled vehicle placed across the tracks on fire west of Mandan; resisting arrest; and otherwise ignoring lawful commands from Law Enforcement. (Apx 458-71.)

November 20-21, 2016 Riot at Backwater Bridge

Prior to November 20, protesters had been making incursions onto private land (including the Cannonball Ranch across which the DAPL project passes) and

the Corps-managed property located north of the Bridge, and destroyed private property and terrorized citizens and Law Enforcement for over three months. These facts cannot reasonably be disputed as they have been the subject of voluminous media reports, Law Enforcement press releases, affidavits in criminal cases, and other litigation before the District Court. *See* August 16, 2016 *Order Granting Plaintiff's Motion for Temporary Restraining Order* (doc. 7) and September 15, 2016 *Order Cancelling Hearing and Dissolving Temporary Restraining Order* (doc. 45) in *Dakota Access, LLC v. Archambault, et al.*, Case No. 1:16-cv-296 (discussing unlawful and violent activities of DAPL protesters); Apx 363-524 (Morton County news releases); Apx 526-36 (affidavits in support of criminal complaint).

On November 20, 2016, both of the previously burned Morton County trucks were located next to, and south of, the Jersey barriers and concertina wire barricades located on the north side of the Bridge blocking Highway 1806. (Apx 302-03.) Both trucks were chained with large log chains to the concrete Jersey barriers, and formed part of Law Enforcements' barricade. (*Id.*) There were two rows of Jersey barriers running east-west across Highway 1806, with each row positioned approximately 12 to 15 feet apart. (*Id.*) Between the two rows of Jersey barriers were three rows of concertina wire, with one row lying atop two ground level rows. (*Id.*) The Bridge was still

closed by the NDDOT at this time following the fire thereon on October 27, 2016. The Bridge was clearly marked by two large combination signs stating “No Trespassing on Bridge” “No Trespassing”. Highway 1806 was shutdown at this location. (Apx 272, 303, 720 at Item 8 [photo of one such combination sign].) In addition, the Corps had requested Law Enforcement prevent protesters from trespassing on Corps-managed land located north of the Seven Council Fires Camp. (Apx 537-38.)

The November 20-21, 2016 incident commenced in the afternoon when, against the repeated warnings and commands of Law Enforcement officers located on the north side of the barricade, protesters utilizing a large bolt cutter and a semi-truck cut the chain securing the burned out dump truck located in the west most lane, and drug it away from Law Enforcements’ barricade. (Apx 302-04.) The protesters returned, determined to remove the remaining burned out dump truck which was secured to, and a part of, Law Enforcements’ barricade. (Apx 304, 720 at Item 4 [aerial video] at meter 0:03:00 to 0:05:40.) The number of protesters on the Bridge swelled quickly at this point to several hundred. (Apx 304.) These protesters came organized and prepared for an assault on the roughly 20 Law Enforcement officers then manning the barricade. (Apx 304-06.) Reinforcements were requested by Law Enforcement (i.e. first Code Red issued). (Apx 305-06.) It

was dark out. (Apx 720 at Item 4 [aerial video – brief video not in infrared] at meter 0:22:56.)

The protesters organized themselves into two principal bodies – a forward staged siege group wearing rain coats, goggles and bandanas over their faces, and bearing assorted shields made of plywood, plastic and corrugated tin/steel, along with tarps, and the larger group which remained further back on the Bridge. (Apx 272, 276-77, 287-91, 304, 306, 309, 720 at Item 4 [aerial video] at meter 00:20:37.) The forward group utilized their shields and tarps to form a mobile barricade to shield themselves and other protesters from Law Enforcements’ view and from any force to be applied by Law Enforcement. (Apx 276, 291, 306, 720 at Item 4 [aerial vide] from meter 00:20:37 to end.) Protesters moved this mobile barricade up against Law Enforcements’ barricade to shield other protesters who were attempting to cut the chains on the remaining burned out dump truck, and protesters cutting the concertina wire in Law Enforcements’ barricade. (Apx 272, 276-77, 288-90, 306-07, 309-12.) Law Enforcement was giving warnings that protesters were trespassing and protesters should disengage and return to the south side of the Bridge. (Apx 274-75, 288, 291, 303-05, 309-12.)

Protesters were yelling profanities and throwing and slinging large rocks, lug nuts, construction nuts, padlocks, frozen water bottles and other objects at Law Enforcement. (Apx 272, 275-77, 288, 292, 304-05, 307-08, 312, 720 at Item 4

[aerial video] at meter 1:06:18 (protester throwing object at officer); *id.* at Item 1 [ground video] at meter 0:00:13 (unidentified object seen flying over barricade towards Law Enforcement); *id.* at Item 6 [ground video] at meter 0:32 (officer yells “heads up” while object flies through air at officers and officers dodge). *See* Apx 486-98 (photographs of weapons recovered following the riot.) Law Enforcement officers were struck by these objects – one officer was struck so violently he was dazed and required assistance back to an armored vehicle. (Apx 275-76, 292, 304-05, 309.) Law Enforcement feared for their physical safety due to the imminent threats of serious bodily injury or death they were encountering. (Apx 273, 275-77, 293, 306, 308, 311-13.)

Protesters attempted to pull one of the combination “No Trespassing on Bridge” “No Trespassing” signs over onto the concertina wire barricade. This incident was captured on video from the ground, and from the air. (Apx 720 at Item 5 [ground video]; *id.* at Item 4 [aerial video] at meter 1:05:50).

Law Enforcement deployed CS gas canisters to drive protesters away from the barricade, but due to the wind blowing to the northwest, the gas crossed over the police line, and its use was discontinued. (Apx 290, 306.) Protesters also threw the CS gas canisters back at Law Enforcement. (Apx 290, 307, 720 at Item 4 [aerial video] at meter 1:41:50, 1:59:37, 2:59:40, 3:05:00, 3:07:25.) Officers also attempted to stop the forward siege group and protesters from

throwing objects through use of OC spray and direct impact sponge and bean bag rounds, again to limited effect due to the protesters' mobile barricade and Law Enforcements' barricade. (Apx 275, 289-91, 293, 304-06, 308-09.) Police shields were requested for the first time during the ongoing DAPL protests due to the constant barrage of objects being thrown at Law Enforcement. (Apx 306.) Not all officers had helmets as the quarter master had run out. (Apx 289, 307.) A second Code Red was issued requesting all available officers to respond within a 100-mile radius. (Apx 307.)

