No. 20-3052 & 20-3053

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CISSY THUNDERHAWK; WAŠTÉ WIN YOUNG; REVEREND JOHN FLOBERG; and JOSÉ ZHAGÑAY,

PLAINTIFFS-APPELLEES,

v.

SHERIFF KYLE KIRCHMEIER; GOVERNOR DOUG BURGUM; FORMER GOVERNOR JACK DALRYMPLE; DIRECTOR GRANT LEVI; and SUPERINTENDENT MICHAEL GERHART JR,

DEFENDANTS–APPELLANTS.

On Appeal from the United States District Court
for the District of North Dakota
Honorable Judge Daniel M. Traynor, District Judge

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NORTH DAKOTA IN SUPPORT OF PLAINTIFFS–APPELLEES AND AFFIRMANCE

Vera Eidelman
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Tel.: (212) 549-2500
veidelman@aclu.org

Andrew Malone
American Civil Liberties Union of North Dakota, South Dakota, and Wyoming*
PO Box 1170
Sioux Falls, SD 57101
Tel.: (678) 416-8970
amalone@aclu.org

**Admitted only in South Dakota*

Counsel for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae American Civil Liberties Union and American Civil Liberties Union of North Dakota state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

Dated: January 29, 2021

By: /s/ Vera Eidelman
Vera Eidelman

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan, non-profit organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of North Dakota is a state chapter of the ACLU. The ACLU and its chapters and affiliates have appeared in numerous cases to defend the First Amendment right of people to protest in the streets, including on rural roads specifically. This includes appearing as counsel in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939) and *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012), and as amici in *Missouri Broadcasters Ass'n v. Schmitt*, 946 F.3d 453 (8th Cir. 2020). As organizations committed to protecting the right to freedom of speech and assembly, amici have a strong interest in the proper resolution of this case.

[1] Pursuant to Fed. R. App. P. 29(c), amici certify that no person or entity, other than amici curiae, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief or authored this brief in whole or in part. The parties have consented to the filing of this brief.

INTRODUCTION

Public streets are quintessential traditional public forums. Roads of every kind—including rural roads, multi-lane roads, and high-speed roads—have served as sites of protest throughout our nation's history, from the civil rights marches and anti-war demonstrations of the 1960s and 70s to more recent protests, including marches in opposition to abortion, in support of rural healthcare, and against police brutality. The environmental and indigenous justice protests at issue in this case are no different. As one of the few communal spaces in rural areas, roads are uniquely positioned to offer rural communities, and those wishing to address them, a public space in which to associate, communicate thoughts, and discuss public issues.

Courts, including the Supreme Court and this Court, have consistently recognized that public streets are the archetypical traditional public forum, and have applied the categorical rule to hold that specific public roads—including specific rural, multi-lane, and high-speed roads—are traditional public forums, without further analysis. This Court should do the same here.

Defendants' arguments to the contrary are incorrect. Subjecting every rural road to a particularized inquiry is not necessary to ensure that the travel-related purposes of roads are safely served, as recognizing the traditional public forum status of roads does not prohibit the government from regulating conduct on streets and highways. Meanwhile, engaging in a particularized inquiry for every road or

sidewalk would likely chill protest in places that have not previously been analyzed by courts and, relatedly, burden judicial resources unnecessarily. While, under existing law, there are limited, discrete circumstances in which courts properly engage in particularized inquiries—for example, when sidewalks or streets are on a military base, within a self-contained postal service complex, on a university campus, or in the arena of a commercial plaza—none of those are relevant here.

Finally, Defendants are incorrect in arguing that this Court must dismiss this lawsuit if it is not clearly established, as a matter of law, that *every* rural road is a traditional public forum. While rural roads are ordinarily traditional public forums and the District Court's opinion should be affirmed on that basis, Plaintiffs need only establish at this stage that roads with the qualities alleged in their complaint constitute traditional public forums.

This Court should affirm the court below and hold that, absent limited circumstances, rural roads are traditional public forums.

