IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

VANESSA DUNDON, ET AL. on behalf of themselves and all similarly- situated persons, Plaintiffs and Appellants, v. KYLE KIRCHMEIER, ET AL., Defendants and Appellees.	No. 17-1306 N.D.D. Case No. 1:16-cv-406 **APPELLANT'S BRIEF**

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Summary of the Case

This matter challenges the indiscriminate, undifferentiated use of dangerous weapons that cause severe injuries against people engaged in First Amendment activity, including peaceful protesters who present no threat. Vanessa Dundon and eight other named plaintiffs sued Appellees on behalf of a class of people who were injured when Appellees' officers sprayed fire hoses and shot impact munitions and explosive grenades into a crowd on a cold North Dakota night. Appellants were present to express their First Amendment rights to pray and protest in opposition to the Dakota Access Pipeline (DAPL). Appellees' use of excessive force had steadily escalated prior to this incident, and continued after this incident.

Appellants sought to enjoin Appellees from violating their First and Fourth Amendment rights by using fire hoses in freezing temperatures and shooting munitions indiscriminately into crowds without regard for whether protesters were peaceful. Despite material factual disputes, the district court denied the request for preliminary injunction without a hearing, and this interlocutory appeal followed.

Request for Oral Argument

Appellants request 30 minutes oral argument for review of these important First and Fourth Amendment issues. (8th Cir. R. 28A(i).)

TABLE OF CONTENTS

Jurisdictional Statement..1

Statement of Issues...2

Statement of the Case and Facts..6

Summary of the Argument..17

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO PROHIBIT DEFENDANTS FROM USING DANGEROUS WEAPONS IN AN INDISCRIMINATE MANNER AGAINST PREDOMINANTLY PEACEFUL DEMONSTRATORS..19

A. STANDARD OF REVIEW..19

B. APPELLANTS ESTABLISHED A PROBABILITY OF SUCCESS ON THE MERITS...21

1. *The Fair Chance Standard Applies Here*......................................21

2. *Appellants Are Likely To Succeed On Their Fourth Amendment Claims*..22
a. The Fourth Amendment Standard Applies Here............................22
b. The Indiscriminate Use of High Levels of Force Was Not Objectively Reasonable...25

3. *Appellants Are Likely To Succeed On Their First Amendment Claim*..42
a. Appellants were engaged in constitutionally protected activity.....43
b. The Evidence Shows Retaliatory Animus......................................47
c. Appellees' Actions Would Chill a Person of Ordinary Firmness..48

C. APPELLANTS ESTABLISHED IRREPARABLE HARM. 48

D. THE DISTRICT COURT'S ASSESSMENT OF THE EQUITIES WAS PREMISED ON INCORRECT ASSUMPTIONS 50

II. THE DISTRICT COURT ERRED WHEN, DESPITE THE EXISTENCE OF MATERIAL DISPUTED FACTS, THE COURT REFUSED TO HOLD AN EVIDENTIARY HEARING AND INSTEAD DENIED THE PRELIMINARY INJUNCTION MOTION SUMMARILY........................52

A. Standard of Review...52

B. A Hearing Was Required Here..52

CONCLUSION..59

Certificates..61

TABLE OF AUTHORITIES

Cases

All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F.2d 1535 (11th Cir.1989)……………………………………………… ………......……53

Am. Prairie Const. Co. v. Hoich, 560 F.3d 78, (8th Cir. 2009)…………….……6, 56

Ass'n of Cmty. Organizations for Reform Now v. St. Louis Cty., 930 F.2d 591 (8th Cir. 1991)…………….. …...............…19

Baribeau v. City of Minneapolis, 596 F.3d 465 (8th Cir. 2010).......................43

Barham v. Ramsey, 434 F.3d 565 (D.C. Cir. 2006)….…………………...……33

Bernini v. City of St. Paul, 655 F. 3d 997 (8th Cir. 2012)…………..…33, 34, 35

Boyd v. Benton County, 374 F.3d 773 (9th Cir. 2004)…………….….………38

Brendlin v. California, 551 U.S. 249 (2007)…………………..…..…2, 22, 23

Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009)….………..….26

Buck v. City of Albuquerque, 549 F.3d 1269, (10th Cir. 2008)..……3, 4, 32, 46
.
Carver v. Nixon, 72 F.3d 633 (8th Cir.1995)..20

Chlorine Institute, Inc. v. Soo Line R.R., 792 F.3d 903, (8th Cir. 2015)………55

City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984)…………………49

Coles v. City of Oakland, No. C03–2962 TEH (N.D.Cal. 2005)………...……25

Collins v. Jordan, 110 F.3d 1363 (9th Cir. 1996)………………..…..........43, 44

Cox v. State of La., 379 U.S. 536………………………………………….....44

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir.1981)……2, 20, 50

Deorle v. Rutherford, 272 F.3d 1272 (9th Cir. 2001) ……………..…………36

Edwards v. South Carolina, 372 U.S. 229 (1963)……… ………....…4, 43, 44

Elliott v. Kiesewetter, 98 F.3d 47 (3d Cir. 1996)…………..…………….……53

Elrod v. Burns, 427 U.S. 347 (1976)…………………………….……..……..…..49

Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs., 111 F.3d 1408, (8th Cir. 1997)…………………..…….………………..…19

Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001)……………..…...…….…….31

Frisby v. Schultz, 487 U.S. 474 (1988)……………………………..………….…44

Glenn v. Washington County, 673 F.3d 864 (9th Cir. 2011)……………..…..…36

Graham v. Connor, 490 U.S. 386 (1989)……………………..…...3, 26, 27, 30, 42

Hartman v. Moore, 547 U.S. 250 (2006)………………..…………….……….....43
.
Heartland Acad. Cmty. Church v. Waddle, 335 F.3d 684 (8th Cir. 2003)……....21

Henderson v. Munn, 439 F.3d 497 (8th Cir. 2006)…………………........……31

Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)………………………………………………………………………..20

Jennings v. City of Miami, No. 07-23008-CIV, 2009 WL 413110, at *9 (S.D. Fla. Jan. 27, 2009) ……………………………………………………..……...24

Jones v. Parmley, 465 F.3d 46 (2d Cir. 2006)………………………………..…..43

Johnson v. Minneapolis Park & Rec. Bd., 729 F.3d 1094 (8th Cir. 2013)……….19

Keating v. City of Miami, 598 F.3d 753 (11th Cir. 2010)…………..…....…4, 46

Kingsley v. Hendrickson, 135 S.Ct. 2466 (2015)…………………..........…3, 27, 42

Lamb v. City of Decatur, 947 F. Supp. 1261 (C.D. Ill. 1996) ……….……......…26

Long Beach Area Peace Network v. City of Long Beach, 574 F.3d 1011 (9th Cir. 2009)………………………………………………………………..……………..44

Loria v. Town of Irondequoit, 775 F. Supp. 599 (W.D.N.Y. 1990)……………...25

Ludwig v. Anderson, 54 F.3d 465 (8th Cir. 1995)… ………………………...2, 22

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)……………………………49

Marcus v. Iowa Pub. Television, 97 F.3d 1137 (8th Cir. 1996)…………………49

McCracken v. Freed, 243 Fed. Appx. 702 (3d Cir.2007)………………………...22

McCullen v. Coakley, 134 S.Ct. 2518 (2014)… …………………...…………44

Marbet v. City of Portland, No. CV 02–1448–HA, 2003 WL 23540258 (D.Or. 2003)…………………………………………………...…………………25

Maryland v. Pringle, 540 U.S. 366 (2003)………………………………………32

Minnesota Citizens Concerned for Life, Inc. v. Swanson, 692 F.3d 864 (8th Cir. 2012)…………………… ……………………………....……..…………..20

Mitchell v. City of N.Y., 841 F.3d 72 (2d Cir. 2016)………...……...………….33

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)…………...………4, 46

NAACP v. Patterson, 357 U.S. 449 (1958)……………………….…...………45

NAACP W. Region v. City of Richmond, 743 F.2d 1346 (9th Cir.1984)…....……44

Nelson v. City of Davis, 685 F.3d 867 (9th Cir. 2012)……….……………2, 23, 24

PCTV Gold, Inc. v. SpeedNet, LLC, 508 F.3d 1137 (8th Cir. 2007)……………..21

Phelps-Roper v. Nixon, 509 F.3d 480 (8th Cir. 2007)……………..……..…5, 52

Phelps–Roper v. Troutman, 662 F.3d 485 (8th Cir. 2011)……...…………….…20

Planned Parenthood of Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008)………………………………… …………………..………………21

Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, (8th Cir.1994)………………… ………………..……………….................5, 50

Reed v. Hoy, 909 F.2d 324 (9th Cir. 1989)…………………………………….…22

Schulz v. Williams, 38 F.3d 657 (2d Cir. 1994)…………… …..………....…….53

Siebersma v Vande Berg, 64 F.3d 448 (8th Cir. 1995)…………………..…....5, 55

Ty, Inc. v. GMA Accessories, Inc., 132 F.3d 1167 (7th Cir. 1997)… ……......…53

United Healthcare Ins. Co. v. AdvancePCS, 316 F.3d 737 (8th Cir. 2002)..5, 52, 53

Virginia v. Moore, 553 U.S. 164 (2008)… …………………..……….............2, 22

Ybarra v. Illinois, 444 U.S. 85 (1979)…………………………......……3, 32, 33

Vodak v. City of Chicago, 639 F.3d 738 (7th Cir. 2011)… …...……...6, 33, 57, 58

Zurcher v. Stanford Daily, 436 U.S. 547 (1978)………………………………...26

Statutes and Other Authorities

28 U.S.C. §1292(a)(1). ……………………………………..………………..1

28 U.S.C. §2201…………………...…………………1

42 U.S.C. §1983 ………………...………….. 1

Fed.R.Civ.Proc. 52(a)(2)………………………………………………………..5

Fed.R.Civ.Proc. 65……………….……………………………………………..1

Fed.R.Evid. 201………………...……………………………………….……….5

Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases*, 31 Creighton L. Rev. 387 (1998)……………………………………….…………20

U.S. Const., 1st Amd., 4th Amd………........…………………………….…….passim

JURISDICTIONAL STATEMENT

The district court had jurisdiction under the Civil Rights Act of 1871 as amended, 42 U.S.C. §1983, and the Declaratory Judgment Act, 28 U.S.C. §2201. Appellants brought a motion for a preliminary injunction under FRCP 65 requesting that the district court prohibit the indiscriminate use of direct impact munitions and explosive grenades for crowd dispersal, and the use of water hoses or cannons for crowd dispersal in freezing weather. (Apx 75.) On February 7, 2017, the district court denied Appellants' motion for preliminary injunction. (Apx 5, Add 2.)