Protesters crossed the bridge and took up positions along the east and west flanks of the police line, starting several large bonfires along the east flank and along the north shore of the Cantapeta Creek. (Apx 273-74, 287-88, 307-08, 720 at Item 4 [aerial video] at meter 01:32:30, 2:20:30, 3:03:24.) One of the bonfires was built within roughly 30 feet of Law Enforcements' barricade and protesters in that vicinity began throwing burning logs at the police line. (Apx 308.) A brush truck from the Mandan Rural Fire Department was requested to address these sorts of fires. (Apx 274-75, 309-11, 326.)

As Law Enforcement reinforcements started to arrive, and when there were approximately 70 officers on the scene against approximately 800 to 1,000 protesters on or north of the Bridge, the officers formed a shield line along the barricade. (Apx 307.) Protesters threw shields across the concertina wire and one

protester climbed over Law Enforcements' barricade. (Apx 291, 310.) This individual was the only person arrested during the riot – Law Enforcement was fully occupied in holding the line. (Apx 310.)

While the siege group was working on cutting the concertina wire and chains securing the truck to the barricade, and while other protesters continued to throw objects at Law Enforcement, a group of approximately 150 protesters gathered in the west ditch north of the Bridge and proceeded west and north in an attempt to flank the police line, cross-country. (Apx 273-74, 292-93, 307, 720 at Item 4 [aerial video] at meter 1:32:30 to 2:00:00.) A small group of roughly 20 officers proceeded west to intercept this group. (Apx 273-74, 308-09, 720 at Item 4 [aerial video] at meter 01:35:50.)

During this time period, Law Enforcement on the scene were also being marked by lasers and spotlights by individuals on high ground. (Apx 273-74, 292, 307.) This gave Law Enforcement concern officers were being targeted by snipers, consistent with previously known social media threats and intelligence regarding weapons in the possession of protesters. (Apx 273-74, 292, 307.) Law Enforcement were also very concerned about being overrun by the aggressive and violent protesters, and the possible consequences in that eventuality. (Apx 273, 293, 308-09, 328-29, 335-36.) In addition to being concerned about the obvious risks to the physical safety of Law Enforcement on

the scene if overrun, there was genuine concern about the potential need to resort to deadly force for the protection of Law Enforcement and emergency responders now on site, and concern about the potential loss of Law Enforcement vehicles (including armored vehicles) and the weapons and munitions contained therein which may later be used by the protesters against Law Enforcement and others. (Apx 273, 275-77, 293, 308-09.) A Signal-100 was issued, requesting the assistance of all available law enforcement, state-wide. (Apx 309.) Photographs and video of the riot are provided. (Apx 720 with index at Apx 721.)

With fire apparatus on the scene, and the methods thus far being utilized by Law Enforcement proving ineffective against the protesters, permission was requested, and received from command, to utilize water to extinguish fires and hold the police line. (Apx 274-76, 289-90, 309.) Following warnings by Law Enforcement, both in relation to the ongoing trespass and commands to proceed south of the Bridge, water was ultimately deployed against protesters utilizing the mobile barricade and attempting to dismantle and penetrate the Law Enforcement barricade, and those throwing objects at Law Enforcement. (Apx 309-10, 327-28, 333-336.) Water was also applied to put out unlawful fires located north of the Cantapeta Creek, in proximity to the police line. (Apx 274-76, 310-11, 327-28, 335.) All the protesters had to do to avoid getting wet or having force applied was obey the lawful commands of Law Enforcement and walk back south

across the Bridge. (Apx 276, 309-11, 329, 336.) The application of water was crucial to Law Enforcements' ability to prevent the penetration of Law Enforcements' barricade and prevent serious bodily injury or death to Law Enforcement and emergency responders on the scene as a result of the immediate threats presented by the protesters. (Apx 311.)

Comments on Appellants' Version of Events

All of the Appellants admit they were either on the Bridge or along the north shoreline of the Cantepeta Creek, in close proximity to Law Enforcement's barricade, when force was allegedly applied as against them. (Apx 49-50 at ¶36 [Dundon]; Apx 53 at ¶47 [Wool]; Apx 55 at ¶¶53-54 [Wilson]; Apx 56-57 at ¶¶59-60 [Demo]; Apx 58 at ¶66 [Dullknife]; Apx 59-60 at ¶¶71, 74 [Bruce]; Apx 62 at ¶78 [Finan]; Apx 62 at ¶80 [Hoagland-Lynn]; Apx 63-64 at ¶¶83-85 [Treanor].) Appellants' complaint does not deny the existence of combination "No Trespassing on Bridge" and "No Trespassing" signs along the barricade, a photograph of one of such combination signs present on November 20 is in the record. (Apx 720 at Item 8 [photo].)

Notably, only two of the Appellants deny hearing particularly described warnings in their pleadings. Wilson only denies hearing any order by Law Enforcement to disperse, and Demo denies hearing any orders to disperse, to get

off the Bridge, or that force would be used by Law Enforcement. The remaining Appellants do not deny receiving warnings from Law Enforcement.