ARGUMENT

I. STREETS, INCLUDING ROADS, ARE QUINTESSENTIAL TRADITIONAL PUBLIC FORUMS.

A. Streets hold a special significance as this nation's archetypical space for public speech and association.

More than 80 years ago, the Supreme Court held that "[w]herever the title of streets . . . may rest, they have immemorially been held in trust for the use of the public." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). In striking down a law that restricted the distribution of leaflets in the streets of Jersey City, the Court rejected the government's argument that its "ownership of streets . . . is as absolute as one's ownership of his home," and refused to grant it the power "to exclude citizens from the use thereof." *Id.* at 514. Instead, in seminal language, the Supreme Court recognized that, "time out of mind, [streets] have been used for . . . assembly, communicating thoughts between citizens, and discussing public questions"—uses that "from ancient times, [have] been a part of the privileges, immunities, rights, and liberties of citizens." *Id.* at 515.

The Court has since repeatedly recognized that it is "a basic rule . . . that a street . . . is a quintessential forum for the exercise of First Amendment rights." *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017). Indeed, "public streets a[re] the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983) (recognizing that "streets" are "quintessential public forums"); *United States v. Grace*, 461 U.S. 171, 177 (1983) ("[S]treets . . . are considered, without more, to be 'public forums.'").

It is therefore "no accident that public streets . . . have developed as venues for the exchange of ideas." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014). "Even today, they remain one of the few places where . . . speaker[s] can be confident that [they are] not simply preaching to the choir." *Id*. While "individual[s] confronted with an uncomfortable message can always turn the page [in a book or magazine], change the channel [on TV], or leave [a] Web site, . . . on public streets and sidewalks . . . listener[s] often encounter[] speech [they] might otherwise tune out." *Id.* "In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, this aspect of traditional public fora is a virtue, not a vice." *Id.* (marks and citation omitted).

Equally, traditional public forums hold a "special significance" because the fact that speech is uttered on a public street suggests that "what is at issue is an effort to communicate to the public . . . on matters of public concern." *Snyder v. Phelps*, 562 U.S. 443, 456 n.4 (2011). "[R]esort to [such] public places" has been "immemorially associated with" "opportunities for the communication of thought and the discussion of public questions." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). And this venerable tradition has a very practical side to it as well: streets provide a free forum for those who cannot afford to take out an advertisement or spend the time to write an op-ed. *See City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) ("Even for the affluent, the added costs in money or time [for certain types

of expression] . . . may make the difference between participating and not participating in some public debate.").

B. Courts have applied the rule that streets are traditional public forums categorically.

The presumption that streets are traditional public forums is so strong that, ordinarily, "a determination of the nature of the forum . . . follow[s] automatically." *Frisby,* 487 U.S. at 480. In *Frisby*, the Supreme Court applied this categorical rule to hold that streets in a town's residential area constituted a traditional public forum. The Court emphasized that its prior "decisions identifying public streets . . . as traditional public fora are not accidental invocations of a 'cliché,'" and held that "[n]o particularized inquiry into the precise nature of a specific street is necessary" because "all public streets are held in the public trust and are properly considered traditional public fora." *Id.* at 480–81.

The Supreme Court explicitly rejected the government's argument that the particulars of the streets at issue—including "the[ir] physical narrowness . . . as well as [] their residential character"—undercut their traditional public forum status by showing that the streets "have not by tradition or designation been held open for public communication." *Id.* at 480. As discussed in further detail below, the same is true here for Defendants' arguments regarding the speed and density of traffic on multi-lane rural roads.

The Supreme Court has frequently applied this rule categorically, holding that streets and roads are traditional public forums by definition. For example, in *Forsyth County v. Nationalist Movement*, the Supreme Court held, without engaging in any particularized inquiry, that an ordinance governing public assemblies on "public . . . roads" in a "primarily rural . . . county" regulated speech in "the archetype of a traditional public forum." 505 U.S. 123, 124, 126, 130 (1992) (marks omitted) (quoting *Frisby*, 487 U.S. at 480). Similarly, in *McCullen v. Coakley*, the Court held that a state law regulating access to "public way[s]" and "sidewalk[s]" regulated speech in a traditional public forum, without considering the specific roads and sidewalks where the law could be applied. 573 U.S. at 476 (alterations in original). And, in *Boos v. Barry*, the Court held that a law regulating the display of signs within 500 feet of a foreign embassy regulated speech in "traditional public fora" simply because it "bar[red] . . . speech on public streets and sidewalks." 485 U.S. 312, 318 (1988).