On February 8, 2017, Appellants filed a timely Notice of Appeal. (Apx 729.)

This court has jurisdiction to review the district court's interlocutory order refusing a preliminary injunction under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

I. Law enforcement officers should be enjoined from indiscriminately using high pressure water hoses in freezing temperatures, impact munitions, and explosive grenades against crowds of protesters, where the group as a whole is not engaged in violent or threatening conduct.

U.S. Const., 1st Amd., 4th Amd.

Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 113 (8th Cir.1981)

A. Appellees' use of force on the crowd should be reviewed under a Fourth Amendment standard.

Although Appellants were not arrested, they were seized by law enforcement and are thus entitled to challenge Appellees' actions under the Fourth Amendment because the officers' acts of shooting them with munitions and spraying them with high pressure hoses were an acquisition of physical control.

Brendlin v. California, 551 U.S. 249, 254, (2007)

Virginia v. Moore, 553 U.S. 164, 175 (2008)

Ludwig v. Anderson, 54 F.3d 465, 471 (8th Cir. 1995)

Nelson v. City of Davis, 685 F.3d 867, 877–878 (9th Cir. 2012)

B. The indiscriminate use of fire hoses, impact munitions and explosive grenades on a crowd in freezing weather, without regard for whether

the vast majority of the crowd was peaceful, was not objectively reasonable as required by the Fourth Amendment.

The evidence shows that the crowd consisted predominately of peaceful protesters who did not present a threat to the police. The District Court concluded that the use of water and munitions on the crowd was reasonable, despite acknowledging that the force was applied indiscriminately against nonviolent protesters. The court wrongly conflated law enforcement's authority to direct Appellants to disperse, with law enforcement's authority to use fire hoses, explosive grenades and impact munitions in an undifferentiated manner. Even if the police determine that a demonstration or gathering is an unlawful assembly and must disperse, the Fourth Amendment prohibits the police from using excessive force. When force is used against protesters exercising their First Amendment rights, this prohibition must be applied with particular precision.

Graham v. Connor, 490 U.S. 386, 397 (1989)

Kingsley v. Hendrickson, 135 S.Ct. 2466, 2473 (2015)

Buck v. City of Albuquerque, 549 F.3d 1269, 1289 (10th Cir. 2008)

Ybarra v. Illinois, 444 U.S. 85, 91 (1979)

C. The indiscriminate use of excessive force against peaceful protesters, without actual notice to disperse, violated Appellants' First Amendment rights.

The evidence shows that audible dispersal orders were not given and that Appellants were engaged in constitutionally protected activity when they were shot with munitions and soaked with fire hoses. The excessive force is presently chilling their First Amendment rights.

Edwards v. South Carolina, 372 U.S. 229 (1963)

Buck v. City of Albuquerque, 549 F.3d 1269, 1289 (10th Cir. 2008)

Keating v. City of Miami, 598 F.3d 753, 767 (11th Cir. 2010)

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 916 (1982)

D. In denying the preliminary injunction, the District Court erred in assessing the equities, in that the court incorrectly equated enjoining the indiscriminate use of dangerous munitions and fire hoses on an entire crowd with enjoining officers from enforcing the law.

Appellants requested a preliminary injunction prohibiting Appellees from the indiscriminate use of direct impact munitions and explosive grenades for crowd dispersal, and the use of water hoses in freezing weather. The requested injunction would not prevent officers from enforcing the law or protecting themselves or others.

Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 929 (8th Cir.1994)

Phelps-Roper v. Nixon, 509 F.3d 480, 488 (8th Cir. 2007), *modified on reh'g,* 545 F.3d 685 (8th Cir. 2008)

II. The District Court erred in refusing to hold an evidentiary hearing despite the existence of material disputed facts, denying Appellants' preliminary injunction motion summarily.

Appellants filed 50 declarations which present material factual disputes with the evidence submitted by Appellees as to the extent and seriousness of any unlawful activity during the subject incident, whether law enforcement was "overrun", and as to whether amplified dispersal orders were given when Appellants were present. Despite acknowledging that there were substantial factual disputes, the District Court failed to hold the required evidentiary hearing before ruling on the preliminary injunction, and accepted Appellees' contentions as undisputed.

Fed.R.Civ.Proc. 52(a)(2)

Fed.R.Evid. 201

United Healthcare Ins. Co. v. Advancepcs, 316 F.3d 737, 744 (8th Cir. 2002)

Siebersma v Vande Berg, 64 F.3d 448, 449-450 (8th Cir. 1995)

Am. Prairie Const. Co. v. Hoich, 560 F.3d 780, 797 (8th Cir. 2009)

Vodak v. City of Chicago, 639 F.3d 738, 746 (7th Cir. 2011)

STATEMENT OF THE CASE AND FACTS

This matter challenges law enforcement's unjustified, indiscriminate, excessive and undifferentiated use of force and deployment of weaponry that causes severe and life-altering injury against groups of people engaged in First Amendment activity, including peaceful protesters who present no threat. Appellees do not dispute or disavow the manner and use of the force and munitions at issue, but instead assert that such use of force is justified as a means of crowd control.

On November 20, 2016, in freezing temperatures, law enforcement unleashed high pressure fire hoses and an array of munitions including explosive grenades and Specialty Impact Munitions (SIM) at people known as water protectors, who gathered to engage in First Amendment prayer and protest of the law enforcement blockade of Highway 1806, north of Backwater Bridge, and of the DAPL under construction nearby. Hundreds of protectors were present, most simply standing, singing, praying, photographing or otherwise engaging in First Amendment activity, and not engaging in, or intending to engage in, any violent or unlawful activity.

Defendants' excessive and indiscriminate use of force against the entire crowd caused serious injuries to numerous peaceful protesters, including the nine Appellants. Vanessa Dundon was struck in the eye with a teargas canister while she was trying to warn a reporter to move away from the barrage coming from a line of officers, and is most likely permanently blind in that eye. (Apx 149-152.) Jade Wool was hit in the face and burned with shrapnel from an exploding grenade, and suffered hypothermia from being sprayed with water. (Apx 101-102.) David Demo was filming the events when law enforcement shot him in the hand with a SIM, breaking two fingers and exposing the bone. He required reconstructive surgery. (Apx 145-146, 92-97, 576-581.) An officer shot Noah Treanor in the head as he lay on the side of the road after having been shot in the legs and sprayed with two fire hoses at once. (Apx 109-110.) Medics treated approximately 300 people for hypothermia, fractures, head injuries, blunt trauma, and exposure to chemical agents, and transported two dozen to hospitals. (Apx 623-624, 92-97.) Even medical personnel who were trying to treat the injured were hit with SIM and shrapnel, and were teargassed. (Apx 552-556, 593-594, 92-97.)

According to Appellees, on October 28, 2016, the North Dakota Department of Transportation had closed the Backwater Bridge located on

Highway 1806. (Apx 21, Add 18.) Highway 1806 is the most direct route between the closest cities, Mandan and Bismarck, and the Standing Rock Sioux reservation. The bridge is located immediately north of the then existing Oceti Šakowiŋ (Seven Council Fires or Great Sioux Nation) camp. (Apx 9, Add 6.) Campers protesting the DAPL, who call themselves water protectors, were legally staying at Oceti Šakowiŋ as the U.S. Army Corps of Engineers has granted them permission to remain on that land until December 5, 2016. (Apx 7, Add 4.)

Law enforcement officials placed concertina wire and concrete barriers north of the bridge to demark the road closure. (Apx 23, Add 20.) Additionally, officers had placed two abandoned Morton County trucks north of the bridge. (Apx 21, 23, Add 18, 20.) They chained the trucks to the concrete barriers, as a part of the barricade. There were two rows of barriers running east-west across Highway 1806, twelve to fifteen feet apart, separated by three rows of concertina wire. (Apx 272.)

Two "No Trespassing" signs were located *north* of the bridge, behind the concertina wire. As can be seen on the Highway Patrol aircraft video, the barricade was well north of the bridge, and there was no signage near the south end of the bridge or anywhere on the bridge indicating that the bridge itself was closed. (Apx 721; DVD 1, 93.4; DVD 2, 93.8 (sign); 93.5 (sign

viewed from behind showing location on side of road).) Notably these signs are not visible in a photo of the barricade taken from the north end of the bridge immediately before the events in question. (Apx 646-647, Add 44.) The concertina wire was between the concrete barricades which were in turn behind the large military dump trucks that formed the front of the barricade. (Apx 21, 23, Add 18, 20.)

In the late afternoon on the cold, windy day of November 20, 2016, a small number of people went to Backwater Bridge.[1] (Apx 10, Add 7.) A witness who saw about ten people at the bridge saw that a semi-truck was trying to pull one of the burned out trucks away from the police barricade at around 5:30 pm. (Apx 10, Add 7; Apx 44.) After that, more people began to gradually arrive in the vicinity, but did not engage in that activity. (DVD 1, 93-4.)

