No. 17-1306

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

VANESSA DUNDON, *ET. AL.,* APPELLANTS

VS.

KYLE KIRCHMEIER, *ET. AL.*, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF SOUTH DAKOTA & NORTH DAKOTA IN SUPPORT OF APPELLANTS

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RULE 26.1 DISCLOSURE STATEMENT

Amicus Curiae American Civil Liberties Union of South Dakota and North Dakota are chapters of the national American Civil Liberties Union Foundation and do not have a parent corporation and no publicly held company owns 10 percent or more of its stock.

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I. INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 900,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has vigorously defended the right to free speech on the public streets and worked to ensure fairness in our criminal justice system. The ACLU of South Dakota is a chapter of the national ACLU and actively provides legal and policy support for the ACLU of North Dakota. The ACLU of South Dakota and North Dakota are committed to the protection of civil liberties for the citizens of their states. The First Amendment and policing issues raised by this case are important to the ACLU and its members.

II. PRELIMINARY STATEMENT

The Appellants filed suit and requested an injunction against the Appellees for their use of militarized weapons against unarmed, civilian protesters gathered near the construction of the Dakota Access Pipeline in Morton County, North Dakota. The District Court, in its opinion, makes little secret of its assessment of the protest as violent and chaotic, despite its conclusions in an earlier matter and in this case that "the majority of the protesters are non-violent." Order of District Court denying Plaintiffs' Motion for Preliminary Injunction ("Order") at 14. It also finds in its facts that a "sizeable minority of protesters who can best be categorized as a group of unlawful and violent agitators who are masked up, terrorize law enforcement officers . . . and whose primary purpose is to simply create chaos and mayhem." *Id.* The Court conflates the two groups throughout the decision with the implicit understanding that the actions of the police against the majority of non-violent protesters is justified because of the violent minority. This is contrary to well-established First Amendment jurisprudence. The Court made inadequate findings of fact, so it impossible to know how it ultimately reached its conclusions, but the Order relies almost

exclusively on evidence presented by the government Defendants/Appellees. There is little hope that any group of concerned citizens can exercise their right to free speech and to challenge the actions of the government if, with the actions of a few violent individuals, protests may be shut down with military-like force. The Order of the District Court errs in its First Amendment legal analysis and in its failure to make adequate, clear, cogent findings of fact. Because of this, the Order denying the Motion for Preliminary Injunction should be remanded.

III. ARGUMENT

The district court's denial of the Plaintiffs/Apellants' motion for a preliminary injunction is reviewed for abuse of discretion. *See, e.g., Phelps-Roper v. Nixon*, 545 F.3d 685, 689 (8th Cir. 2008) overruled on other grounds by *Phelps-Roper v. City of Manchester, Mo.*, 697 F.3d 678 (8th Cir. 2012); *Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir.2000); *see also Rosen v. Siegel*, 106 F.3d 28, 31 (2d Cir. 1997). There is such an abuse when the court "appl [ies] an incorrect legal standard or rel[ies] on a clearly erroneous finding of fact," *See Rosen,*

citing *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir.1996) (internal quotations omitted).

Here, the district court did not make adequate findings of fact and the "facts" relied upon are disputed and, in some cases erroneous. The District Court made an error of fact and law when it determined that the Plaintiff/Appellants had no constitutional right to be present on a highway bridge. Order at p. 29. There is little discussion of the First Amendment concerns and there is no discussion public forum doctrine related to the finding, but whether the bridge was a public forum for free speech purposes is a question of law, not fact.

The District Court reached its conclusion that the Appellants' case would not succeed on the merits largely because of this finding, that "[i]t is clear and undisputed that on November 20, 2016, the Backwater Bridge and Highway 1806 near Cannonball, North Dakota were closed to the general public and to all of the pipeline protesters." Order, p. 29. The highway and its bridge had been closed to vehicle traffic for many months, however it is both unclear and disputed that the bridge was closed to pedestrians and protesters. This is crucial to the First

Amendment analysis, the Fourth Amendment analysis, and the balancing test for the requested injunction.