This Circuit has also clearly accepted and reiterated the presumed traditional public forum status of roads. "'[P]ublic places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *Pursley v. City of Fayetteville, Ark.,* 820 F.2d 951, 954 (8th Cir. 1987) (alteration in original) (citing *Grace*, 461 U.S. at 177). Under Eighth Circuit law, "[a] traditional public forum is a type of

property that 'has the physical characteristics of a public thoroughfare, . . . [that has] the objective use and purpose of open public access or some other objective use and purpose inherently compatible with expressive conduct, [and that has] historical[ly] and traditional[ly] . . . been used for expressive conduct.'" *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) (fourth and fifth alterations in original) (quoting *Warren v. Fairfax Cty*, 196 F.3d 186, 191 (4th Cir. 1999)). The vast majority of rural roads satisfy each of these factors by definition. Indeed, as this Court has recognized, the "quintessential" examples of such traditional public forums are streets, sidewalks, and public parks. *Ball v. City of Lincoln*, 870 F.3d 722, 730 (8th Cir. 2017).

Like the Supreme Court, the Eighth Circuit has applied this rule to hold that roads are traditional public forums without any further analysis. *See Ass'n of Cmty. Orgs. for Reform Now v. St. Louis Cty*., 930 F.2d 591, 594 (8th Cir. 1991) (holding that regulation of speech in "roadways" regulated speech in a traditional public forum); *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969, 974 (8th Cir. 2014) (accepting parties' agreement that ordinance regulating "speech in the public streets of Desloge" regulated "a traditional public forum") (citing *Frisby*, 487 U.S. at 480).

The same is true of other courts of appeal. In considering a law regulating speech on highways, the Fourth Circuit has held that "[t]here is . . . no question

that public streets," including the highways at issue, "qualify as traditional public forums." *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (cleaned up); *see also Warren*, 196 F.3d at 191–92 ("Since it is so likely that any given street, sidewalk, or park meets all three characteristics of a traditional public forum a court can generally treat a street, sidewalk, or park as a traditional public forum without making a 'particularized inquiry.'") (quoting *Frisby*, 487 U.S. at 481). The Sixth Circuit has similarly held that "[t]here can be no doubt that [a county's] streets . . . are traditional public fora." *Ater v. Armstrong*, 961 F.2d 1224, 1227 (6th Cir. 1992); *see also Dean v. Byerley*, 354 F.3d 540, 549–50 (6th Cir. 2004) (recognizing that "the Supreme Court considers streets . . . to be public fora for purposes of First Amendment scrutiny" and assuming that the street at issue was a traditional public forum without further analysis).

Reflecting the same categorical approach, the Fifth Circuit has applied time, place, and manner scrutiny—that is, the scrutiny that applies in a traditional public forum—to a law regulating solicitations in roadways because "the applicable law [states that] streets are traditional public forums." *Houston Chronicle Pub. Co. v. City of League City*, 488 F.3d 613, 621–22 (5th Cir. 2007) (citing *Grace,* 461 U.S. at 177). The Ninth Circuit has applied time, place, and manner scrutiny to speech restrictions in roads for the same reason. *Comite de Jornaleros de Redondo Beach*

v. City of Redondo Beach, 657 F.3d 936, 945 (9th Cir. 2011) (applying time, place, and manner scrutiny to law regulating solicitation in roadways).

C. The traditional public forum status of streets is so clear that courts compare other spaces to streets to determine their forum status.

The status of streets as traditional public forums is so well established that courts around the country often use public roads as a benchmark against which to determine the forum status of other public spaces. The Sixth Circuit has held that a paved, privately owned two-lane roadway "looks and functions like a public street, and that is enough to classify it as a traditional public forum." *Brindley v. City of Memphis*, 934 F.3d 461, 469 (6th Cir. 2019). Similarly, the Fourth Circuit has determined that a pedestrian plaza "is a traditional public forum because it is merely a combination of the three prototypical examples of traditional public fora—streets, sidewalks, and parks." *Warren*, 196 F.3d at 190. And within the last year, the Tenth Circuit held that medians on public roads are traditional public forums because "medians share fundamental characteristics with public streets, sidewalks, and parks, which are quintessential public fora." *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1067–68 (10th Cir. 2020).

This Court has similarly compared spaces to streets to determine their traditional public forum status—including by distinguishing certain spaces from streets in order to hold that they are not traditional public forums. For example, in holding that a particular commercial plaza did not constitute a traditional public

forum, this Court highlighted the ways in which the plaza differed from public streets, noting that it is "not primarily used as [a] thoroughfare for the public to travel" but instead "functions as a venue for commercial use by Arena Tenants, as a means to facilitate safe and orderly access to the Arena for its patrons, as a security screening area, and as a gathering place and entryway for Arena patrons." *Ball*, 870 F.3d at 734–35.