Appellants went to the bridge exercising their First Amendment rights, praying and peacefully showing their opposition to the road closure and to DAPL construction through historic Sioux sacred sites and under the Missouri River, the source of drinking water for the Standing Rock Sioux Tribe and thousands of others. (Apx 9, Add 6.) The Morton County Sheriff's

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[1] Accuweather measured the weather in Cannonball, North Dakota on November 20, 2016 to be a high of 42 and a low of 26 degrees. http://www.accuweather.com/en/us/cannon-ball-township-nd/58646/month/2640170?monyr=11/01/2016.

[2] "[P]hotographs show the crowd was peaceful" (Apx 10, Add 7) a legal

Department had at least 70 officers behind the barricade north of the bridge. (Apx 26, Add 23.) Both Appellants and Appellees initially agree that there were several hundred water protectors present as the evening went on. Appellees later contradict their own estimate by stating there were 800-1,000 protesters. (Apx 10, 24, 26, 273, Add 7, 21, 23.) Appellees' aerial video shows this to be an overestimate. (DVD 1, 93.4.)

Most of the water protectors were drawn to the location out of concern that peaceful protesters were being assaulted by the Morton County Sheriff's Department and assisting agencies who had immediately begun to shoot teargas canisters, SIM and fire hoses into the crowd. One of the teargas canisters ignited a fire, which alerted campers at Oceti Šakowiŋ that something was happening at the bridge. (Apx 10, Add 7.) Medical personnel also responded as injuries began to mount. (Apx 92-97, 104-108, 552.)

Appellees claim that they made announcements to the crowd with a Long Range Acoustic Device (LRAD). However, the evidence indicates that the announcement was made at 6:23pm, before most of the protectors arrived (Apx 625, 645), and did not tell people to leave the area, but rather to stay off the bridge and south of the river shoreline. (Apx 303.) At one point there was another order to individuals near the barricade to move away from the barricade. (DVD 1, 93.5, at 2:44; Apx 725.) But the vast majority of the

persons assembled were not standing in close proximity to the barricade and there is no evidence they heard this. In fact, most of the Appellants and declarants did not hear any dispersal announcements despite being at the scene for hours. One heard the police yell, "Step back", but was immediately shot with SIM before he could do so. (Apx 11, 12, 17, 565; Add 8, 9, 14.)

The law enforcement affidavits are not specific as to the time that they claim announcements were made and for the most part are not inconsistent with the observers' declarations that an amplified general announcement was only given early in the evening, while the activity with the semi was occurring, and before most of the water protectors arrived at the bridge. Only LE-3 claims that "We continued to warn the protesters that they were all trespassing and subject to arrest at this point and to stay away from the burnt truck and barricade. These commands were constant throughout the incident. This is a highly secure area and civilians were not allowed beyond our *check points*, to include the Bridge area." (Apx 264, 282-294, 296-314 (emphasis added).) "Check points" would indicate the barricade, north of the bridge, where law enforcement was stationed.

At all times, it was within the capacity of Appellees to issue orders to disperse if they deemed it appropriate to do so, but the video evidence and 50 declarations submitted by Appellants show that they did not do so.

As Appellants contend and the district court found, the majority of the crowd, including hundreds of water protectors, was peaceful. (Apx 9, 10; Add 6, 7.)[2]

The officers remained north of the abandoned truck, behind the two rows of concrete barriers, three rows of concertina wire, armored vehicles, and protected with helmets, visors, shields, and weapons. (Apx 10, 14; Add 7, 11.) Officers were not in danger according to appellant's expert witness, former Baltimore Police Commissioner Thomas Frazier. (Apx 16; Add 13.) Despite Appellees' claims of unruly behavior amounting to a riot, only one person was arrested for illegal actions that evening. (Apx 16, Add 13; and see Apx 282-295, 296-313.) Despite officers' claims that they were not safe, they document a single, very minor injury to an officer, in contrast to Appellants' numerous serious injuries. (Apx 25; Add 22.)

Indeed, the videos submitted by Appellees confirm that only a small number of water protectors were ever engaged in the early evening attempt to move the burned out trucks, or any attempt to cross the barricade or throw

[2] "[P]hotographs show the crowd was peaceful" (Apx 10, Add 7) a legal observer noted the crowd was "engaged in peaceful protest, song or prayer," (Apx 11, Add 8.), expert witness' review of photos and video led him to comment that " protestors he saw gathered were "only engaged in peaceful protest, song or prayer" (Apx 12.), another legal observer saw "peaceful protestors" (Apx 13, Add 10.), protestor went to peacefully protest (Apx 15, Add 12.). And the Court noted that "the majority of the protestors are non-violent." (Apx 18, Add 15.)

things at the police. The videos show only a small number of spent munitions being thrown back toward the police line over the course of the night. The vast majority of the crowd remained at a distance from the barricade, and those closest to it can be seen simply standing, demonstrating, not trying to cross the barricade or assault the officers and not acting in an aggressive manner. (DVD 1, 93.5, 93.4.) At one point, the video shows a small group approaching the concertina wire with loud whoops, but simultaneously saying "We are peaceful" "We are unarmed" and crouching under the torrent of water and munitions. (DVD 1, 93.9; 93.4, 21:29-23:20.) Appellees' video index conveys a narrative that officers were overrun by violent rioters but that is not borne out by the videos themselves. (See Apx 721; compare DVD 1, 93.1, 93.3, 93.4, 93.5.)

On the other hand, it is undisputed that law enforcement deliberately aimed and discharged their weapons throughout the crowd, not just at those closest to the barricade or at specific people who they assert were throwing objects. (Apx 9-14, 16-17; Add 6-11, 13-14.)

Attorney Cecilia Candia, who was acting as a legal observer, "saw a gas canister launched next to the area where medics were trying to treat the injured, several yards to the south of the bridge and nowhere near the barbed wire fencing to the north of the bridge. Because officers were throwing gas

canisters far into the middle of the crowd on the bridge, and also to the south of the bridge, people were unable to get away from the gas to disperse. Candia saw many protesters injured and never heard any dispersal announcements." (Apx 9,16; Add 6, 13.) Appellees admit that they used fire hoses on the protestors. (Apx 27; Add 24.) Appellants and declarants saw the impact the water had as it soaked people standing both near and far from the barricade, for hours, in freezing conditions. (Apx 11, 13-14; Add 8, 10-11.) Despite Appellees' deceptive phrasing that they "just used a hose," suggesting a garden hose, protectors were knocked off their feet by the force of the fire hoses mounted atop the armored vehicle. (Apx 11; Add 8.)

Appellees contend they used force only to "hold the line" and to put out fires. (Apx 27, Add 24.) Yet, the water spray's reach was 25 to 100 yards beyond the bridge. (Apx 16; Add 13.) There is no documentation that any fires were put out with the forceful water blasts directed at peaceful protectors.

Appellees additionally admit that they shot impact munitions (SIM) at the protestors. (Apx 25; Add 22.) Legal observers, medics and numerous others saw explosive grenades launched into the crowd. (E.g., Apx 92, 104, 121, 619, 557, 561.)

As a result of Appellees' unjustified use of excessive force, Appellants and many others were injured. Officers shot some water protectors squarely in the head. (Apx 109, 111.) Defendants' SIM and teargas canisters knocked some people unconscious (Apx 111, 92, 132.) and caused others to vomit blood or suffer seizures (Apx 92, 114, 132.) Many, including the elderly, went into shock and risked hypothermia after being soaked by water hoses in freezing temperatures. (Apx 92, 100, 104, 118, 128, 132, 136.) Medics who were trying to aid others who were injured were hit with explosive grenades, water and teargas. (Apx 92, 104, 552.) Protectors who were peacefully praying and drumming were drenched in icy water sprayed as far as it could reach on all sides of the bridge. (Apx 619.)

Appellees' use of force against peaceful protectors has continued, showing the enduring nature of the underlying policy, practice or custom at issue. (Apx 18; Add 15.) On January 18, 2017, Appellees again used SIM against protestors on Backwater Bridge, shooting another person in the face causing serious eye injury. (Apx 18, 582; Add 15.)

Plaintiffs filed this action on November 28, 2016, along with a motion for a temporary restraining order and preliminary injunction. The original motion requested that the district court prohibit Appellees from using excessive force in responding to the pipeline protests and prayer ceremonies

and specifically prohibit the use of SIMs, explosive grenades, water cannons or hoses, and various other weapons, *as means of crowd dispersal*. (Apx 75, emphasis added.) Following denial of the TRO, Appellants filed a Reply in which Appellants narrowed their request, asking that the district court "impose reasonable constraints on defendants' use of force by prohibiting the *indiscriminate* use of direct impact munitions and explosive grenades for crowd dispersal, and the use of water hoses or cannons in freezing weather". (Apx 547, Add 39, emphasis added.)

On February 7, 2017, the district court denied the preliminary injunction without a hearing. (Apx 5; Add 2.)

Appellants filed a timely notice of interlocutory appeal from the denial of injunctive relief on February 8, 2017. (Apx 729.)

SUMMARY OF THE ARGUMENT

It is undisputed that Appellees' law enforcement officers sprayed fire hoses, and shot impact munitions (SIM) and explosive grenades, into a crowd of protesters in an indiscriminate manner, including protesters and medics who were far from the police barricade; that at least the majority of the crowd was peaceful, and presented no threat; and that severe injuries resulted. Appellants requested a preliminary injunction prohibiting these weapons from being used in an indiscriminate manner for crowd dispersal, and prohibiting use of fire hoses in freezing weather. These weapons can cause serious permanent injuries or death and are an intermediate level of force, which is excessive force absent a strong governmental need.