Appellants' allegations also establish they were on notice the Bridge and Highway 1806 were closed, and their presence on the north shore was not permitted by Law Enforcement. Appellants admit observing Highway 1806 heavily barricaded on the north side of the Bridge and manned by Law Enforcement on November 20, 2016, prior to force allegedly being applied against them. (Apx 49-50 at ¶36 [Dundon]; Apx 53 at ¶46 [Wool]; Apx 55 at ¶53 [Wilson]; Apx 56 at ¶59 [Demo]; Apx 58 at ¶66 [Dullknife]; Apx 59-60 at ¶71 [Bruce]; Apx 61 at ¶77 [Finan]; Apx 62 at ¶80 [Hoagland-Lynn].) Appellants admit they had been staying in the Seven Council Fires Camp (i.e. Oceti Sakowin) for several weeks to months prior to November 20, 2016, a camp located immediately south of, and in close proximity to, the Bridge. (Apx 49 at ¶35 [Dundon]; Apx 52-53 at ¶¶44-45 [Wool]; Apx 55 at ¶52 [Wilson]; Apx 56 at ¶57 [Demo]; Apx 59-60 at ¶71 [Bruce]; Apx 109 at ¶ 2 [Treanor Decl.]; Apx 111 at ¶ 2 [Hoagland-Lynn Decl.]; Apx 128 at ¶ 4 [Dullknife Decl.]; Apx 136 at ¶ 2 [Finan Decl.].) The Corps had previously (November 1, 2016) requested Law Enforcement assistance in removing trespassing protesters from federal lands located on the north side of the Cantapeta Creek. (Apx 537-38.) Appellants admit being forcibly removed from, or prevented from accessing, private property

located north of the Cantapeta Creek by Law Enforcement on several occasions prior to November 20, 2016, including, among other places, Turtle Hill located on the north shoreline of the confluence of the Cannonball River and Cantapeta Creek, and the DAPL construction sites located north of the Bridge along Highway 1806. (Apx 48 at ¶¶31, 32, 33; Apx 128-29 at ¶¶ 6-7 [Dullknife Decl.]; Apx 139-40 at ¶¶ 5-8 [Wilson Decl.]; Apx 144-45 at ¶ 5 [Demo Decl.].) Most Appellants admit to observing Law Enforcement utilizing force against other protesters in the vicinity of the barricade and Bridge prior to force allegedly being applied as against them on November 20. (Apx 53 at ¶46 [Wool]; Apx 58 at ¶66 [Dullknife]; Apx 61 at ¶77 [Finan]; Apx 128-29 at ¶¶ 6-7 [Dullknife Decl.]; Apx 145 at ¶ 7 [Demo Decl.]; Apx 115 at ¶ 9 [Bruce Decl.].) Dundon admits being one of the first protesters on the Bridge, observing protesters remove the first burned out dump truck from the barricade, and being on the Bridge in close proximity to the barricade while observing protesters using tow equipment in an attempt to remove the second burned out truck from Law Enforcement's barricade. (Apx 49-50 at ¶ 36.) Dundon alleges she was injured during the protesters' attempt to remove the second dump truck from the barricade. (Apx 49-50 at ¶ 36.) All other Appellants allege they arrived on the scene after Dundon. With the sole exception of Dundon, all of the Appellants admit remaining in close proximity to the barricade and on the Bridge, often for extended periods of time after force was initially allegedly

applied against them by Law Enforcement, within range of the continued force allegedly being applied. (Apx 53-54 at ¶¶46-49 [Wool]; Apx 55 at ¶¶53-55 [Wilson]; Apx 56-57 at ¶¶59-60 [Demo]; Apx 58 at ¶¶66-67 [Dullknife]; Apx 59-60 at ¶¶71-74 [Bruce]; Apx 62-63 at ¶¶80-81 [Hoagland-Lynn]; Apx 63-64 at ¶¶83-85 [Treanor]; Apx 137 at ¶¶11-15 [Finan Decl.]; Apx 111-12 at ¶¶6-9 [Hoagland-Lynn Decl.]) Appellants admit to being surrounded by other protesters engaging in similar conduct (Apx 53 at ¶¶46-47 [Wood]; Apx 55 at ¶¶53-54 [Wilson]; Apx 60 at ¶74 [Bruce]; Apx 61 at ¶77 [Finan]; Apx 62 at ¶80 [Hoagland-Lynn]), and the video footage and affidavits submitted by Law Enforcement, in the record, substantiate that conduct. A protester asserts in his declaration:

I do not recall any warning announcements. At some points the police would say, **“move off the side of the bridge;”** Once, I heard them say “we are going to test the LRAD” and they did for a second. That was the only time I heard it. I did not hear, or at least I do not recall hearing, any announcement about them using other less lethal weapons. However, it was hard to hear. There was a lot of noise and commotion. There were also people singing and praying. If they did announce anything, I could not hear it. **I only heard them announce things like “you’re trespassing,” “you’re not supposed to be on the bridge,” and “move to the south side.”** There were no announcements that were warnings that I can recall.

(Apx 634 at ¶22 [Kanahele Decl.](emphasis added).) Another protester alleges “I do remember some sort of announcements being made by the police, but I don’t remember – or at least did not hear – them making announcements about when they were going to use rubber bullets or gas or anything.” (Apx 596 at ¶8 [Toraty Decl.]) The uncontroverted record establishes Law Enforcement gave warnings.

The Appellants, in their declarations, also do not deny observing other protesters around them: throwing or slinging objects at Law Enforcement, including CS gas canisters, large rocks, frozen water bottles, burning logs, or other objects; attempting to flank Law Enforcement's barricade to the west – cross-country; assaulting the barricade with a mobile shield wall; and starting fires along the north shore of the Cantapeta Creek in proximity to the barricade. Other protesters grudgingly admit to seeing objects thrown at Law Enforcement by protesters. (Apx 634 at ¶21 [Kanahele Decl.] (“I saw one person throw what appeared to be a rock in the direction of the police. I saw another throw a stick in the direction of the police.”); Apx 679 at ¶12 [Lopez Decl.] (“I did not see water protectors threaten the police, or use any weapons, with the exception of a few individuals who I saw throw the gas canisters that had been launched by the police, back toward the police.”); Apx 670 at ¶58 [Lenoble Decl] (“A few people . . . threw plastic water bottles at the police”); (Apx 627-28 at ¶15 [Weeks Decl.] (“The only things that I saw thrown from the side of the water protectors to the side of the razor wire where law enforcement was located was an occasional plastic bottle of water, maybe 4 in total throughout the entire evening (7 hours). I also witnessed an individual protester try to throw a spent smoke canister from where it landed on the west side side [sic] of the Highway 1806 to the north side of the razor wire where the police were located.”) These are all events established