Similarly, this Court held that the public spaces of a specific university were not a traditional public forum, but instead an unlimited designated public forum, because they "differ[] in significant respects from public forums such as streets[.]" *Bowman*, 444 F.3d at 978 (quoting *Widmar v. Vincent*, 454 U.S. 263, 268 n.5 (1981)). Specifically, this Court held that "[a] university's purpose, its traditional use, and the government's intent with respect to the property is quite different because a university's function is not to provide a forum for all persons to talk about all topics at all times." *Id.* "Thus, streets, sidewalks, and other open areas that might otherwise be traditional public fora may be treated differently when they fall within the boundaries of the University's vast campus." *Id.* In reaching this holding, this Court recognized that, as a general matter, streets are traditional public forums.

In addition, while there are discrete and limited circumstances in which courts have considered streets and sidewalks not to be traditional public forums—

as reflected by *Ball* and *Bowman*—none apply here. *See also United States v. Kokinda*, 497 U.S. 720, 727 (1990) (plurality) (postal service sidewalk was not public thoroughfare and was "constructed solely to provide for the passage of individuals engaged in postal business"); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (sidewalks in military reservation are not a public forum because they have not "traditionally served as a place for free public assembly and communication of thoughts by private citizens"). As alleged, the rural road at issue here is not part of a commercial plaza, a university campus, a postal service complex, or a military reservation.

II. THE GENERAL RULE THAT STREETS ARE TRADITIONAL PUBLIC FORUMS HOLDS FOR RURAL ROADS, HIGH-SPEED ROADS, AND MULTI-LANE ROADS.

A. Rural roads, high-speed roads, and multi-lane roads have served as sites of protest throughout our nation's history.

The Eighth Circuit test for forum status also considers whether there "any special characteristics regarding the environment" that inform the inquiry. *Ball*, 870 F.3d at 731. If anything, the special characteristics of rural roads—as exemplified by their historic uses—confirm their traditional public forum status.

From the civil rights marches across rural fields and state lines in the 1960s to today's protests against police brutality, rural roads and highways have served as sites of protest. During the civil rights era, political leaders often relied on multi-day protest marches—on routes that necessarily included rural roads, high-speed

roads, multi-lane roads, and bridges—to capture a national audience and transport their message across the United States.

The 1965 Voting Rights March is one of the most iconic examples. On March 21, 1965, thousands of voting rights activists began a 54-mile-long journey along U.S. Route 80 from Selma, Alabama to the state capitol in Montgomery. The planned route covered bridges, sidewalks, and the highway between the two cities. *Williams v. Wallace*, 240 F. Supp. 100, 104–05, 107 (M.D. Ala. 1965). For five days, protesters marched through rural and urban areas, walking along everything from a narrow dirt road to a high-speed highway.[2] The highway was two lanes with a three-foot shoulder in some places and four lanes with a six-foot shoulder in others. *Williams*, 240 F. Supp. at 107.[3]

A year later, approximately 15,000 protesters, joined by major civil rights organizations, engaged in a march across state lines from Memphis, Tennessee to Jackson, Mississippi in the Meredith March Against Fear, crossing dirt roads, densely packed Black neighborhoods, and interstate highways and, in the process,

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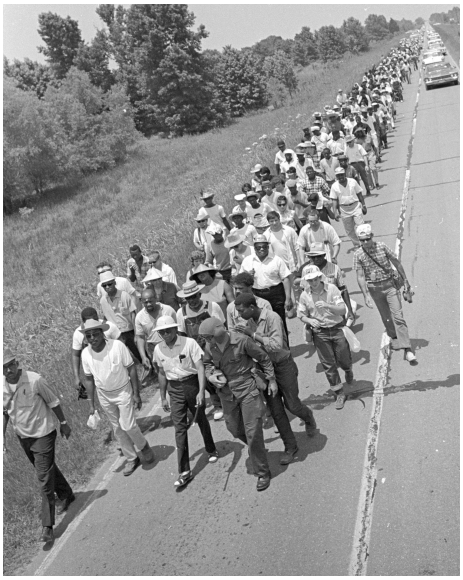
[2] Townsend Davis, *Weary Feet, Rested Souls: A Guided History of the Civil Rights Movement* 117 (1998).