This abuse of discretion requires that the case be remanded for actual findings of fact to be reached by the Court and the preliminary injunction be weighed under the appropriate legal standard. Finally, even if the court had entered clear and cogent findings of fact, there are no facts which justify the use of paramilitary weapons on unarmed civilians and the rejection of the Fourth Amendment excessive force claims.

A. THE DISTRICT COURT DID NOT MAKE ADEQUATE FINDINGS OF FACT.

The Court's Order denying the Plaintiffs' Motion for a Preliminary Injunction should be remanded to ensure that proper findings of fact are entered. The current Order is difficult, if not impossible, to review or understand. Federal Rule 52(a)(2) requires the court to make findings of fact and conclusions of law if it grants or refuses a preliminary injunction. Fed. R. Civ. P. 52(a); *Mesa Petroleum Co. v. Cities Serv. Co.,* 715 F.2d 1425, 1433 (10th Cir.1983); *Prairie Band of Potawatomi Indians v. Pierce,* 253 F.3d 1234, 1244–46 (10th Cir. 2001).

Without adequate findings of fact and conclusions of law, appellate review is in general not possible. See, e.g., *Curtis v. Commissioner,* 623 F.2d 1047, 1051 (5th Cir. 1980) (noting that a trial court's findings of fact "may be challenged as inadequate to give a clear understanding of the process by which the court's ultimate conclusions were reached and thus inadequate to permit appellate review").

The District Court made very few actual findings of fact. The Order dedicates approximately three pages to its "facts" section, which includes a map and an excerpt from its opinion in August dissolving an *ex parte* temporary restraining order it granted to the oil company seeking to enjoin "interference" with its construction of the pipeline. Order, pp. 2-5. The excerpt provides little relevant information, but does demonstrate the "fact" that news media in North Dakota characterized the protest as violent and the court adopted that view.

The facts offered are not necessarily relevant or relied upon. For instance, the District Court noted that the Army Corps of Engineers, which manages the land where the camps were set up "initially granted the protesters a permit to demonstrate on Corps-managed lands" but that the "permit pertaining to the [camp closest to the Backwater

Bridge] has been terminated with a December 5, 2016, deadline for all persons to evacuate". Order at p. 3 citing its Docket No. 61-11. The events described in the Order all occurred on November 20, 2016, so the camp next to the bridge was not under evacuation order, but this is not discussed again in the Order or used in its analysis of the underlying claims. The District Court Order also included an excerpt from an August 2016 order it issued with a reference to outside agitators reminiscent of the government response to the Civil Rights movement in the 1960s. The Court wrote that it "recognizes that many of the troublesome "peaceful protestors" are from out-of-state who have political interests in the pipeline protest and hidden agendas vastly different and far removed from the legitimate interests of Native Americans of the Standing Rock Sioux Tribe who are actually impacted by the pipeline project." *Id.* at 4.

The rest of its "facts" section listed the "Protesters' version" and the "Defendants' version" of facts without clarifying which were its findings of fact and despite the deep conflict between the two versions. The Appellants submitted evidence the district court acknowledged "that both sides had presented "very conflicting affidavits, paint[ed] a

very different picture of what occurred on November 20th"." Brief of Appellants at p. 20.

The denial of the preliminary injunction mostly turns on one issue of fact: whether the peaceful citizen pedestrian protesters, including Appellants, had a right to be on the bridge where the events described on November 20, 2016 took place. The District Court's opinion characterizes the presence of the Appellants on the bridge as a trespass based upon the finding that the bridge was closed despite facts suggesting that its closure to pedestrian protesters was not clear. There is little indication that the Court considered any of the evidence offered in what it characterized "Protesters' version" of events, despite the need for impartial review of both sides.

B. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD.