through video and affidavit testimony in the record submitted by Law Enforcement and Fire Service officers which are not contradicted by Appellants' allegations in the complaint. Appellants admit to bearing shields and tarps (Apx 53-54 at ¶¶48 [Wood]; Apx 55 at ¶54 [Wilson]; Apx 57 at ¶60 [Demo]; Apx 58 at ¶66 [Dullknife]; Apx 60 at ¶73 [Bruce]; Apx 62-63 at ¶¶80-81 [Hoagland-Lynn]), and wearing bandanas (*id.* at ¶37 [Dundon]), goggles (*id.* at ¶72 [Bruce]), rain coats (Apx 142 at ¶12 [Wilson Decl.]) while in close proximity to the barricade, matching the descriptions of protesters who engaged in assaults on the barricade behind shield walls, as identified in Law Enforcement's affidavits, documented in video evidence shot from the perspective of the protesters forming the shield wall, and evidenced by the North Dakota Highway Patrol infrared aerial surveillance video, all in the record herein. (Apx 304-12 at ¶¶45, 55, 60-61, 73, 74, 81; Apx 272-77 at ¶¶47, 61, 63, 69; Apx 287-91 at ¶¶26, 28, 33, 34, 40, 41; Apx 720 [video] at Items 4, 9.)

These uncontroverted activities constitute felony assault upon law enforcement officers (N.D.C.C. § 12.1-17-01), felony reckless endangerment with extreme indifference to the value of human life (N.D.C.C. § 12.1-17-03), and felony terrorizing (N.D.C.C. § 12.1-17-04), as well as the misdemeanors of criminal trespass (N.D.C.C. § 12.1-22-03), engaging in a riot (N.D.C.C. § 12.1-25-03), disobedience of public safety orders under riot conditions (N.D.C.C. § 12.1-

25-04), other assaults (N.D.C.C. § 12.1-17-02), passing over a closed highway and removing a barricade thereon (N.D.C.C. § 24-03-05), and obstruction of government function (N.D.C.C. § 12.1-08-01). (Apx 277-78, 313.)

On November 28, 2016, Appellants filed their *Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief* (doc. 1) requesting, in relevant part, “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.” Appellants rephrased their requested injunctive relief in their November 28, 2016 motion for preliminary injunction (Apx 75-76), wherein Appellants requested an order “prohibiting Defendants from using excessive force in responding to the pipeline protests and prayer ceremonies and specifically prohibiting the use of SIM, explosive grenades, chemical agents, sound cannons, directed energy devices, and water cannons and hoses, as means of crowd dispersal.”

Pursuant to a well-reasoned 35-page *Order Denying Plaintiffs’ Motion for Preliminary Injunction* filed February 7, 2017 (Apx 5-39), the District Court denied Protester’s request for preliminary injunction determining all four of the factors set forth in *Dataphase Systems, Inc. v. C. L. Systems, Inc.*, 640 F.2d 109 (8th

Cir. 1981) weighed against granting Protesters' requested injunction. The District Court summarized its conclusions as follows:

It is not realistically possible to predict the dangers law enforcement officers and others will face in the future relative to the Dakota Access pipeline protests. The protests have plagued western North Dakota for more than six months, with the resulting mayhem that has occurred on the Backwater Bridge, Highway 1806, the city streets, and rural highways. The events that occurred on the Backwater Bridge on November 20-21, 2016, are a tragedy. All parties bear some responsibility for the chaos that day. However, it is clear the Plaintiffs and pipeline protesters had no constitutional right to be present and engage in civil protest on the Backwater Bridge and Highway 1806 on November 20-21, 2016. Their presence was in clear violation of the law. Under well-established Eighth Circuit law, the protesters bear the burden of proof, and bear the burden of establishing the necessity of a preliminary injunction. The Court concludes the Plaintiffs have not met that difficult burden. A careful consideration of the entire record, and the *Dataphase* factors, reveals the *Dataphase* factors do not weigh in favor of the Plaintiffs. The Plaintiffs' motion for a preliminary injunction (Docket No. 2) is DENIED.

(Apx 39 (emphasis in original).)

SUMMARY OF THE ARGUMENT

The District Court's denial of Appellants' request for preliminary injunction should be upheld as Appellants failed to meet their heavy burden of proving the need for the requested injunctive relief. First, Appellants are unlikely to prevail on the merits of their claims as Appellants had no constitutional right to exercise their First Amendment Rights at the locations where force was allegedly applied as to them, and no reasonable juror could possibly conclude the alleged level of force applied by heavily outnumbered and besieged Law Enforcement was objectively

unreasonable under the totality of the circumstances. Second, there is no threatened immediate and irreparable injury as none of the Appellants are any longer located within the jurisdiction of Law Enforcement and Appellants are merely speculating Law Enforcement may, at some uncertain date, time and location, apply an unknown and allegedly unlawful level of force as to them under uncertain circumstances. Third, the harm to the public interest in maintaining law and order, preserving the peace, protecting the lives and safety of law enforcement officers when upholding the rule of law, and preserving private and public property far outweighs Appellants' claim of entitlement to protest in locations where they have no right to be, and while engaging in unlawful behavior. Fourth, the public interest in preserving and protecting the peace and rule of law strongly outweighs Appellants' alleged interest to protest and trespass upon the Backwater Bridge and Highway 1806.

ARGUMENT

In determining whether a preliminary injunction should be granted, Rule 65(b) of the Federal Rules of Civil Procedure directs the Court to assess whether immediate and irreparable injury, loss, or damage will result to the applicant. “[W]hether a preliminary injunction or temporary restraining order should be granted involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the

injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.” *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981).

It is well-established that the burden of establishing the necessity of a temporary restraining order or a preliminary injunction is on the movant. *Baker Elec. Coop., Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir. 1994); *Modern Computer Sys., Inc., v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989). “No single factor in itself is dispositive; in each case all of the factors must be considered to determine whether on balance they weigh toward granting the injunction.” *Baker Elec. Coop., Inc.*, 28 F.3d at 1472 (quoting *Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987)).