The district court was incorrect in finding that Appellants had not shown a fair chance of prevailing on their Fourth Amendment claim, because the evidence establishes that the crowd was not acting as a group in a threatening manner and that law enforcement was not so overrun that it was necessary to use such a high level of force in this indiscriminate fashion, as opposed to giving dispersal announcements and making arrests. The district court erroneously conflated Appellees' authority to order the crowd to disperse, with the authority to use dangerous force on the entire crowd in an undifferentiated manner over many hours without particularized probable

cause as to the individuals being shot. This was erroneous because the Fourth Amendment limits police use of force to force which is objectively reasonable and the force used here was excessive.

The district court was incorrect in finding that Appellants had not shown a fair chance of prevailing on their First Amendment claim on the basis that Appellants were trespassing on the bridge and therefore not engaged in First Amendment activity. There was no actual notice that the bridge was closed, as opposed to the area north of the barricade, and law enforcement failed to give audible dispersal orders after most of the crowd arrived. Even if some individuals committed unlawful acts, this did not strip Appellants' lawful activities of First Amendment protection. During a protest, even if unlawful activity or violence occurs, the First Amendment requires police to act with precision and to not abridge or violate the constitutional rights of peaceful persons, especially through use of force. Appellants showed that Appellees' use of force would chill a person of ordinary firmness from continuing to engage in the activity, and there is evidence that retaliatory animus was the cause of the massive barrage of water, impact munitions and explosives that went on for many hours and was even directed at medics who were aiding the injured.

Alternatively, the district court erred in denying the preliminary injunction summarily, without holding an evidentiary hearing, particularly given its acknowledgement that both sides had presented "very conflicting affidavits, paint[ed] a very different picture of what occurred on November 20th". The material disputes of fact required that the court hold a hearing to assess credibility before making findings of fact.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO PROHIBIT DEFENDANTS FROM USING DANGEROUS WEAPONS IN AN INDISCRIMINATE MANNER AGAINST PREDOMINANTLY PEACEFUL DEMONSTRATORS

A. STANDARD OF REVIEW

Review of constitutional issues is *de novo*, and the Court of Appeals is "obliged to make a fresh examination of crucial facts." (*Johnson v. Minneapolis Park & Rec. Bd.,* 729 F.3d 1094, 1098 (8th Cir. 2013).) "Crucial facts" are also referred to as "critical facts" or "constitutional facts", for which the appellate court independently reviews the evidentiary basis. (*Families Achieving Independence & Respect v. Nebraska Dep't of Soc. Servs.,* 111 F.3d 1408, 1411 (8th Cir. 1997) (en banc); *Ass'n of Cmty. Organizations for Reform Now v. St. Louis Cty.*, 930 F.2d 591, 595 (8th Cir. 1991).) Factual findings of a trial court are critical where the finding of fact

and a conclusion of law as to a federal right are so intermingled as to make it necessary to analyze the facts in order to decide the federal constitutional question. (*Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995); *Carver v. Nixon*, 72 F.3d 633 (8th Cir. 1995), cert. denied, 116 S.Ct. 2579 (1996); and see L. Steven Grasz, *Critical Facts and Free Speech: The Eighth Circuit Clarifies Its Appellate Standard of Review for First Amendment Free Speech Cases*, 31 Creighton L. Rev. 387, 401 (1998).)

In determining whether a preliminary injunction should be issued, a district court must consider (1) the threat of irreparable harm to the movant, (2) the balance between that harm and the injury that granting the injunction would inflict on other interested parties, (3) the probability that the movant will succeed on the merits, and (4) whether the injunction is in the public interest. (*Dataphase Sys., Inc. v. C L Sys., Inc.,* 640 F.2d 109, 113 (8th Cir.1981) (en banc).) However, the balance-of-harms and public-interest factors need not be taken into account where a plaintiff shows a likely violation of his or her First Amendment rights. (*Minnesota Citizens Concerned for Life, Inc. v. Swanson,* 692 F.3d 864, 870 (8th Cir. 2012); *Phelps–Roper v. Troutman,* 662 F.3d 485, 488 (8th Cir. 2011) (per curiam).)

B. APPELLANTS ESTABLISHED A PROBABILITY OF SUCCESS ON THE MERITS.

1. ***The Fair Chance Standard Applies Here***

Because Appellants seek a preliminary injunction to stop activity that is something other than government action based on presumptively reasoned democratic processes, Appellants need only show a "fair chance of prevailing" to show likelihood of success on the merits. (*Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008); *Heartland Acad. Cmty. Church v. Waddle*, 335 F.3d 684, 690 (8th Cir. 2003).) Here, Appellees engaged in indiscriminate and dangerous force directed at protectors exercising their First Amendment rights and posing no threat to law enforcement. The Eighth Circuit has rejected a requirement that a party seeking preliminary relief prove a greater than fifty per cent likelihood that they will prevail on the merits. (*PCTV Gold, Inc. v. SpeedNet, LLC*, 508 F.3d 1137, 1143 (8th Cir. 2007).) Because Appellees' decision to use the fires hoses and munitions was purely discretionary and not subject to the same democratic processes as a statute or administrative code, Appellants' likelihood of success should be assessed using the "fair chance" standard. (*See Rounds*, 530 F.3d, at 732.) Appellants' claims satisfy this standard.

2. *Appellants Are Likely To Succeed On Their Fourth Amendment Claims.*

a. The Fourth Amendment Standard Applies Here.

The law is clear that defendants' use of force here is properly analyzed under the Fourth Amendment, not the Fourteenth Amendment due process clause. "A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority terminates or restrains his freedom of movement through means intentionally applied." (*Brendlin v. California,* 551 U.S. 249, 254 (2007) (internal quotation marks and citations omitted).) Whether the force is used for the purpose of effectuating an arrest, or for the purpose of self-defense, it is an acquisition of physical control by a law enforcement official that implicates the victim's Fourth Amendment interest to be free from unreasonable seizures. (*Reed v. Hoy*, 909 F.2d 324, 329 (9th Cir. 1989), overruled on other grounds by *Virginia v. Moore*, 553 U.S. 164, 175 (2008); *Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995) [applying mace constitutes a seizure]; *McCracken v. Freed,* 243 Fed. Appx. 702, 708 (3d Cir.2007) ["[Plaintiff] was seized ... when the team members threw the pepper spray canisters into the house."].)

Here, the officers terminated Appellants' freedom of movement through means intentionally applied when they fired and launched impact

munitions, explosive grenades, and chemical weapons at Appellants and sprayed Appellants with fire hoses.

In *Nelson v. City of Davis*, police, responding to an unruly party involving 1,000 university students, launched pepper balls into the crowd, and a student was shot in the eye. As Appellees here are expected to do, the officers argued that their actions could not constitute a seizure because their intent was to disperse the crowd, not to make arrests. The court rejected this argument.

> The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. *See, e.g., Ashcroft v. al–Kidd,* ––– U.S. ––––, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011); *Brendlin,* 551 U.S. at 261, 127 S.Ct. 2400; *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). "The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." *Brendlin,* 551 U.S. at 260–61, 127 S.Ct. 2400 (alterations in original) (internal quotation marks and citation omitted). Recently, the Court again emphasized that "the Fourth Amendment regulates conduct rather than thoughts." *al–Kidd,* 131 S.Ct. at 2080. Whether the officers intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates. Regardless of their motives, their application of force was a knowing and willful act that terminated Nelson's freedom of movement. It unquestionably constituted a seizure under the Fourth Amendment.
>
> (*Nelson v. City of Davis*, 685 F.3d 867, 877–878 (9th Cir. 2012).)

The court also found that although the officers did not intend to shoot the student, “he and his fellow students were the undifferentiated objects of shots intentionally fired by the officers in the direction of that group. Although the officers may have intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement. Nelson was therefore intentionally seized under the Fourth Amendment.” (*Id*. at p. 877.) Similarly, here the conduct of the officers in firing munitions and directing blasts of water at individual protectors, without regard to any individualized illegal conduct, was intentional.

Another court concurred in a case arising from large protests against the FTAA meetings in Miami in 2003. Based on allegations that the defendants opened fire on demonstrators with teargas, pepper-spray, shotgun-based projectiles and other weapons, encircled them and forced them to move, the court found that the plaintiffs had sufficiently alleged a seizure and denied defendants’ motion to dismiss their Fourth Amendment claims. (*Jennings v. City of Miami*, No. 07-23008-CIV, 2009 WL 413110, at

*9 (S.D. Fla. Jan. 27, 2009); and see, *Marbet v. City of Portland,* No. CV 02–1448–HA, 2003 WL 23540258 (D.Or. 2003); *Coles v. City of Oakland,* No. C03–2962 TEH (N.D.Cal. 2005); see also, *Loria v. Town of Irondequoit*, 775 F. Supp. 599, 604 (W.D.N.Y. 1990) [For Fourth Amendment purposes, officer's motive for drawing and firing weapon -- whether for self defense or to apprehend or stop a suspect -- goes to "reasonableness" of his actions, not to whether there was a "seizure".].)

Here, the officers' intentional acts of shooting water and munitions into the crowd of water protectors were unquestionably seizures.

b. The Indiscriminate Use of High Levels of Force Was Not Objectively Reasonable.

The district court concluded that all of the force applied was "objectively reasonable" despite acknowledging that the force was applied indiscriminately against nonviolent protesters. "*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*." (Apx 36, Add 33, emphasis added.) The court seemed to find it dispositive that "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." (*Ibid*.) Yet, the fact that law enforcement called in reinforcements is not determinative of whether the

force used on Appellants was reasonable (and as Appellants' expert noted this would reduce, not increase, the need for force. (Apx 549, Add 40.)

The district court wrongly conflated law enforcement's authority to direct Appellants to disperse, with law enforcement's authority to use force in the form of fire hoses, explosive grenades and impact munitions in an undifferentiated manner. (See Apx 34, 36, Add 31, 33.) Even if the police determine that a demonstration or gathering is an unlawful assembly and must disperse, the Fourth Amendment prohibits the police from using excessive force. When force is used against protesters or others exercising their First Amendment rights, this prohibition "must be applied with scrupulous exactitude." (*Lamb v. City of Decatur*, 947 F.Supp. 1261, 1263 (C.D. Ill. 1996) (quoting *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)).)