As the Appellants point out in their brief, where a preliminary injunction is sought to enjoin government conduct that is not the result of the democratic process, the correct test is whether the Plaintiff/Appellants have a "fair chance of prevailing". *Planned Parenthood Minnesota, N. Dakota, S. Dakota v. Rounds*, 530 F.3d 724, 732–33 (8th Cir. 2008). The more stringent test, that the

Plaintiff/Appellants are "likely" to prevail on the merits is reserved for attempts to "thwart a state's presumptively reasonable democratic processes." *Id.* at 733.

The District Court never articulated the correct standard. While the District Court stated that it "need not decide whether the party seeking the preliminary injunction will ultimately prevail" (Order, p. 27), it also stated that a "preliminary injunction cannot be issued if the movant has no chance on the merits". *Id.* While it states that Eighth Circuit has rejected the more stringent rule, it never articulates the "fair chance of prevailing" language. As a result, it is not clear that the Court actually applied the correct standard, the more stringent standard, or something in between.

The unclear standard, coupled with incomplete findings of fact, makes remand necessary.

C. THE COURT ERRED WHEN IT DECIDED THAT THE PROTESTERS HAD NO CONSTITUTIONAL RIGHT TO BE PRESENT.

In reaching its decision, the district court concluded that the protesters had "no constitutional right to be present and engage in civil protest on the Backwater Bridge and Highway 1806." Order, p. 35.

This crucial finding by the Court is a question of law and it ignores important facts raised by the Appellants and analysis of public forum decisions.

In the Appellants' facts, they state that the government "placed concertina wire and concrete barriers north of the bridge to demark the road closure." Appellants Brief at p. 8. The Appellants also state that "[t]wo "No Trespassing" signs were located *north* of the bridge, behind the concertina wire. . . and there was no signage near the south end of the bridge or anywhere on the bridge indicating that the bridge itself was closed." *Id.* The camp and the protesters entering the bridge on November 20, 2016 were south of the bridge. *Id.*

These facts were ignored even though they are crucial to consider when determining whether the peaceful speech on the bridge was protected by the First Amendment. The Supreme Court has repeatedly held, the public streets are a "quintessential public forum for expressive activity." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also United States v. Grace*, 461 U.S. 171, 177 (1983). The District Court went a step further than declaring that the protesters were trespassing. It wrongly concluded that even "peaceful

and prayerful" "protesters cannot insist upon marching, picketing, or protesting on public bridges, streets and highways as a form of freedom of speech or assembly, or a means of social protest, at any time or place they choose without restrictions." Order, p. 30. While time, place and manner restrictions are constitutional, the starting place is that speech is permitted in public forums. The government can exclude a speaker from a traditional public forum "only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985).*

To support its sweeping declaration that protesters cannot insist upon protesting on public streets and bridges, the District Court relies on *Cox v. State of La.*, 379 U.S. 536, 558 (1965). *Cox* is a civil rights era case that ultimately concluded that the criminal charges levied against a young leader of protests against segregation and racial discrimination in Baton Rouge violated his First Amendment rights because "allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to

him by the First Amendment, as applied to the States by the Fourteenth Amendment." *Id.*, 379 U.S. 536, 55 (1965). The logic of *Cox* supports the Appellants as much or more than it does the Appellees. The state's abridgement of the free speech and assembly of peaceful protesters was left up to the discretion of local officials and has been ratified by the District Court's Order.

1. Public Forum Doctrine

There can be no doubt that the First Amendment reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). A citizen's right to speak on matters of public concern "'is more than self-expression; it is the essence of self-government.'" *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 472 U.S. 749, 759 (1985) (citation omitted). "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values." *Id.* (citation and internal quotation marks omitted). This is so even if the speech may be offensive to listeners."