This Court “review[s] the District Court’s material factual findings for clear error, its legal conclusions de novo, and the court’s equitable judgment – the ultimate decision to grant the injunction – for an abuse of discretion.” *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 739 (8th Cir. 2002). In this case, all factors weigh heavily against Appellants’ requested injunctive relief.

As a preliminary matter, the Appellants’ assertion the District Court applied the wrong standard in this case is without merit. The District Court’s decision expressly states the Appellants were not required to establish a greater than 50% chance of prevailing on the merits, and at no time did the District Court assert

Protesters had failed to establish a “substantial likelihood” of success on the merits. *See Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 731 (8th Cir. 2008) (explaining differences between “substantial likelihood” and “fair chance” standards). In fact, the District Court’s analysis of each of the four *Dataphase* factors makes abundantly clear each and every one of the factors weigh heavily against the requested injunction.

Appellants’ assertion the District Court was required to hold an evidentiary hearing on its motion for preliminary injunction is similarly without merit. As recently summarized by the United States Court of Appeals for the Federal Circuit:

We do not ask, nor do the Federal Rules of Civil Procedure require, that the district court conduct a preliminary injunction hearing, or even request a responsive brief from [the opposing party]. *See Bradley v. Pittsburgh Bd. of Educ.*, 910 F.2d 1172, 1175 (3d Cir. 1990) (explaining that “[t]he applicable Federal Rule does not make a hearing a prerequisite for ruling on a preliminary injunction.”). Indeed, a “limited analysis may support a trial court’s denial of a preliminary injunction” so long as the district court concludes that some of the requisite preliminary injunction factors disfavor the movant. *Polymer Techs., Inc. v. Bridwell*, 103 F.3d 970, 973-74 (Fed. Cir. 1996); *see also Prairie Band [of Potawatomi Indians v. Pierce]*, 253 F.3d [1234,] 1246 [10th Cir. 2001] (explaining that “Rule 52(a) does not require over-elaboration of detail or particularization of facts” so long as the findings are not “conclusory” (internal citations and quotations marks omitted)). We simply ask that the district court explain its views on why a preliminary injunction would or would not be appropriate in this case. *Bradley*, 910 F.2d at 1178 (explaining that for preliminary injunctions, “conclusions of law are . . . essential” under Federal Rule of Civil Procedure 52(a)(2) and that even when there has been no hearing held, “the factual bases on which the conclusions are predicated . . . serve to permit evaluation of the legal conclusions reached by the district court”).

Murata Machinery USA v. Daifuku Co., Ltd., 830 F.3d 1357, 1364-65 (Fed. Cir. 2016). This Court has stated a district court’s decision to forego an evidentiary hearing before *granting* a preliminary injunction is reviewed for an abuse of discretion. *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744 (8th Cir. 2002) (determining district court did not abuse its discretion by failing to hold an evidentiary hearing before granting preliminary injunction); *Movie Systems, Inc. v. MAD Minneapolis Audio Distribs.*, 717 F.2d 427, 432 (8th Cir. 1983) (finding no impropriety in the district court’s modification of prior preliminary injunction without an evidentiary hearing and instead relying upon submitted affidavits).

Protesters assertion the District Court’s decision is not adequately supported by findings and conclusions as required by Federal Rule of Civil Procedure 52, is also without merit. As stated by this Court:

Though the Rule [52(a)(2)] is stated categorically – “the court must . . . state the findings and conclusions that support” its grant or denial of a preliminary injunction – we measure compliance by a practical, not a formalistic, standard: “the [district] judge need only make brief, definite, pertinent findings and conclusions upon the contested matters; there is no necessity for over-elaboration of detail or particularization of facts. Merely indicating the factual basis for the ultimate conclusion will suffice in most cases.” *Osthus v. Whitesell Corp.*, 639 F.3d 841, 845 (8th Cir. 2011)(quotations and citations omitted).

H & R Block Tax Services LLC v. Acevedo-Lopez, 742 F.3d 1074, 1077 (8th Cir. 2014). In the present case, the District Court issued a 35-page opinion summarizing the evidence presented by both parties, addressing all four *Dataphase*

factors, and concluding the Appellants had failed to meet their burden of proving the need for injunctive relief. The District Court concluded all four *Dataphase* factors weighed against the granting of Appellants' requested injunction.

A. Appellants Are Unlikely To Prevail On The Merits

In considering a motion for preliminary injunctive relief, the likelihood of success on the merits is “most significant.” *S & M Contractors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992).

Appellants and other protesters had no constitutional right to express their views on the closed Bridge or any location where force was applied by Law Enforcement on November 20, 2016. *See Wood v. Moss*, 134 S.Ct. 2056, 2066 (2014) (“[T]he fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views “whenever and however and wherever they please.” (quoting *United States v. Grace*, 461 U.S. 171, 177-178 (1983), quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)). The Supreme Court has clearly indicated the First Amendment cannot be utilized as a justification for trespass and that the government has the right to enforce trespass laws in relation to both private and public property. *See Adderley v. State of Florida*, 385 U.S. at 48, (rejecting protesters' argument they had a constitutional First Amendment right to remain in the curtilage of a jailhouse over the objection of the sheriff, concluding “[t]he United States Constitution does not forbid a State to control the

use of its own property for its own lawful nondiscriminatory purpose.”). As explained by the Supreme Court in *Cox v. State of Louisiana*:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations.

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. [] We reaffirm the statement of the Court in *Giboney v. Empire Storage & Ice Co.*, supra, 336 U.S., at 502, 69 S.Ct., at 691, that “it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.”