The question in an excessive force case is whether an officer's actions are objectively reasonable in light of the facts and circumstances confronting him. (*Graham v. Connor*, 490 U.S. 386, 397 (1989); *Brown v. City of Golden Valley,* 574 F.3d 491, 496 (8th Cir. 2009).) Considerations such as the following, may bear on the reasonableness or unreasonableness of the force used: the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by

the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting. (*Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 (2015), citing *Graham, supra*.)

It is clear that on November 20, 2016, law enforcement was not overrun, yet water and munitions were shot at people who were doing nothing wrong. The video evidence submitted by Appellees is consistent with witness Martin Lenoble's declaration that early in the evening not more than ten people were involved in trying to remove the burned truck from the barricade. (Apx 647, Add 44; DVD 1, 93.4.) It was only after that activity ceased that most of the water protectors arrived, but officers continued to shoot munitions and teargas canisters from behind the barricade. Lenoble's photos show the police shooting water at a peaceful crowd. (Apx 651-654, Add 44-47.) Lenoble and other witnesses described how the shooting and water spraying went on for hours as protesters remained on and near the bridge, singing and drumming, and medics and ambulances removed the wounded. (Apx 10-11, Add 7-8.)

According to legal observer[3] Phillip Weeks, "Most of those gathered were standing on the highway away from the razor wire and thus a significant distance from law enforcement who were all on the north side of the wire. From what I could see they were only engaged in peaceful protest, song, or prayer.... The force of the water cannons was enough to knock some of the protesters off their feet. The water cannon.... could reach people on the road, arching water high in the air or by a direct line of fire. Water protectors were sprayed whether they were on the highway or off to the side of the highway.... None of the protesters I witnessed were engaged in attempts to cross the razor wire or carry out any type of assault against the law enforcement . . . . ." (Apx 11, Add 8; Apx 626-628.)

An EMT tending to the injured, Zachary Johnson, similarly saw many peaceful people sprayed with water and shot with munitions. Despite being at the scene for hours he saw only a couple of items thrown by water protectors. He himself was hit with a grenade when he was more than 50 feet from the barricade carrying out his duties. (Apx 552.)

No reasonable law enforcement officer could have believed that everyone in the crowd was engaged in illegal activity warranting the barrage

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[3] Legal observers are a National Lawyers Guild program to protect the right to protest by observing law enforcement response to demonstrations. <https://www.nlg.org/lo-trainings/>

of water and munitions that was unleashed on them. The district court erroneously appeared to confer upon Appellants the actions, or alleged actions, of undifferentiated “protesters”, including at times and locations that predate the event at issue by weeks, as a basis for the use of force on November 20. The district court order details for more than four pages Appellees’ allegations of misconduct and violence by other unnamed persons weeks earlier at other locations. (Apx 19-23, Add 16-20.) The only connection of these events to Appellants and the putative class is shared political beliefs, which is not a lawful basis to undertake law enforcement action against those who have committed no wrong.

In a similar vein, the district court order attributes actions taken by a few individuals on November 20th, to Appellants and the entire putative class, when most were not even present when the recited unlawful actions occurred and there was no showing that any of the Appellants were involved in any unlawful, violent, or threatening activity. To justify denying an evidentiary hearing, the court accepted many of Appellees’ allegations as true and further labeled material disputed facts as “undisputed” facts. For example, the order states incorrectly, “It is undisputed that protesters were yelling profanities and throwing and slinging large rocks, lug nuts, construction nuts, padlocks, frozen water bottles, and other objects at law

enforcement officers" citing to the law enforcement affidavits. Yet many declarants including the four legal observers disputed whether more than a few items were thrown.

The court relied heavily on the premise that it was "undisputed" that the bridge was closed to the pipeline protesters on November 20, 2016, and that all persons, other than authorized law enforcement or government officials who entered upon the bridge or any location north of the bridge were trespassing. (Apx 33, Add 30.) The court also accepted as true that "[i]ntermediate and less-lethal force was utilized by law enforcement personnel after commands for protesters to disperse." (Apx 36, Add 33.)

First of all, if persons were trespassing, this alone does not authorize the police to use force. The force must be necessary under *Graham, supra*. Second, there is no evidence that audible amplified dispersal orders were given when the bulk of the crowd, including Appellants and putative class members, was present, or of any other actual notice to Appellants or putative class members that it was unlawful to stand on or in the vicinity of the bridge, south of the barricade. Nor do Appellees even contend that persons were ordered to leave the area south of the bridge or the south bank of creek, yet fire hoses, munitions and chemical agents were directed at people in those areas. Criminal trespass requires actual notice under North Dakota

law. (N.D.C.C. §12.1-22-03.) Moreover, it is a nonviolent misdemeanor. Especially in the context of First Amendment activity, orders to disperse should have been given to all those present to seek voluntary compliance with efforts to clear the area prior to subjecting all those present to massive indiscriminate force but it is clear that they were not.

Nor were Appellants resisting or trying to evade arrest. No order was issued to those present that persons in the area, or remaining in the area, were subject to arrest. Appellants were shot and sprayed while peacefully standing, protesting, aiding others, and photographing.

It is undisputed that the officers were behind multiple layers of heavy vehicles, barricades and concertina wire and were wearing body armor, helmets, visors and carrying shields. If a given individual presented a threat by throwing something or trying to climb over the concertina wire, the officers could (and did) immediately arrest him and bring him under control. (Apx 549, Add 40.)

"[W]here there is no need for force, *any* force used is constitutionally unreasonable." (*Fontana v. Haskin,* 262 F.3d 871, 880 (9th Cir. 2001), cited with approval in *Henderson v. Munn,* 439 F.3d 497, 503 (8th Cir. 2006).) Even where there is a need for some force, "force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest."

(*Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10th Cir. 2008) (shooting pepper balls at demonstrators lying in street was excessive force).)

It is clear from the video evidence, the 50 declarations submitted by Appellants, and the analysis of defendants' affidavits and videos by police practices expert Frazier discussed below, that there was never any real threat to the law enforcement officers and that only a small number of people were involved in throwing objects or trying to breach the blockade. Even had all those on the front line been intent on assaulting the officers, it is undisputed that Appellees directed the same weapons at the entire crowd including those keeping their distance and peacefully singing, praying, documenting the event, or helping others.

The fact that an individual is a member of an unruly crowd does not provide justification for law enforcement to use force against that individual consistent with the Fourth Amendment. A seizure must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another. A person cannot be arrested merely for being in proximity to others who engage in unlawful conduct. (*Ybarra v. Illinois,* 444 U.S. 85, 91 (1979); *see also Maryland v. Pringle,* 540 U.S. 366, 371 (2003) ["the belief of guilt

must be particularized with respect to the person to be searched or seized”]; *Vodak v. City of Chicago,* 639 F.3d 738, 746 (7th Cir. 2011) [officers did not have reasonable belief that all members of a crowd were willfully disobeying police orders]; *Barham v. Ramsey,* 434 F.3d 565, 573-574 (D.C. Cir. 2006) [allegations that 'demonstrators' committed offenses insufficient basis for arresting individual protesters].) Otherwise put, “a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause” supporting a search or seizure. (*Ybarra, supra; see also Mitchell v. City of N.Y.*, 841 F.3d 72, 78-79 (2d Cir. 2016).)

No less is true of the unwarranted use of force. If a demonstrator cannot be arrested without individual probable cause, it is axiomatic that so-called “less lethal” weapons may not be used indiscriminately on a crowd without probable cause as to the persons targeted.

Appellees relied below on this Court’s inapposite decision in *Bernini v. City of St. Paul,* 655 F. 3d 997 (8th Cir. 2012). In *Bernini,* the St. Paul police officers were protecting the downtown business area from a growing crowd advancing directly toward it. A valid order was in place that no one was allowed to enter the downtown area. Police were notified of a crowd heading toward the downtown area which grew to four times its initial size.

The crowd, acting as a unit, chanted their intentions and directly confronted the officers. Police repeatedly instructed people to "back up" and deployed rubber pellet balls, smoke and chemical irritants to move the crowd. When the crowd was contained in a park, officers gave orders to disperse and multiple announcements of impending arrests. (*Id.* at 1001-1002.) There was no evidence that any defendant police officer directly used force against any of the *Bernini* plaintiffs. (*Id.* at 1006.) There is no discussion in *Bernini* of any injuries sustained by plaintiffs.

Bernini dealt only with the false arrest claims of 160 individuals who were booked and taken into custody, whereas here, Appellants' Fourth Amendment seizure claims have to do with Appellees' excessive use of force. With respect to the excessive force claim in *Bernini,* the Court noted there was no evidence to suggest the individually named defendant officers used force against any of the plaintiffs. (*Bernini*, at 1006.)

In stark contrast here, Appellants suffered serious injuries as a result of Appellees' mass use of force. Moreover, after the initial period when only a small number of water protectors were present, dispersal announcements were not issued to those present and the barrage of force did not direct or control the crowd in any particular way. Appellants did not advance upon and threaten police officers, as in *Bernini*, nor were they blocking traffic as

in *Bernini*. Rather, SIM, explosives, and high pressure water were directed at Appellants as they stood, crouched or lay on the ground from one end of the bridge to the other as well as in the grassy areas on the sides of the road. There is no evidence that the crowd was ever acting as a unit threatening the police. The force was not used here to move an unruly crowd to another area where it could be contained, but against all people within a wide radius of hundreds of feet. When teargas and other weapons were launched all the way to the south end of the bridge, it actually impeded protesters from leaving. Weapons were even aimed at medic vehicles that were trying to evacuate injured persons. (Apx 122, 555, 654, 677-678, 639-640.)