Indeed, long before the public forum doctrine even developed as an analytic tool in First Amendment cases, the Supreme Court famously

observed that public streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Thus, this nation's Court has always reacted with skepticism to restrictions on speech that require the speaker to seek prior permission from the audience in a public forum where anyone who does not want to hear the speaker's message is free to walk away. See *Cohen v. California*, 403 U.S. 15, 21 (1971)("we are often `captives' outside the sanctuary of the home and subject to free speech"). The Court's declaration that public streets and areas are not presumptively open to free speech contradicts the principles of the First Amendment.

Because there are inadequate findings of fact, it is unclear if the road was closed to pedestrian traffic from the south and from the camp area when the barriers, concertina wire, and signs were posted on the north side of the bridge. Appellants' Brief at p. 8. Even if the street was closed, the government may not unilaterally deprive the road of its public character simply by classifying it as a non-public forum with the express aim of chilling speech activities. *U.S. v. Grace,* 461 U.S. 171,

180 (1983) (holding that the inclusion of the sidewalks surrounding the Supreme Court within the statutory definition of non-public "Supreme Court grounds" did not deprive the sidewalks of traditional public forum status). Rather, the Court must look to the objective characteristics of the road to determine whether it functions like a traditional public street. *Id.; see also Arkansas Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 677 (1998). The highway and bridge ran directly next to the camp and had been closed to vehicular traffic. The Court's description of the 65-mile-per-hour speed limit is irrelevant to the inquiry because the area was only being used for protest, not traffic. Had it been open for traffic, the side of the highway would likely have been considered open for protest.

The Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Id.* citing *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. at 802. Traditional public fora are defined by the objective characteristics of the property, such as whether, "by long tradition or by government fiat," the property has been "devoted to assembly and debate." *Perry Ed. Assn.,* 460 U.S., at 45.

"Public streets are "the archetype of a traditional public forum."" *First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1123 (10th Cir. 2002) citing Frisby v. Schultz,* 487 U.S. 474, (1988).

As mentioned above, the government cannot bar speech in a public forum without ensuring that such a restriction "is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest." *Cornelius, supra,* at 800. At a very minimum, the side of the public highway is a free speech public forum. *Knights of Ku Klux Klan v. Arkansas State Highway & Transp. Dep't*, 807 F. Supp. 1427, 1434–35 (W.D. Ark. 1992) (highway rights-of-way are traditional public forums); citing *Jackson v. Markham*, 773 F. Supp. 105 (N.D. Ill. 1991) (specifically holding that the shoulder of a highway is a traditional public forum on which picketing was allowed.). In *Knights*, the court went on to note that "[i]t is undeniable that public roads in Arkansas and throughout the nation are used for public speech and for the promotion of various political, religious, social and commercial views." *Id.*

Designated public fora are nontraditional public forums that the government has intentionally opened for public discourse. *International Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 678 (1992) *(ISKCON)* (designated public forum is "property that the State has opened for expressive activity by part or all of the public"). Hence "the Court has looked to the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius,* 473 U.S., at 802. Arguably, the closure of the highway made it a designated public forum. The bridge had barriers on its north side, but the south side and the highway below it could be characterized as part of the protest camp because law enforcement did not permit the regular use of the highway there are no facts presented that suggest law enforcement, prior to November 20, 2016, did anything to prevent its use as a forum for the protest. To the contrary, the fact that vehicle traffic was closed on Highway 1806, suggests that the government anticipated that the camp inhabitants would be using the road and that it was unsafe to have pedestrians and vehicles on the highway simultaneously.

The last category of government properties are nonpublic fora or not fora at all. The government can restrict access to a nonpublic forum "as long as the restrictions are reasonable and [are] not an effort to suppress expression merely because public officials oppose the speaker's view." *Cornelius, supra,* at 800 (internal quotation marks omitted). The District Court's Order is not explicit, but its decision implies that the highway and the bridge are, in its opinion, non-public fora.

Because the District Court did not consider whether the road was a public forum and decided, without analysis of the relevant First Amendment law, that the bridge was closed to speech activities, the case should be remanded for specific findings of fact and a conclusion of law with respect to that question.