379 U.S. 536, 554-55 (1965) (citations omitted).

Appellants make no secret of their stated intention to stop work on the DAPL project by any means necessary, and Appellants admit in their pleadings

their objective on November 20, 2016 was to prevent work on the DAPL project. (Apx 49-50, 55, 61.) All force was allegedly applied in close proximity to Law Enforcement's barricade on the north side of the Bridge, or along the north shore of the North Branch of the Cantapeta Creek near the barricade – all restricted areas closed to the public. Combination “No Trespassing on Bridge” and “No Trespassing” signs were plainly visible. In addition, Appellants admit protesters with whom Appellants were intermingled were engaged in removing and attempting to remove, damage and destroy government property from Law Enforcement's barricade, and otherwise engaged in hostile acts against Law Enforcement (i.e. attempting to pass through and around Law Enforcements' barricade for the obvious purpose of once again gaining unlawful access to, and damaging, the DAPL project site, and endangerment to the safety and lives of Law Enforcement and other first responders on the scene by throwing or slinging dangerous objects) and in contravention of lawful commands by Law Enforcement, prior to force allegedly being applied to them. The only reasonable inference is the unlawful conduct of the protesters, not protected speech, motivated Law Enforcement's alleged use of force. Appellants are highly unlikely to prevail on their retaliation claim.

Appellants are also unlikely to prevail on their excessive force claim under either the Fourth or Fourteenth Amendments. In accordance with *Graham v*

Connor, 490 U.S. 386, 394 (1989), the first step in analyzing Appellants’ excessive force claim brought under § 1983 is to identify the specific constitutional right allegedly infringed upon. In the present case, Appellants allege an excessive force claim under the Fourth Amendment. The Fourth Amendment protects individuals against “unreasonable searches and seizures.” U.S. CONST. AMEND. IV. An excessive force claim under the Fourth Amendment requires an allegation of the use of excessive force by the government in connection with a seizure of the plaintiff by the government. *See Graham v. Connor*, 490 U.S. at 393-396 (noting the Fourth Amendment guarantees citizens right “ ‘to be secure in their persons . . . against unreasonable . . . seizures’ of the person”, and noting excessive force claims under the Fourth Amendment relate to the use of force in the context of seizures). “[A] person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In addition, an attempted but failed seizure of a person is beyond the scope of the Fourth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1998).

In the present case, there is no allegation, and Law Enforcement did not attempt to, effectuate any arrests or detentions of Appellants or any other protesters, except the one who actually penetrated the barricade (not a named

plaintiff in this case). Appellants admit they could have, and did freely walk away from Law Enforcement at all times on November 20 in this case. Law Enforcement were giving warnings that protesters were trespassing and protesters should disengage and return to the south side of the Bridge. Appellants were not “seized” by Law Enforcement.

Even assuming Appellants have alleged a viable excessive force claim under the Fourth Amendment, which is denied as no “seizure” has been alleged, the relevant inquiry is whether the level of force applied was “objectively reasonable” under a totality of the circumstances analysis. *Graham v. Connor*, 490 U.S. at 396-97.

Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of

reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

As in other Fourth Amendment contexts, however, the “reasonableness” inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.

Id. (citations and quotations omitted).

The record establishes Law Enforcement’s use of force was objectively reasonable under the totality of the circumstances. The protesters were engaged in numerous felonies and misdemeanors under North Dakota law when force was applied by Law Enforcement, including felony assault upon law enforcement officers (N.D.C.C. § 12.1-17-01), felony reckless endangerment with extreme indifference to the value of human life (N.D.C.C. § 12.1-17-03), and felony terrorizing (N.D.C.C. § 12.1-17-04), as well as the misdemeanors of criminal trespass (N.D.C.C. § 12.1-22-03), engaging in a riot (N.D.C.C. § 12.1-25-03), disobedience of public safety orders under riot conditions (N.D.C.C. § 12.1-25-04), other assaults (N.D.C.C. § 12.1-17-02), passing over a closed highway and removing a barricade thereon (N.D.C.C. § 24-03-05), obstruction of government

function (N.D.C.C. § 12.1-08-01), and prevention of discharge of official duties (N.D.C.C. § 12.1-08-02). North Dakota law authorizes Law Enforcements' use of force to suppress riots and breaches of the peace (N.D.C.C. § 11-15-03(1), (3), (10)), for lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence (N.D.C.C. § 12.1-05-07(2)(b)), and to prevent the carrying away or damaging of personal property, even without an advance request to stop the activity where such request would have been useless under the circumstances (N.D.C.C. § 12.1-05-06). A person is not justified in using force for the purpose of resisting arrest or other performance of duty by a public servant under color of law. (N.D.C.C. § 12.1-05-03.)

The November 20, 2016 events at issue, and Appellants' claims in this action, are similar to those considered by this Court in *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012). In *Bernini*, law enforcement utilized *less-lethal* munitions (i.e. smoke, stinger blast balls, and chemical irritants described as *non-lethal* in *Bernini*) for the purpose of preventing unlawful entry into a restricted area (i.e. downtown St. Paul) closed to the public by an unruly crowd which officers reasonably believed was acting as a unit, and to otherwise restore order. The plaintiffs in *Bernini* alleged the actions of police violated their rights under the First and Fourth Amendments and asserted claims of unlawful arrest (not at issue

in the present action), excessive force, and retaliation. This Court affirmed the district court's grant of summary judgment in favor of the officers on the basis of qualified immunity, noting a "requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot", and law enforcement is not required to pinpoint every person in the crowd who has engaged in specific unlawful conduct, but may reasonably conclude the individuals in the vicinity are acting together as a *unit*. *Id.* at 1003 (citation omitted). In such event, it is objectively reasonable for law enforcement to effectuate arrests (i.e. seizures) of the entire *unit*. *Bernini* also establishes a First Amendment retaliation claim will not stand where law enforcement's application of force is in response to unlawful conduct. Unlawful conduct will not be shielded under the rubric of the First Amendment. Consistent with the precedent of *Bernini*, Law Enforcement in this action are entitled to qualified immunity.

In the present case, the hostile actions of the protesters were aimed at penetrating and circumventing Law Enforcements' barricade for the obvious purpose of once again gaining access to, and further damaging the DAPL project site. To accomplish this objective, protesters endangered the lives and safety of Law Enforcement and other first responders at the Bridge, disregarded the repeated

lawful commands by Law Enforcement on the scene, and disregarded the legal rights of others with whom the protesters' disagreed.