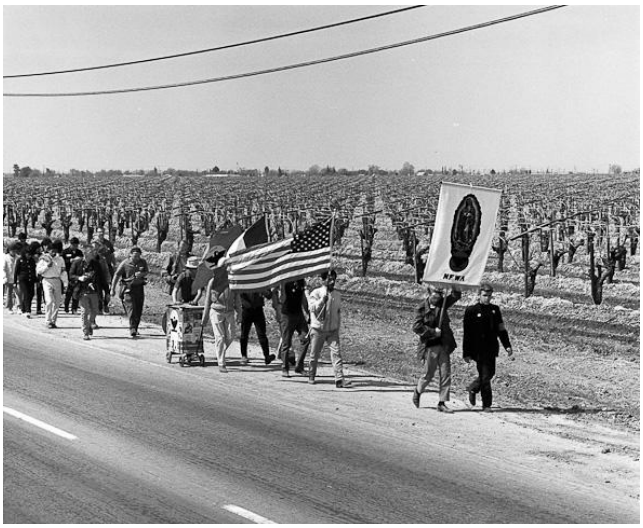
[3] Notably, a district court considering the marchers' challenge to the government's interference with their intended march held that they had a "constitutional right to march along [the h]ighway" and that Governor Wallace's efforts to "absolutely ban[] any march by any manner—regardless of how conducted" violated the First Amendment. *Williams*, 240 F. Supp. at 107.

registering over 4,000 Black Americans to vote.[4] Participants included elected officials, clergymen, and civil rights leaders like Martin Luther King, Jr. and Stokely Carmichael.

Thirty years after the Voting Rights March, Congress designated Route 80 a National Historic Trail. Half a century later, it awarded the "foot soldiers" and civil rights leaders of the Selma Marches, including the late Congressman John Lewis, Congressional Gold Medals.[5]



(Bob Fitch Photography Archive, *Meredith March Against Fear, June 1966*, Stanford Libraries,



(Paul Richards, *Farm Workers on Strike 1959–1966*, Harvey Richards Media Archive (March 1966),

[4] Aram Goudsouzian, *Down to the Crossroads: Civil Rights, Black Power, and the Meredith March Against Fear* 246 (2015).

[5] *Congressional Gold Medal Ceremony for 1965 Voting Rights Marches Foot Soldiers*, C-SPAN (Feb. 24, 2016), https://www.c-span.org/video/?405070-1/congressional-gold-medal-ceremony-1965-voting-rights-marches-foot-soldiers.

https://exhibits.stanford.edu/fitch/browse/meredith-march-against-fear-june-1966.)

https://estuarypress.com/hrma-photo-post/farm-workers-strike/.)

Concurrently, labor activists and anti-war dissidents used rural roads and highways to elevate their own political demands. From 1963 through 1975, protesters in hundreds of antiwar demonstrations walked across the roads of rural towns and major cities.[6] In Minneapolis, Minnesota, 30,000 to 40,000 people marched ten miles to the state's capitol in protest of the war, setting the record for the largest of any such demonstration in the state's history.[7] And on the West Coast, Cesar Chavez, along with leaders of the National Farm Workers association, engaged in a 340-mile pilgrimage from Delano to Sacramento, California. For twenty-five days, approximately 1,500 farmworkers and their supporters walked north on Highway 99 to bring attention to dangerous working conditions at grape farms across the state.[8]

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[6] Amanda Miller, *Vietnam-Era Antiwar Protests - Timeline and Maps 1963–1975*, Univ. of Wash., https://depts.washington.edu/moves/antiwar_map_protests.shtml.

[7] William Greider, *Fires Hit Campuses; Rallies Calm*, ProQuest Hist. Newspapers: Wash. Post, May 10, 1970, at A1.

[8] Greg Lucas, *The "Perigrinacion" Begins,* California State Library, https://cal170.library.ca.gov/march-17-1966-the-perigrinacion-begins/.