2. Time, Place, and Manner Restrictions

The District Court touches on the government's ability to place time, place, and manner restriction on speech activities, but does not adequately describe how limited those restriction may be. In its Order, the District Court states that even "peaceful and prayerful" "protesters cannot insist upon marching, picketing, or protesting on public bridges, streets and highways as a form of freedom of speech or assembly, or a

means of social protest, at any time or place they choose without restrictions." Order, p. 30. While a state may enforce regulations of time, place, and manner of expression which are content-neutral, they must be "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels of communication." *Perry*, at 45. The District Court did not engage with either of these restrictions on the government's ability to regulate speech activities. The action of the government in this case was neither narrowly tailored nor did it leave open ample alternative channels of communication. Protesters in the area attempting to raise their concerns about the environment and tribal rights were met with resistance to any and all speech activities and there were no alternative channels of communication in place to raise their concerns.

The government's response to the protest, as evidenced by the District Court's opinion in August, was to characterize it as violent and treat all speech as part of a violent movement despite the undisputed evidence that the majority of the protesters were peaceful. Order at p. 4. The government's interest in preventing violence, had it been narrowly tailored, would have entailed arresting individuals who were

behaving violently, not shutting down all of the protests and attempting to characterize public fora as nonpublic. While the government has the right to impose restrictions on speech, there is no indication that the government was willing to permit any protest anywhere regarding the pipeline. The District Court explicitly indicated that free speech on the sidewalks of Bismarck was similarly barred or banned without much more explanation. The Order states that "[e]ven the demonstrations by DAPL protesters on the streets of downtown Bismarck were unlawful without the proper permits and permission of city officials. No one has the constitutional right to insist upon protesting on public bridges or highways whenever they unilaterally decide to do so, and without any permission to do so." Order, p. 30.

Again, the District Court incorrectly changes the legal analysis with respect to free speech in a public forum. The sidewalks of Bismarck are open to speech activities and content-neutral permit requirements are constitutional, such a process cannot be used to abridge free speech. *See, e.g., American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F. 3d 600, 608 (6th Cir. 2005) (statute requiring small groups to get permit before walking on a public

right of way is overly broad and not narrowly tailored because it would apply to circumstances that "do[ ] not trigger the [city's] interest in safety and traffic control."). Marchers on sidewalks are almost always constitutionally protected even without a permit. *See, e.g., Forsyth County, Ga. v. Nat'list Movement*, 505 U.S. 123, 130 (1992); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039, 1040-43 (9th Cir. 2006) (statute requiring protests that do not interfere with traffic to acquire a permit is insufficiently tailored).

The premise implicit in the District Court's opinion denying the motion for preliminary injunction is that, as a general rule, unregulated speech is not permitted and public forums may be converted to non-public forums by the government at any time without analyzing the government interest in such an action and whether or not it is narrowly tailored. This premise is completely contrary to jurisprudence regarding the First Amendment. The First Amendment, at its core, is in place to protect unpopular speech and the right of citizens to hold their government and, in this case, corporations accountable. The District Court's legal errors with respect to the First Amendment and

its failure to make adequate findings of fact to support its decision make remand necessary.

D. THE POLICE SHOULD NOT USE PARAMILITARY WEAPONS ON PEACEFUL PROTESTS.

It is undisputed that the police used paramilitary weapons on the protesters during the November 21, 2016 incident described in the Plaintiffs' Complaint. While the District Court characterizes them as "less than lethal," they can cause fatal injuries and their use is not a reasonable response to a group of unarmed protesters exercising their First Amendment rights. Unfortunately, it is becoming common for the police to respond to demonstrations with military-style tactics, full body armour, and an arsenal of weaponry suited more to a battlefield than a protest. While police safety is important, the widespread militarization of police needlessly escalates tensions between police and protesters. Protesters are not war enemies and should never be treated as such.