The repeated use of dangerous levels of force was excessive considering the totality of the circumstances and not objectively reasonable in light of the factors set forth by the Supreme Court. Despite Appellees' and the district court's characterization of them as "less lethal", the types of weapons used were highly injurious and punitive. Impact munitions and grenades constitute intermediate force, which is excessive force absent a strong governmental need. With regard to one type of SIM that was used by law enforcement on November 20, the Ninth Circuit Court of Appeals observed:

> Every police officer should know that it is objectively unreasonable to shoot – even with lead shot wrapped in a cloth case – an unarmed man

> who has committed no serious offense, … has been given no warning of the imminent use of such a significant degree of force, poses no risk of flight, and presents no objectively reasonable threat to the safety of the officer or other individuals.

(*Deorle v. Rutherford*, 272 F.3d 1272, 1285 (9th Cir. 2001).)

"Beanbags" are one type of SIM or KIP. They are not beanbags at all, but lead birdshot wrapped in fabric and fired from a 12 gauge shotgun. The Ninth Circuit has noted that these munitions are extremely dangerous and can kill a person who is shot in the head at a range of fifty feet or less. (*Id*; *see Glenn v. Washington County*, 673 F.3d 864, 872 (9th Cir. 2011).)

Physicians for Human Rights and the International Network of Civil Liberties Organizations recently released a comprehensive report on the use of crowd-control weapons in response to protests worldwide. (Apx 153.) The report found that "close-range firing of a [SIM / KIP] results in injury patterns similar to those seen with live ammunition, causing severe injuries and disabilities. It is important to note that while factors such as a large surface area may reduce the risk of skin penetration, they increase the inaccuracy of the weapon. KIPs, therefore, are not only likely to be lethal at close range, but are likely to be inaccurate and indiscriminate at longer ranges, even those recommended by manufacturers for safety." (Apx 176.) "[W]hile KIPs are sometimes described as 'less lethal' than conventional ammunition, the number of deaths, serious injuries, and permanent

disabilities that they can cause in a crowd-control setting is of serious concern." (Apx 187.)

In addition to "beanbags", SIM/KIP include the "sponge rounds" used on November 20, which are referred to in some of the declarations as "rubber bullets", a high-speed projectile that is fired from a 40mm launcher. In 2004, a 21-year-old college student, Victoria Snelgrove, lost her life as a result of being struck with a similar plastic SIM fired from a gas powered launcher, the "FN303." Ms. Snelgrove was shot by an officer who was aiming at someone else in a large crowd and accidentally hit Ms. Snelgrove in the eye, shattering the bone and killing her. (*See* District Attorney's Investigation Letter (Sept. 12, 2005), http://www.suffolkdistrictattorney.com/wp-content/uploads/2014/01/Snelgrove-Victoria-Police-Shooting-of-DA-Letter-to-PC-9.12.05.pdf.)

The danger of using SIM, particularly in conjunction with chemical agents and explosive grenades that are designed to cause panic, is heightened when, as here, crowds are present. Grenades and chemical agents cause people to run and move unpredictably, and if SIM are shot into the crowd, it is inevitable that innocent people will be injured—or shot at closer range than recommended or in potentially fatal, non-target areas such as the

head and groin. Thus, appellant Vanessa Dundon is now partially blind after being shot with a SIM. (Apx 151.)

Appellees also used explosive grenades such as Instantaneous Blast CS grenades. These types of devices are "inherently dangerous". (*Boyd v. Benton County*, 374 F.3d 773, 779 (9th Cir. 2004).) They "typically result in panic and serious injuries. Recent reports document more than 50 cases of severe injuries and deaths from the use of these weapons, and highlight the risks of ... use in dense crowds. . . . . The weapons are made of both metal and plastic parts that may fragment during the explosion and act as shrapnel. Blast injuries from close proximity explosions can lead to amputation, fractures, and degloving injuries (extensive skin removal that exposes underlying tissue)..." (Apx 217) -- as tragically occurred here. (Apx 111.)

The use of fire hoses in riot control contexts also can lead to injury or death. Potential health effects include hypothermia and frostbite, as many of the putative class members suffered here, as well as trauma directly to the body or internal injuries from the force of the water stream. Eye damage resulting in blindness as well as facial bone fractures and serious head injuries have been documented when water hoses are used. (Apx 211; <https://www.opendemocracy.net/opensecurity/anna-feigenbaum/white-washing-water-cannon-salesmen-scientific-experts-and-human-rights>.)

There is no current caselaw on the use of water cannons against protesters in the United States because such use effectively ended in the 1960s amidst national outcry over the use of these tactics on nonviolent civil rights protesters.

Police Chief expert Thomas Frazier opined based on his review of the evidence submitted by both sides, that the indiscriminate use of these weapons in this case was unnecessary and excessive.

> In my professional opinion the Defendants' representation that what happened on November 20, 2016 near Standing Rock was a riot is overstated and inaccurate. It was, by and large, a crowd control event. By that I mean there were a handful of protestors whose intentions were to challenge law enforcement authority and cross police lines. They threw objects and attempted to breach the concertina wire and move the vehicle on the bridge. The one person able to cross the concertina wire was immediately arrested. The bulk of the protestors were there to protect tribal lands and sacred religious sites. Though present, these persons did not challenge law enforcement, were prayerful, and not assaultive in any way and there was, therefore, no justification to use force on them. Even assuming that there were persons on the front line who were throwing objects or otherwise posing a physical threat to the police, the reach of law enforcement's shoulder fired weapons and the water cannon were from 25 to 100 yards, an expansive area which encompassed and reached protestors who had no intention of challenging the line of law enforcement. The reach of these weapons ensured that individuals outside any zone or area that even could be considered to be directly confronting law enforcement could be and was subject to serious bodily injury. This is contrary to modern law enforcement standards for use of force.
>
> (Apx 548, Add 39.)

Frazier determined that while some of those present may have had knives, hatchets, propane canisters and other items associated with camping, they were not used in any assaultive fashion, and even if this were so, "it is clear that most of the crowd was not involved in any such behavior, and the police were well protected behind the barricade. The proper response to individual crimes is to arrest the perpetrators, not inflict physical punishment on the entire crowd." (*Ibid*.) Frazier noted that as the number of campers increased at the demonstration, so did the number of law enforcement officers, and law enforcement was never outnumbered or endangered. The triple row of coiled concertina wire made crossing into law enforcement space almost impossible. Reinforcements were called in and did arrive expeditiously. (Apx 549, Add 40.) In fact, if the people who were injured had violated the law, there were enough officers present to arrest them and therefore no reasonable justification for the use of force. (*Ibid*.)

Frazier opined that the use of SIM was excessive force. Shotgun fired bean bag rounds "are highly dangerous weapons which should never be used indiscriminately in a crowd, yet that is exactly what I saw based on the video evidence. It is inappropriate and excessive force to shoot beanbag rounds, or to launch direct impact sponge rounds, into a crowd for the purpose of crowd dispersal. Launched munitions, including explosive grenades, gas,

and smoke canisters, with their high trajectory, as evidenced by the video, landed far behind protestor lines, injuring persons on the periphery of the protest who were clearly not advancing on the police. This too was an unnecessary use of force, and was also likely responsible for many of the fires reported by law enforcement." (Apx 549-550, Add 40-41.)

Moreover,

> The brute force of the impact of the water jet is a force option that would not be considered appropriate by most modern police chiefs or sheriffs, or tolerated by their citizenry. In this case, the use of this device in sub-freezing temperatures, in my opinion, serves no reasonable purpose and can only be considered a retaliatory and punitive action. Not only can the water jet cause injury when applied at such short range, but the water was also subsequently sprayed in a wide arc and far behind protestor lines, seemingly to get as many protestors wet as possible. The video evidence shows indiscriminate use of the water on peaceful protesters who were not being aggressive towards the police. In the sub-freezing weather, its use was certain to cause hypothermia, which it did.

(Apx 550, Add 43.)

Frazier went on to note that "if the intention was crowd dispersal, such use should have ceased as soon as it became apparent that it was not having the desired effect. Law enforcement should distinguish between persons who attack the police or actively resist arrest, and protesters who disobey dispersal orders as an act of symbolic civil disobedience. There is no legitimate reason to continue using force on demonstrators who are simply nonviolently disobeying a dispersal order once it is clear that they are

determined to hold their ground until arrested. The only proper police response is to make arrests – not to deliberately inflict physical punishment." (Apx 550-551, Add 43-44.)

No evidence proffered by Appellees below supports the *indiscriminate* use of such dangerously high levels of force as fire hoses, explosive grenades, and SIM against Appellants. It is important to note that this was not a situation involving split-second decisions by police officers, but continued over many hours, presumably with commanders' approval and based on their orders. The mass use of dangerous weapons continued not only after the single arrest of the evening but long after the tampering with the abandoned trucks on the bridge had ceased. The extent of Appellants' injuries are substantial and in some cases permanent. Appellees made no attempt to temper or limit the amount of force used by law enforcement over the course of this incident. The factors set forth in *Graham v. Connor* and *Kingsley v. Hendricks* clearly weigh in favor of a finding of excessive force.

3. *Appellants Are Likely To Succeed On Their First Amendment Claim*

The district court found that the Appellants were not engaged in First Amendment activity when they were subjected to force on November 20. (Apx 33, Add 30.) This is incorrect.

To prevail on a First Amendment retaliation claim, the plaintiffs must show that they engaged in protected activity, that the defendants' actions caused an injury to Appellants that would chill a person of ordinary firmness from continuing to engage in the activity, and that a causal connection exists between the retaliatory animus and the injury. (*Baribeau v. City of Minneapolis,* 596 F.3d 465, 481 (8th Cir. 2010) (per curiam); *see also Hartman v. Moore,* 547 U.S. 250, 256 (2006).) “A citizen's right to exercise First Amendment freedoms without facing retaliation from government officials is clearly established.” (*Baribeau,* 596 F.3d at 481 (quotation marks omitted).)

a. Appellants were engaged in constitutionally protected activity.