Today, activists continue the long tradition of utilizing rural roads as sites of protest. In 2015, supporters with the National Rural Health Association took to backroads to protest the closure of rural hospitals and walked 283 miles from North Carolina to Washington, D.C.[9] Rural roads and highways also feature prominently in demonstrations against abortion. In 2017, thousands of pro-life protesters participated in a prayer march along the shoulder of a narrow East Charlotte, North Carolina road outside a local abortion clinic.[10] Catholic youth engage in an annual continental pro-life pilgrimage, inspired by Pope John Paul II's 1995 challenge to "create a culture of life," walking in shifts for dozens of miles starting in Stanley County, South Dakota, with the aim of reaching Fort Pierre by nightfall.[11] Finally, each year in Mobile, Alabama, pro-life leaders, clergy, and local organizations participate in the March for Mobile, created so

[9] Will Huntsberry, *As More Rural Hospitals Close, Advocates Walk to Washington*, NPR (June 14, 2015), https://www.npr.org/2015/06/14/414466952/as-more-rural-hospitals-close-advocates-walk-to-washington.

[10] Nick de la Canal, *Anti-Abortion Group Intensifies Protests with March Outside Charlotte Clinic*, WFAE 90.7 (Dec. 2, 2017), https://www.wfae.org/local-news/2017-12-02/anti-abortion-group-intensifies-protests-with-march-outside-charlotte-clinic.

[11] Stephen Lee, *Pro-Life Youth on Cross-Country Crossroads Pilgrimage*, Crossroads Pro-Life (June 23, 2015), https://www.crossroadswalk.org/2015/06/23/pro-life-youth-on-cross-country-crossroads-pilgrimage/.

"Mobilians [who] cannot make the national March for Life in DC," can still join in nationwide commemorative protest against *Roe v. Wade*.[12]

Most recently, in the summer of 2020, protests gripped rural parts of the country following the police killing of George Floyd. On June 4, more than 1,000 protesters in Catskill, NY marched down Main Street, across the Catskill Creek bridge, finally taking a knee at the police station. Days later, in Morehead, Kentucky, a county with a population of less than 8,000 people, 400 protesters marched down Main Street, using the street to transport their message from a library to a local Veteran memorial.[13] The national outcry also inspired extensive

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[12] March for Life – Mobile, AL, Facebook, https://www.facebook.com/marchforlifemobile/. *See also* Christian Jennings, *March for Life Draws Hundreds in Mobile*, NBC 15 News (Jan. 27, 2017), https://mynbc15.com/news/local/march-for-life-draws-hundreds-in-mobile. Similar marches are held annually across hundreds of rural towns, from Palatine, Illinois to Cody, Wyoming. *See* Bob Susnjara, *March for Life Draws Hundreds Along Northwest Highway in Palatine*, Daily Herald (Oct. 19, 2019), https://www.dailyherald.com/news/20191019/march-for-life-draws-hundreds-along-northwest-highway-in-palatine; Zac Taylor, *About 90 Come Out for Annual Right to Life March Saturday*, Cody Enterprise (Jan. 22, 2018), https://www.codyenterprise.com/news/local/article_32261b62-ffb9-11e7-99a8-5bbd2199bcba.html.

[13] John Flavell, *Black Lives Matter March in Morehead*, Daily Independent (June 6, 2020), https://www.dailyindependent.com/black-lives-matter-march-in-morehead/image_30585228-a836-11ea-aded-7ba0ce4ce7a3.html; Nick Oliver, *Hundreds Come Together for Morehead Peaceful Protest*, WKYT (June 6, 2020), https://www.wkyt.com/content/news/Hundreds-come-together-for-Morehead-peaceful-protest-571075201.html.

counterprotest in the streets, including in Wantagh, New York, home to a population of both active and retired law enforcement agents. More than 1,000 local protesters marched down Wantagh Avenue in the pro-police rally, with participants chanting "back the blue" and "Blue Lives Matter."[14]

Thus, our nation's rural roads, high-speed roads, and multi-lane roads have a storied history of protest in accordance with the categorical definition of traditional public forums under the law. They are public thoroughfares that are "inherently compatible with expressive conduct, [and that have] historical[ly] and traditional[ly] . . . been used for expressive conduct." *Bowman,* 444 F.3d at 975.