It is in the context of this militarized response that the Appellants seek an injunction against the use of policing weapons such as high-pressure water hoses in freezing temperatures, impact munitions and explosive grenades against unarmed protesters and claim that excessive force was used. Appellants' Brief, p. 2. These weapons can and did

cause serious bodily injury, and while death did not occur in this particular case, it is conceivable that protesters could have died as a result of injuries such as pneumonia or blunt force trauma.

The excessive force claim is properly examined under the Fourth Amendment objective reasonableness standard. The right of the protesters to exercise their First Amendment rights was abridged by the excessive force and use of militarized weapons by the police. 42 U.S.C. § 1983 provides a remedy for excessive-force claims based on the deprivation of a victim's constitutional rights. When addressing an excessive-force claim under § 1983, a court must begin its analysis "by identifying the specific constitutional right allegedly infringed by the challenged application of force." 'The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person.' *Moore v. Indehar,* 514 F.3d 756, 759 (8th Cir. 2008) (quoting *Guite v. Wright,* 147 F.3d 747, 750 (8th Cir.1998)). "When an officer restrains an individual's liberty through physical force or a show of authority, a Fourth Amendment seizure occurs." *Moore* at 759.

It is undisputed that the plaintiffs suffered a number of injuries, so while courts are divided about whether an excessive force claim can stand without injury that analysis is inapplicable here. The Court's rejection of the Fourth Amendment excessive force claim is rooted in its determination that the protesters were free to leave and, as discussed above, its determination that there were not exercising their First Amendment rights in a public forum.

The First Amendment finding is discussed above. The Fourth Amendment seizure analysis conducted by the Court relies on the conclusion that "Plaintiffs and other pipeline protesters could have easily removed themselves from the Backwater Bridge and the presence of law enforcement by simply complying with lawful commands, voluntarily disengaging from law enforcement, and dispersing and proceeding south". Opinion, p. 31. This finding ignores the Appellants' claims that they were not given warnings prior to being hit with freezing water and munitions and their recitation of the "Protesters' Version of Facts." Opinion, p. 6. In the Protesters' Version of facts, an affidavit and pictures show that the police were "shooting water at a peaceful crowd" and "tear gas was launched all the way to the south end

of the bridge" impeding protesters from leaving the bridge. *Id.* An attorney observer south of the bridge was impacted by teargas. *Id* at 8. A medic who went to the scene to help those who were injured by the water and grenades was himself "hit in the leg with a 'grenade' fired by law enforcement officer when he was more than 50 feet from the barricade". *Id.* at 10.

The so-called "Protesters' Version of Events" provides ample factual support for the legal conclusion that the individuals on the bridge were "seized", but inexplicably, the Court concluded that they could have left and that not only were the Appellants "unlikely to prevail on their claims of excessive force under the Fourth or Fourteenth Amendment", but that "no reasonable juror could conclude the level of non-lethal force used by law enforcement officers during the chaos on November 20, 2016, at the Backwater Bridge was objectively unreasonable, based on the totality of the facts and circumstances that confronted law enforcement officers on the bridge." *Id.* at p. 32.

The District Court did not conduct the analysis conceived in *Graham*, which requires "a careful balancing of "'the nature and quality of the intrusion on the individual's Fourth Amendment interests' "

against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396–97 (U.S. 1989) quoting *United States v. Place,* 462 U.S. 696, 703 (1983). The "proper application [of the test] requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.*

Assuming for the sake of argument that the Court's conclusory finding that the bridge was a nonpublic forum is accurate, the severity of the "crime" at issue is misdemeanor trespass. The Court's conclusion that no reasonable juror could find that the police used excessive force when employing water cannons and grenades on unarmed individuals defies logic and reason.

IV. CONCLUSION

The District Court improperly concluded that the Appellants' Motion for Preliminary Injunction should be denied without appropriate findings of fact, without hearing, and with legal error in its First Amendment analysis. For these reasons, the case should be remanded.

Respectfully submitted,

/s/ Courtney A. Bowie

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,891 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 Word 2016 in 14 point Century font.

/s Courtney A. Bowie