Appellants’ protest and prayer activity was indisputably First Amendment activity. Even if some others committed unlawful acts, this did not strip Appellants’ lawful activities of First Amendment protection. “Activities such as demonstrations, protest marches, and picketing are clearly protected by the First Amendment.” (*Edwards v. South Carolina,* 372 U.S. 229 (1963); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).) “Neither energetic, even raucous, protesters who annoy or anger audiences, nor demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest.” (*Jones v. Parmley*, 465 F.3d

46, 58 (2d Cir. 2006), citing *Cox v. State of La.,* 379 U.S. 536, 546–547, 549 n. 12, *Edwards,* 372 U.S. at 232, 237 ("clear and present danger" means more than annoyance, inviting dispute or slowing traffic).) "Political speech," such as a protest, "is core First Amendment speech, critical to the functioning of our democratic system." (*Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009); *Edwards*, 372 U.S. at 235.)

In this case, Appellants protested on public property, including the road and bridge, that constitute traditional public fora. (*See, e.g.*, *Edwards*, 372 U.S. at 235; *Collins*, 110 F.3d at 1371; *Frisby v. Schultz*, 487 U.S. 474, 480 (1988).) "Consistent with the traditionally open character of public streets," the Supreme Court has held that the government's ability to restrict speech in these locations is very limited. (*McCullen v. Coakley,* 134 S.Ct. 2518, 2529 (2014); *NAACP W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir.1984) (restrictions on First Amendment activities in public fora are "subject to a particularly high degree of scrutiny.").)

While the highway was closed as a through road, only the area marked by the barricade and "No Trespassing" signs, well north of the bridge, was identified as closed to pedestrians. Appellants were at all times south of the law enforcement barricade. On November 20th, the area south of

Backwater Bridge was the area where the Army Corps allowed protest. (Apx 7-8, Add 4-5.) The order irrelevantly mentions that the Backwater Bridge has no sidewalks and is in a 65 mile-per-hour zone (Apx 33, Add 30), but on the date in question, Highway 1806 was blocked to through traffic by the barricade to the north. There was no traffic, and no indication that the bridge and nearby open areas south of the barricade were not available for pedestrian assembly. As discussed, the district court's finding that Appellants were trespassing (Apx 32-33, Add 29-30) is incorrect because there is no evidence of notice. Appellees proffered a press release dated October 30, 2016, concerning the bridge closure (Apx 444), but there is no evidence that this gave actual notice to Appellants and class members. Indeed, when witness Martin Lenoble stood on the bridge taking photos before the activity with the truck began, he was not told to get off the bridge. (Apx 645, Add 43.)

Appellees could have provided fair warning and notice by giving amplified dispersal orders using the LRAD that was present at the scene, and allowing Appellants an opportunity to disperse before using force.

Government actions that "directly suppress" or have "the practical effect of discouraging" protests "can be justified only upon some overriding valid interest of the State." (*NAACP v. Patterson*, 357 U.S. 449, 460-461

(1958).) Courts have therefore repeatedly found a viable claim of First Amendment violations where, as here, there is evidence the government uses force to break-up peaceful protests. (*Keating v. City of Miami*, 598 F.3d 753, 767 (11th Cir. 2010); *Buck v. City of Albuquerque*, *supra*, 549 F.3d at 1292.) In *Keating*, the 11th Circuit found that it was clearly established that police commanders violated the plaintiffs' First Amendment rights when, as here, they directed officers to use less-than-lethal weapons to disperse a crowd of demonstrators. (*Ibid*.)

The district court's conclusion that Appellants were not engaged in constitutionally protected activity is not supported by the record. During a protest, even if unlawful activity or violence occurs, the First Amendment requires police to act with precision and to not abridge or violate the constitutional rights of peaceful persons, especially through arrest or use of force. (*See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ["The First Amendment does not protect violence. . . When such conduct occurs in the context of constitutionally protected activity, however, 'precision of regulation' is demanded."].) "[O]therwise there is a danger that one in sympathy with the legitimate aims of" a political movement but not "intending to accomplish them by resort to violence, might be punished for his adherence to lawful and constitutionally protected purposes, because of

other and unprotected purposes which he does not necessarily share." (*Id.* at 919.) There was no probable cause to shoot munitions at Appellants on the basis that they were not engaged in First Amendment activity, just because some others had earlier tried to move the burned out trucks or defied an order not given to Appellants. "The right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." (*Id.* at 908.)

b. The Evidence Shows Retaliatory Animus

As detailed above, the evidence shows that the force was applied in a retaliatory manner, against water protectors who were far from the police barricade and simply praying or singing. Witness Lenoble saw himself being targeted with SIM immediately after photographing an officer, and saw others targeted who were photographing, as Appellants Demo and Finan were. Many of the Appellants and Declarants were shot, drenched or impacted by grenades while trying to aid others. Legal observer Gabriela Lopez saw that the water protectors' clothing was coated with ice yet the police continued spraying water for hours, and saw the police launch teargas into the area south of the bridge where medics were tending people. (Apx 677-678.)

Retaliatory animus can clearly be inferred from Appellees' profligate use of force in a deliberately indiscriminate, undifferentiated manner against persons who were simply protesting, praying, documenting the events, providing medical aid or observing the events, over many hours. Commissioner Frazier concluded that the prolonged use of the water amounted to the deliberate infliction of physical punishment. (Apx 550-551.)

c. Appellees' Actions Would Chill a Person of Ordinary Firmness.

It goes without saying that being sprayed with water in freezing weather, shot with "less lethal" munitions, hit with explosives, or subjected to the other similarly high levels of force used here would chill a person of ordinary firmness from engaging in similar activity and Appellants' declarations indicate that they are presently chilled in that they fear expressing their views and religious beliefs in opposition to the DAPL because of the excessive force.

Appellants have shown at least a fair chance of success on the merits of their First Amendment claim.

C. APPELLANTS ESTABLISHED IRREPARABLE HARM.

The district court erred in finding that Appellants had asserted only a "mere possibility" of irreparable harm should the preliminary injunction not be granted, rather than a significant risk of irreparable harm. It is well

established that "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (*Elrod v. Burns,* 427 U.S. 347, 373 (1976) (plurality)*; Marcus v. Iowa Pub. Television,* 97 F.3d 1137, 1140-1141 (8th Cir. 1996).)

Here, Appellants and putative class members averred that Appellees' excessive force has chilled their ability to constitutionally exercise their First Amendment rights. (Apx 93, 94, 149.) Accordingly, Appellants have established that the challenged practices have caused and are causing actual, concrete and particularized "injury in fact", and that they would benefit from an injunction curtailing Appellees' excessive and indiscriminate use of weapons and force. Appellants suffer a direct injury that is traceable to the challenged policy, custom and/or practice of using these munitions in this manner, including the chilling of their exercise of free speech and association and free exercise of religion. (See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984).)

Moreover, the record establishes that the challenged policy, custom and practice is continuing. Appellees have used the weapons in the same indiscriminate manner against crowds of protesters and people praying since

the November 20, 2016 incident, and this caused another person serious eye and facial injuries on January 19, 2017. (Apx 582.)

D. THE DISTRICT COURT'S ASSESSMENT OF THE EQUITIES WAS PREMISED ON INCORRECT ASSUMPTIONS.

The "balance of harms" *Dataphase* factor requires the Court to consider "the balance between the harm [to the movant] and the injury that the injunction's issuance would inflict on other interested parties." (*Pottgen v. Missouri State High Sch. Activities Ass'n,* 40 F.3d 926, 929 (8th Cir.1994).) The goal is to assess the harm the movant would suffer absent an injunction, as well as the harm other interested parties and the public would experience if the injunction issued. (*Id.* at 928.)

Here, the district court balanced "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", against "the Plaintiffs' claim of entitlement to protest in locations where they have no legal right to be, and while engaging in unlawful behavior." Similarly, in assessing the public interest, it characterized the injunction request as asking the court to prevent Appellees from enforcing the law.

Appellants do not seek to prevent law enforcement from enforcing the law or protecting officer safety nor do they claim to be allowed to break the law. Rather, Appellants seek to uphold the law by enjoining indiscriminate use of high pressure water, explosive grenades, and impact munitions to disperse crowds. Thus, the harm that the court should have balanced is the risk of serious injury through the indiscriminate use of dangerous weapons to break up the protest, against the utility of using the munitions in an indiscriminate manner.

Appellants have established that the use of the munitions and water caused many significant injuries, including permanent injuries, to people who were doing no wrong. Clearly, the risk of further serious injury to innocent people outweighs law enforcement's interest, if any, in using munitions in an indiscriminate unlawful manner. Appellants do not question law enforcement's authority to make arrests after giving reasonable notice and opportunity to disperse, or to use reasonable force in defense of themselves or others. But as police departments are armed with a growing array of paramilitary weapons, it is a necessary corollary that there be enforcement of constitutionally required limitations as to the manner and criteria for deployment and use of such weapons.

In these particular circumstances, Appellees concede that the protests took place in an isolated rural area. There is no real public safety interest being threatened by a crowd gathering on or near Backwater Bridge and if there was a threat, the police have the authority to handle it lawfully. In contrast, there is a strong public interest in preserving constitutional rights (*Phelps-Roper v. Nixon*, 509 F.3d 480, 488 (8th Cir. 2007), *modified on reh'g,* 545 F.3d 685 (8th Cir. 2008)), and in preserving public safety by avoiding injuries to innocent persons by law enforcement's indiscriminate use of dangerous forms of force on crowds. The equities are clearly in Appellants' favor.