B. Courts have specifically applied the categorical rule to rural roads.

Courts around the country have specifically held that rural roads, including multi-lane and high-speed roads, constitute traditional public forums. *See e.g., Forsyth Cty*, 505 U.S. at 130 (holding that "public . . . roads" in a "primarily rural . . . county" are "the archetype of a traditional public forum."); *Jacobson v. United States Dep't of Homeland Sec.,* 882 F.3d 878, 882–83 (9th Cir. 2018) (holding that public rural roads are traditional public forums and the government bears the burden of proving otherwise, by showing that they no longer function as public

[14] Kayla Guo, *Over 1,000 Attend 'Back the Blue' March in Wantagh: PHOTOS*, Patch (July 6, 2020), https://patch.com/new-york/wantagh/over-1-000-attend-back-blue-march-wantagh-photos; Jesse Coburn, *Supporters March to Shine Light on Work of Police Officers*, Newsday (July 6, 2020), https://www.newsday.com/long-island/nassau/wantagh-blue-lives-matter-rally-police-1.46424236.

rural roads); *Reynolds*, 779 F.3d at 225 (holding that "[t]here is . . . no question that public streets," including the highways at issue, "qualify as traditional public forums"); *Brindley*, 934 F.3d at 469 (holding that two-lane roadway that directly intersects with a busy public thoroughfare is a traditional public forum).

Indeed, rural roads are often a necessary site for communicating certain messages or reaching certain audiences. As one district court explained in holding that rural roads constitute a traditional public forum and rejecting the government's argument "that rural roads are not proper public forums because an average citizen does not frequent such roadways, nor would the average citizen expect to find vigorous public debate in such areas," "picketing in a park or along a roadway in a more urban area" may be a less effective means of communication as it may be "more unlikely that the intended communication will reach its intended audience." *Pineros Y Campesinos Unidos del Noroeste v. Goldschmidt*, 790 F. Supp. 216, 220 (D. Or. 1990).

The traditional public forum status of streets, including rural roads that do not fall within certain limited exceptions, is therefore well established, and the District Court's denial of Defendants' motion to dismiss on qualified immunity grounds should be affirmed on this basis alone.[15]

[15] The cases Defendants cite for the proposition that "locations adjacent to or related to modern high-speed highway systems . . . are nonpublic forums" do not support it. *See* State Defs. Br. at 15; Sheriff Def. Br. at 29. They consider the

C. Holding that rural roads, absent limited exceptions, are traditional public forums would not hinder the government's ability to keep roads safe, and it would promote free speech and judicial efficiency.

Notwithstanding this case law and clear history, Defendants argue that rural roads cannot be traditional public forums because "[p]ermitting people to assemble and discuss the environment amid cars, trucks and semis traveling at high speeds is a recipe for personal injury and death." State Defs. Br. at 18. Defendants' concerns are red herrings.

"The designation of an area as a traditional public forum does not prevent localities from addressing such significant concerns as public safety and the movement of traffic." *Warren*, 196 F.3d at 190. The government's concerns regarding the "proximity, speed, and volume of passing cars" "may support [an] argument that a time, place, and manner restriction is constitutional . . . [b]ut ample precedent holds that these characteristics do not deprive public streets of their

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forum status not of roads, but of rest areas, signage that is part of Adopt-a-Highway Programs, and highway overpass fences. *See Brown v. California Dep't of Transp.*, 321 F.3d 1217, 1222 (9th Cir. 2003) ("Because [the plaintiffs] hung their banners from highway overpass fences, the forum at issue is the highway overpass fence."); *Jacobsen v. Bonine,* 123 F.3d 1272, 1274 (9th Cir. 1997) ("These [rest area] walkways are integral parts of the rest stop areas, which are themselves oases from motor traffic."); *Texas v. Knights of Ku Klux Klan*, 58 F.3d 1075, 1078 (5th Cir. 1995) ("[W]e define the forum in this case as the Program rather than the public highways.").

status as public fora." *McCraw*, 973 F.3d at 1068–69 (citing *Frisby*, 487 U.S. at 481).

While regulations of speech in a traditional public forum are subject to a higher level of scrutiny than the reasonableness standard Defendants seek to apply here, a road's traditional public forum status does not deprive the government of all power to regulate speech there. Rather, the government may impose "reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

Equally, Defendants' argument that the road's "primary dedicated purpose" is to serve not as a site for expression, but rather as a route for "safe and efficient transportation," is inapposite. *See* State Defs. Br. at 16–18; Sheriff Def. Br. at 30. As the Fourth Circuit has explained, "[o]ne cannot seriously argue with Justice Kennedy's observation that the traditional public fora of streets, sidewalks, and parks are not primarily designed for expressive purposes." *Warren*, 196 F.3d at 195 (citing *Int'l Soc. for Krishna Consciousness, Inc. v. Lee* ("*ISKCON*"), 505 U.S.