When considering Law Enforcements' alleged response at the Bridge, it should be kept in mind the location of the riot was in remote rural North Dakota. North Dakota is comprised of vast distances between population centers which have any sizeable law enforcement presence. The nearest such population center to the Bridge is the City of Mandan, located approximately 35 miles north of the Bridge. In addition to the fact there would be considerable delay between any request for assistance and the arrival of any such assistance, is the fact North Dakota, as a whole, has a very limited number of law enforcement officers which could potentially respond to an emergency request for assistance, even taking into account the additional officers from other states who were assisting. Law Enforcement were vastly outnumbered by the aggressive protesters. In this respect, this case is not analogous to riots occurring in urban settings where backup is generally more readily available.

Appellants are also unlikely to prevail on their claim of excessive force under the Fourteenth Amendment. The Fourteenth Amendment Due Process Clause protects citizens from governmental deprivation of life, liberty and property without due process of law. U.S. CONST. AMEND. XIV. Even assuming, arguendo, the Fourteenth Amendment has application to the facts of this case, this

Court has noted the standards which must be met to establish excessive force in violation of the Fourteenth Amendment is a more burdensome standard than is applied under the “objective reasonableness” standard under the Fourth Amendment as the claimant must establish, among other things, the specific application of force “shocks the conscience” under the circumstances. *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000). An excessive force claimant who cannot win his case under the Fourth Amendment standard certainly cannot win his case under Fourteenth Amendment standards. *Id.* Considering the circumstances Law Enforcement was confronted with during the November 20 riot, it cannot reasonably be concluded the use of intermediate and *less lethal* force by Law Enforcement to hold back the uncontrolled mob and protect the physical safety of Law Enforcement “shocks the conscience”, in a constitutional sense.

As correctly found by the District Court in this case:

It is clear and undisputed that on November 20, 2016, the Backwater Bridge and Highway 1806 near Cannonball, North Dakota, were closed to the general public and to all of the pipeline protesters. The Backwater Bridge is comprised of two driving lanes with no sidewalks in a 65 mile-per-hour zone. The DOT close the Backwater Bridge immediately following the October 27, 2016, riot and prior to November 20, 2016, for safety reasons due to damage to the bridge caused by fires started by protesters. See N.D.C.C. § 24-03-05 (authorizing DOT to close any portion of a highway by posting same with suitable signs and placement of barricades, and making it unlawful to remove, pass through, over, or around any such barricade). It is undisputed the Backwater Bridge remained closed on November 20, 2016. No public access on the bridge was allowed on November 20, 2016, for any purpose. The Backwater Bridge was heavily barricaded, manned by law enforcement officers, and the bridge and surrounding areas were secured

areas. All persons, other than authorized law enforcement or government officials who entered upon the Backwater Bridge, or any location north of the bridge within the vicinity of the events on November 20, 2016, were trespassing and in violation of the law.

The Court finds that law enforcement officials had the clear authority to direct the plaintiffs and other protesters to disperse and remove themselves from the Backwater Bridge and land located along the north bank of the North Branch of the Cantepeta Creek on November 20, 2016. The named Plaintiffs and pipeline protesters did not have an unfettered constitutional right to exercise their First Amendment rights on the Backwater Bridge on November 20-21, 2016. Based on a careful review of the record before the Court, the Plaintiffs are unlikely to prevail on their claim of retaliation. The Plaintiffs have not sustained their burden of proof, and the burden of establishing the necessity of a preliminary injunction, based on the record before the Court. The Court also finds that based on the current record, the Plaintiffs are unlikely to prevail on their claims of excessive force under the Fourth or Fourteenth Amendment.

The Plaintiffs have neither alleged they were arrested or detained by law enforcement officials on November 20, 2016, nor alleged they were informed by law enforcement officers they were not free to leave and walk away. The Plaintiffs and other pipeline protesters could have easily removed themselves from the Backwater Bridge and the presence of law enforcement by simply complying with lawful commands, voluntarily disengaging from law enforcement, and dispersing and proceeding south and away from the barricade on the Backwater Bridge and the secured areas manned by law enforcement officers.

At this early stage of the litigation, and after a careful review of the record, the Court finds no reasonable juror could conclude the level of non-lethal force used by law enforcement officers during the chaos on November 20, 2016, at the Backwater Bridge was objectively unreasonable, based on the totality of the facts and circumstances that confronted law enforcement

officers on the bridge. **The record reveals two “Code Reds” and a “Signal 100” requesting the aid of every available law enforcement officer statewide were utilized – which are emergency measures not taken lightly.** Intermediate and less-lethal force was utilized by law enforcement personnel after commands for protesters to disperse.

The videos reviewed by the Court reveal a very chaotic scenario with law enforcement officers outmanned and flanked by protesters on and around the bridge area. The Court is fully aware of the indiscriminate use of water and other forms of non-lethal force that were used that evening in the midst of the darkened chaos. The Court is also cognizant that it is [sic] sometimes difficult for a law enforcement officer to determine how the doctrine of excessive force will apply to the particular factual situation the officer is confronted with. See Ashcroft v. Kidd, 563 U.S. 731, 742 (2011).

The Court further finds that based on the record reviewed at this stage, the Plaintiffs are unlikely to prevail on their claim of excessive force under the Fourteenth Amendment.

Based upon the record presented to the Court, the Court finds the Plaintiffs are unlikely to succeed on the merits of their claims, and they have not sustained their burden of proof. Thus, this *Dataphase* factor weighs against the requested injunctive relief.

(Apx 31-37 (emphasis in original).) The record in this case more than adequately supports the District Court’s findings and conclusions. There was no “clear error” in the District Court’s findings of fact.