II. THE DISTRICT COURT ERRED WHEN, DESPITE THE EXISTENCE OF MATERIAL DISPUTED FACTS, THE COURT REFUSED TO HOLD AN EVIDENTIARY HEARING AND INSTEAD DENIED THE PRELIMINARY INJUNCTION MOTION SUMMARILY.

A. *Standard of Review*

The district court's decision to forego an evidentiary hearing on a motion for preliminary injunction is reviewed for abuse of discretion. (*United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 744 (8th Cir. 2002).)

B. *A Hearing Was Required Here*

The district court abused its discretion in denying the preliminary injunction without an evidentiary hearing despite its acknowledgement that there were material disputed facts.

In granting or refusing an interlocutory injunction, the court must make findings of fact on the record. (Fed. Rules Civ. Proc. 52(a)(2).) When a material factual controversy exists as to a motion for a preliminary injunction, an evidentiary hearing is required. (*United Healthcare Ins. Co.*, *supra*, 316 F.3d at 744.[4]) Other circuits are in accord. (E.g., *Ty, Inc. v. GMA Accessories, Inc.*, 132 F.3d 1167, 1171 (7th Cir. 1997); *Elliott v. Kiesewetter,* 98 F.3d 47, 53 (3d Cir. 1996); *Schulz v. Williams,* 38 F.3d 657 (2d Cir. 1994) (per curiam); *All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc.,* 887 F.2d 1535, 1538 (11th Cir.1989).)

At a telephonic status conference on January 26, 2017, the district court noted that the two sides had presented conflicting evidence. "Both sides have presented very conflicting affidavits, paint a very different picture of what occurred on November 20th, and I'm not sure it's a completely fair and accurate presentation from either side." The Court characterized the

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[4] In *United Healthcare*, the 8th Circuit found that the district court had not erred in not holding an evidentiary hearing since no facts were in dispute and held that "[a]n evidentiary hearing is required prior to issuing a preliminary injunction only when a material factual controversy exists". In this case, the court erred since, despite the existence of disputed facts, the Court denied the preliminary injunction without holding an evidentiary hearing.

plaintiffs' declarations as essentially stating that "the protesters were at all times peaceful and prayerful", which the Court felt was not accurate. (RT[5] p. 5-6.) It noted that law enforcement "paints a dramatically different picture, 500-plus protesters on the bridge ignoring repeated orders to disperse, throwing debris, threatening officers, destroying public and private property, burning vehicles on the bridge..." but that Appellees' affidavits did not mention "the indiscriminate use of water being sprayed on protesters for long periods of time and over a wide range onto people that were protesting, that were far beyond the front line, where most of the chaos was going on; water being sprayed on people who arguably didn't pose much, if any, threat to anyone. There's no mention of the use of nonlethal specialty impact weapons, teargas, rubber bullets that were being fired indiscriminately into the crowd, some of whom were apparently located far beyond the front line. There are at least declarations from the plaintiffs that reveal that some people were injured that were way in the back, off of the bridge or at the very end, I think, of the south end of the bridge." (RT 8-9.)

Expressing skepticism over Appellants' contention that they did not receive notice that the bridge was closed, as opposed to the highway north of the bridge at the barricade, the court relied on its own impressions:

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[5] "RT" refers to the Reporter's Transcript of the Jan. 26, 2017, Status Conference.

> ...I can honestly tell you that almost everyone in this state, certainly everyone that lives in Cannonball, Fort Yates, Bismarck, Mandan, western North Dakota or any place else in North Dakota knows that that bridge was closed to the general public on November 20th.
>
> I don't know exactly when it was closed, but that bridge was the topic of every news report, every TV report that came out on almost a daily basis that it had been closed for quite some time because of all the problems that were occurring on Highway 1806. And Highway 1806 was closed for a long time down there and still is closed, I believe.
>
> That subject was discussed by every member of the Congressional delegation, the governor's office on almost a daily basis, law enforcement officers that were speaking to the press. Chairman Dave Archambault of the Standing Rock Sioux Tribe was talking about the closed bridge and closed Highway 1806 almost every day in the fall.
>
> I saw myself on the TV, video of so-called leaders of the different protest camps that were being interviewed by the press on TV that were talking about their displeasure about the bridge and Highway 1806 being closed, so it's not a -- I mean, to suggest that the protesters out there on November 20th didn't know the bridge was actually closed, that is almost ludicrous.
>
> (RT 10-11.)

The court went on to say,

> I'm confronted with having to deal with a motion for a preliminary injunction where I've got two very conflicting versions of what happened, and none of which is entirely accurate and forthright. So how am I supposed to sort this out?
>
> (RT 11.)

Yet, the court did not hold a hearing. The district court abused its discretion in accepting the Appellees' facts and rejecting Appellants' facts prior to a hearing. (See *Chlorine Institute, Inc. v. Soo Line R.R.*, 792 F.3d

903, 913 (8th Cir. 2015).) The district court also erred when it found that, despite its own assertions that disputed facts existed, there were no disputed facts. (*Siebersma v Vande Berg*, 64 F.3d 448, 449-450 (8th Cir. 1995).) In so doing, the district judge appears to have gone outside the record and improperly relied on TV news and his own personal impressions concerning prior DAPL pipeline protests and related local events as establishing notice to Appellants and as justification for Appellees' actions, without giving Appellants a chance to refute those purported facts. The judge also referred to the DAPL protests as "this nightmare that we've been dealing with for the last six months." (RT 13.)

When taking judicial notice of adjudicative facts, a judge is required to use the procedures set forth in Fed.R.Evid. 201. "One of the requirements of Rule 201 is procedural, namely, that the parties be given notice and an opportunity to object to the taking of judicial notice." (*Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 797 (8th Cir. 2009).) Moreover, "on fact questions, the court should not use the doctrine of judicial notice to go outside the record unless the facts are matters of common knowledge or are capable of certain verification." (*Id*. at 798.) Whether the Appellants had actual notice that the area *south of the barricade* was closed is disputed as discussed above, and not capable of certain verification based on unspecified

TV broadcasts that may have referred generally to the Highway 1806 being closed as a through road.

The district judge recognized that there was a myriad of disputed facts, and that he would probably "have to hold a hearing because of the different factual scenarios in this case" but stated that he hadn't decided yet if he *wanted* to have a hearing. (RT 11:13-17, and see RT 32:12-18.)[6] The court discussed its busy calendar and the difficulty of scheduling sufficient time for a hearing involving many witnesses given all the other cases before the court. (RT 11:18-25, 12:1-11; 35:9-16.) Eventually the court denied the motion for preliminary injunction without holding a hearing.

The district court was well aware that material disputed facts did indeed exist including the extent of any violence or threat presented by Appellants, the extent and seriousness of any unlawful activity, whether law enforcement could have addressed unlawful acts without shooting dangerous weapons indiscriminately into the crowd, and whether adequate notice was given Appellants that they were prohibited from standing on the bridge. In his order denying the injunction, the judge repeatedly characterized the subject incident as a "riot" (Apx 22-27, Add 19-24) despite the fifty

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[6] Plaintiffs' attorney agreed that a hearing would be helpful for the court to assess credibility and determine the true facts as well as to hear directly from Appellants' police practices expert. (RT 17:11-20 and see 34:4-11.)

declarations filed by Appellants disputing the facts necessarily underlying such a finding.

Based on these disputed facts, the court was required to hold an evidentiary hearing prior to ruling. As in *Vodak, supra*, "The police were numerous, in riot gear, and formidable. The crowd was just milling about, predominantly peaceably (the defendants do not agree that the crowd was peaceable, but this is a disputable and disputed contention; *it cannot be confirmed without a trial).*" (*Vodak*, 639 F.3d at pp. 745-746, emphasis added.)

The court denied Appellants a hearing based on its busy schedule and biased personal impressions of Appellants that were based on improper extrajudicial sources. As noted above, this violated clear Eighth Circuit precedent and requires that this Court vacate the order and that this matter be returned to the district court for an evidentiary hearing on Appellants' motion.

CONCLUSION

The district court was concerned that the requested preliminary injunction limiting indiscriminate use of dangerous weapons for crowd dispersal "would result in anarchy and an end to the rule of law in civilized society." (Apx 39, Add 36.) Yet, the district court acknowledged that the water and munitions were fired indiscriminately in darkness into a largely peaceful crowd. (Apx 39, Add 36.) Appellants' requested injunction simply seeks to restrain Appellees from using the specified weapons in an indiscriminate manner as a means of crowd dispersal -- not to prevent law enforcement from defending themselves or others or from imposing and enforcing reasonable time, place and manner restrictions, including with *necessary* force. It is only a matter of luck that the excessive force that the district court has sanctioned in this case has not yet killed anyone although it has caused many serious injuries, including permanent injuries, and is currently chilling Appellants' and class members' First Amendment rights to express their views, religious beliefs, and document opposition to the DAPL. This appellate court is in the position to promote the rule of law in civilized society by stopping this free for all of indiscriminate shooting and the shocking deployment of fire hoses against nonviolent demonstrators, the likes of which has not seen in this country in more than 50 years.

Therefore, this Court should vacate the district court order and remand this matter to the district court with instructions to grant the preliminary injunction; alternatively, this Court should order the district court to hold an evidentiary hearing to resolve the factual disputes at the heart of its order.

Dated: May 24, 2017 Respectfully submitted,

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Counsel hereby certifies that she has scanned this brief and the addendum for viruses and found them virus-free before E-filing.

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Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 12,941 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.

/s/ Rachel Lederman
Co-Counsel for Appellants

Certificate of Service

Undersigned counsel hereby certifies that on this May 24, 2017, pursuant to F.R.A.P. 25 and 8th Cir. R. 25A(d), Appellants are serving this corrected brief and its Addendum on Appellees by the CM/ECF system.

/s/
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