672, 696–97 (1992) (Kennedy, J., concurring in the judgment)). And yet they are, undeniably, traditional public forums. Even for spaces that are not categorically traditional public forums, "[t]he test is not whether the property was designed for expressive activity, but whether the objective uses and purposes of the property are compatible with the wide measure of expressive conduct characterizing public fora." *Id.*; *see also First Unitarian Church of Salt Lake City v. Salt Lake City Corp*., 308 F.3d 1114, 1125–26 (10th Cir. 2002) (citing *ISKCON,* 505 U.S. at 686 (O'Connor, J., concurring)). As discussed at length above, rural roads—which have served as a site of protest throughout our nation's history—are compatible with expressive uses.

Moreover, requiring a particularized inquiry into the government's intended purpose for any piece of public property could, in practice, enable the government to destroy the public forum status of any public land by deeming its purpose to be anything other than serving as a site for expression. But the Supreme Court has made clear that the government "may not by its own *ipse dixit* destroy the 'public forum' status of streets and parks which have historically been public forums," including by listing them "within the statutory definition of what might be considered a non-public forum[.]" *Grace*, 461 U.S. at 180. Courts "reject the contention that the [government's] express intention not to create a public forum controls [their] analysis. The government cannot simply declare the First

Amendment status of property regardless of its nature and its public use." *First Unitarian Church*, 308 F.3d at 1124.

Making particularized inquiries the norm for rural roads, as Defendants propose, rather than the limited exception, as the caselaw requires, would chill speech on any specific piece of land that a court had not previously considered and deemed a traditional public forum. Relatedly, requiring courts to consider the facts of every public street would unnecessarily burden judicial resources.

III. EVEN WITHOUT A CATEGORICAL RULE, THE DISTRICT COURT'S DECISION TO DENY DEFENDANTS' MOTION TO DISMISS WAS CORRECT.

Finally, even if this Court declines to apply the rule that rural roads, outside of certain limited categories, constitute traditional public forums, the court below was correct in denying Defendants' motion to dismiss on qualified immunity grounds. State Defendants' argument that the district court had to consider "the purely legal question [of] whether the forum status of rural high-speed highways is a point of law that is beyond debate" overstates the inquiry. State Defs. Br. at 10, 11, 14–15; Sheriff Def. Br at 28. Qualified immunity does not suspend the normal rules of civil procedure. *See Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam) (summarily reversing appellate court's failure to apply settled summary judgment standards in qualified immunity context). And "[n]umerous Eighth Circuit cases have held that defendants are entitled to dismissal under Rule

12(b)(6) if they show they are entitled to qualified immunity *on the face of the complaint*." *Vandevender v. Sass*, 970 F.3d 972, 975 (8th Cir. 2020) (emphasis added) (marks and citation omitted).

The question on which Defendants must prevail in order for the complaint to properly be dismissed at this stage is not whether *every* rural road is a traditional public forum—though, as discussed above, the answer to this question is "yes," absent certain limited exceptions not present here—but rather whether a road *with the characteristics of the road alleged here* constitutes a traditional public forum. That is the inquiry the district court properly engaged in.

CONCLUSION

For the foregoing reasons, amici respectfully urge this Court to apply the rule set forth above—that, absent limited exceptions not present here, rural roads are traditional public forums by definition—to affirm the district court's opinion.

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Respectfully submitted,

/s/ *Vera Eidelman*
Vera Eidelman
American Civil Liberties Union Foundation
125 Broad Street
New York, NY 10004
Tel.: (212) 549-2500
veidelman@aclu.org

Andrew Malone
American Civil Liberties Union of North

Dakota, South Dakota, and Wyoming*
PO Box 1170
Sioux Falls, SD 57101
Tel.: (678) 416-8970
amalone@aclu.org

**Admitted only in South Dakota*

*Counsel for Amici Curiae***

** Shreya Tewari, Brennan Fellow at the ACLU's Speech, Privacy & Technology Project, contributed substantial legal research and drafting to this brief.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify as follows:

1. This Brief of Amici Curiae in Support of Plaintiffs–Appellees and Affirmance complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,452 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using the word-processing system Microsoft Word 2010.

Dated: January 29, 2021

By: /s/ *Vera Eidelman*
Vera Eidelman

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on January 29, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 29, 2021

By: /s/ *Vera Eidelman*
Vera Eidelman

Counsel for Amici Curiae