B. No Irreparable Harm Will Result If Injunction Is Denied

In this case, Appellants are asserting a “mere possibility” Law Enforcement may use excessive force at some undetermined time and place in relation to

unknown circumstances which cannot reasonably be predicted at this time. Such an allegation is not sufficient to establish irreparable harm if the requested injunction is denied. “[T]he irreparable injury inquiry must concentrate on current threats, not past ones” *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002). “The ‘mere possibility’ that harm may occur before a trial on the merits is not enough” to establish irreparable harm if injunctive relief is not granted. *MKB Management Corp. v. Burdick*, 954 F.Supp.2d 900, 912 (D.N.D. 2013). The party seeking injunctive relief must show that a significant risk of harm exists, and the absence of such a showing is sufficient grounds to deny injunctive relief. *Id.*

Over seven months have now elapsed since the November 20 riot, and water assets have not been utilized by Law Enforcement for crowd control purposes since, the protester camps in the vicinity of the Bridge were completely cleared in March of 2017, and none of the Protester Appellants remain in North Dakota. Protesters’ assertion of irreparable injury is based upon pure speculation and denial of injunctive relief was warranted on this basis alone.

In addition, a person cannot genuinely claim irreparable harm from the availability to Law Enforcement of intermediate and *less lethal* crowd control methods, the use of which may be necessary to preserve the lives and physical safety of Law Enforcement and others. The alternative is to leave Law

Enforcement with the extremes of hand-to-hand force (i.e. batons and shields) and deadly force, with no options available in the middle. As a practical matter, tying the hands of Law Enforcement as requested by Appellants would also hinder Law Enforcement's ability to protect the safety and rights of the protesters from others as well.

The District Court was correct in concluding this factor weighs against Appellants' requested injunction, as follows:

In their request for injunctive relief, the Plaintiffs are asserting a possibility that law enforcement officers may use excessive force at some undetermined time and place, and in relation to unknown factual circumstances that cannot reasonably be predicted at this time. . . . This *Dataphase* factor weighs against the issuance of a preliminary injunction.

(Apx 37 (emphasis in original).)

C. The Balance of Harm Weighs Against Granting An Injunction

While the irreparable harm factor focuses on the harm or potential harm to the plaintiff, the balance of harm factor analysis examines the harm to all the parties to the dispute and other interested parties, including the public. *See Dataphase*, 640 F.2d at 114; *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991). As correctly found by the District Court:

. . . The Court finds that the harm to the public interest in maintaining law and order, preserving the peace, protecting the lives and safety of law enforcement officers when upholding the rule of law, and preserving private and public property, far outweighs the Plaintiffs' claim of entitlement to protest in locations where they have no legal right to be, and while engaging

in unlawful behavior. The rights of free speech and assembly do not mean the Dakota Access pipeline protesters can trespass on public or private property, or protest on public bridges, streets, and highways without permission, whenever they choose to do so under the guise of such activity being a “peaceful and prayerful protest.” Simply stated, those who protest on city streets while failing to obtain proper permits and permission from city authorities, or protest on public bridges or rural highways closed to the general public, are in violation of the law. Such persons are subject to prosecution in the courts of the cities, counties, or states where the unlawful activity occurs. The Court finds this *Dataphase* factor weighs against the issuance of a preliminary injunction.

(Apx 38 (emphasis in original).) The balance of harm in this case weighs strongly against the requested injunction.

D. The Public Interest Weighs Against Granting An Injunction

It cannot reasonably be disputed that maintaining law and order, and preventing serious bodily injury or death to public servants engaged in upholding the rule of law is in the public interest, and serves a compelling state interest. Similarly, it cannot reasonably be disputed preserving private and public property interests serves a compelling state interest. As correctly found by the District Court:

The Plaintiffs have essentially asked the Court to find that their interest to protest (and trespass) upon the Backwater Bridge and Highway 1806, near Cannonball, North Dakota, outweigh the public interest in preserving and protecting the peace and rule of law. Based upon a careful consideration of all the evidence presented by the parties to date, the Court finds that the public interest strongly weighs against the issuance of a preliminary injunction. As previously noted, the rights of free speech and assembly do not mean, and have never meant, that everyone who chooses to protest against the Dakota Access pipeline may do so at any time, any place, and

under any set of conditions they choose in total disregard of the law. To allow that to occur would result in anarchy and an end to the rule of law in civilized society. This *Dataphase* factor weighs strongly in favor of a denial of a preliminary injunction.

(Apx 38-39 (emphasis in original).) The District Court correctly concluded the public interest “weighs strongly in favor of a denial of a preliminary injunction.”

CONCLUSION

The District Court’s denial of Appellants’ request for preliminary injunction should be upheld as all relevant factors weigh heavily against Appellants’ requested injunction, and Appellants failed to meet their heavy burden of proving the necessity of the requested injunctive relief. Not a single factor weighs in Appellants’ favor. Appellants had no constitutional right to exercise their First Amendment Rights at the restricted locations where force was allegedly applied as to them, and no reasonable juror could possibly conclude the alleged level of force applied by heavily outnumbered and besieged Law Enforcement was objectively unreasonable under the totality of the circumstances. There is also no threatened immediate and irreparable injury as none of the Appellants are any longer located within the jurisdiction of Law Enforcement and Appellants are merely speculating Law Enforcement may, at some uncertain date, time and location, apply an unknown and allegedly unlawful level of force as to them under uncertain

circumstances. In addition, the harm to the public interest in maintaining law and order, preserving the peace, protecting the lives and safety of law enforcement officers when upholding the rule of law, and preserving private and public property far outweighs Appellants' claim of entitlement to protest in locations where they have no right to be, and while engaging in unlawful behavior.

The application of force, and the level of force to be applied, should be left to the sound discretion of each individual Law Enforcement officer based upon the totality of the circumstances faced by that officer at the moment. It is not realistically possible to predict the dangers Law Enforcement will be faced with moving forward and the physical safety and lives of Law Enforcement and others whom they are sworn to protect is dependent upon the tools available to Law Enforcement to accomplish such public duty. The DAPL protesters have repeatedly demonstrated their complete disregard for the authority of Law Enforcement, the rights of others with whom the protesters disagree, and the rule of law. The District Court did not abuse its discretion in denying Appellants' requested preliminary injunction and its' decision should be upheld.

Dated this 10th day of July, 2017.

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