

STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

GREGORY BOMBARD,

v.

JAY RIGGEN, Vermont State Police
Trooper, and STATE OF VERMONT,

Washington Unit
Docket No. 21-CV-176

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As permitted under Vermont Rules of Civil Procedure 56 and the Stipulated Discovery and Arbitration Scheduling Order in this case, as modified by this Court's August 2, 2023 Entry Order ¶ 2, Plaintiff Gregory Bombard submits his motion for summary judgment.

INTRODUCTION

Criticizing and insulting government officials—whether the President or a police officer—is speech “at the core of First Amendment values.”

, 164 F.3d 757, 771 (2d Cir. 1999) (citation omitted), , 531 U.S. 533 (2001). Greg Bombard did nothing more than, from his driver seat, direct the words “asshole” and “fuck you” and his middle finger at Vermont State Trooper Jay Rikken after an illegal traffic stop. For this, and without other lawful authority, Rikken stopped, arrested, and jailed Bombard. He also towed Bombard's car, sent his mugshot to Vermont news outlets, and initiated criminal proceedings against Bombard that lasted nearly a year.

The material facts are undisputed, with most of them videorecorded by Trooper Rikken's front-mounted cruiser camera and his body-worn microphone. The interaction started when, on a wintry February day in 2018, Rikken believed Bombard displayed his middle finger at him as their vehicles passed each other. Within seconds, Trooper Rikken turned around and pulled Bombard over. He detained Bombard and interrogated

of Riggen's stop. Eventually, Riggen abruptly walked away while Bombard was mid-question.

Riggen, already at his cruiser's driver-side door, heard Bombard say "asshole" and "fuck you" and immediately decided to arrest Bombard for "profane behavior in public." Bombard then pulled away into traffic and briefly displayed his middle finger just out of his window. Riggen pulled Bombard over again, immediately walked to his door, and told him he was under arrest for "disorderly conduct 101." To further punish Bombard, Riggen ordered Bombard's car towed because he had stopped—as required by Riggen and law—in front of a sign that said "no parking this side of the street."

Riggen actions repeatedly violated clearly established First and Fourth Amendment law. Police cannot stop motorists for displaying their middle finger.

, 704 F.3d 105, 110 (2d Cir. 2013). The stop, arrest, and vehicle seizure were textbook First Amendment retaliation. , 139 S. Ct. 1715, 1722 (2019) (citing

rights. SUMF ¶ 172; Ex. 1 [Bombard Dep. Tr. 102:1–8, 112:11–25, 136:14–139:3].

On February 9, 2018, Bombard was driving in his hometown, not violating any law, when Trooper Jay Rikken stopped and harangued him based on his mistaken belief that Bombard had flipped him off. At the conclusion of that first stop, Bombard—humiliated and upset that Rikken had pulled him over without any lawful basis—cursed at Rikken and actually did flip him off. In response, Rikken put Bombard through a series of humiliating ordeals: He stopped Bombard again, arrested him, berated him, jailed him, had his car towed, had his fingerprints and mugshot taken, submitted his mugshot to Vermont media outlets, and ensured that he was charged with disorderly conduct.

A.

on the same road. SUMF ¶ 6; Ex. 2 [Riggen Aff. ¶ 1]; Ex. 3 [Riggen Dep. Tr. 80:3–9]. As their vehicles were about to pass each other, Riggen looked through Bombard's front windshield and believed he saw Bombard display his middle finger. SUMF ¶ 8; Ex. 2 [Riggen Aff. ¶ 2]; Ex. 3 [Riggen Dep. Tr. 82:17–83:7]. Because of glare on Bombard's windshield, Riggen saw nothing other than "a guy wearing glasses" who Riggen believed was displaying his middle finger. SUMF ¶ 16; Ex. 3 [Riggen Dep. Tr. 86:8–11, 98:19–22]; Ex. 2 [Riggen Aff. ¶ 1]. He could not see whether there were passengers in Bombard's vehicle. SUMF ¶ 17; Ex. 2 [Riggen Aff. ¶ 2]; Ex. 3 [Riggen Dep. Tr. 91:18–92:1, 113:18–114:3]. Nor could Riggen see any emotion on Bombard's face. SUMF ¶ 20; Ex. 3 [Riggen Dep. Tr. 85:2–14].

But Trooper Riggen believed that Bombard had intentionally displayed the middle-finger gesture

SUMF ¶ 56; Ex. 7 [Cruiser Video 1:46–2:08]. Bombard also asked Rigger about the basis for the stop—i.e., what crime he would have been committing if he had actually displayed his middle finger. SUMF ¶ 59; Ex. 7 [Cruiser Video 3:14–3:38]. Rigger never told Bombard of any law that he believed Bombard had broken; nor did he ever ask for Bombard’s license, registration, or insurance. SUMF ¶¶ 66, 69; Ex. 7 [Cruiser Video 1:36–4:50]; Ex. 3 [Rigger Dep. Tr. 168:15–17]. Bombard told Rigger that he planned to file a complaint against him. SUMF ¶ 60; Ex. 7 [Cruiser Video 3:50]. Bombard was in the middle of asking Rigger—“So if I did flip you off . . .”—but was cut short by

19]; Ex. 3 [Riggen Dep. Tr. 197:20–198:3]; Ex. 7 [Cruiser Video 4:50–5:10]. Bombard did not believe anyone other than Riggen would have been able to hear him. SUMF ¶ 70; Ex. 1 [Bombard Dep. Tr. 81:22–82:7].

Bombard began pulling forward along the side of the road and, before starting to reenter the roadway, yielded to wait for a passing vehicle to go by. SUMF ¶ 79; Ex. 7 [Cruiser Video 4:59–5:06]. As Bombard merged with traffic and drove away, Riggen saw Bombard place his hand just outside of the driver-side window and display his middle finger for no more than six seconds as he drove. SUMF ¶¶ 87, 88; Ex. 2 [Riggen Aff. ¶ 10]; Ex. 3 [Riggen Dep. Tr. 172:21–173:15]; Ex. 7 [Cruiser Video 5:03–5:09].

Riggen knew that the cursing and middle finger were directed at him. SUMF ¶ 91; Ex. 3 [Riggen Dep. Tr. 252:7–10]. Riggen did not think Bombard's expressions were violent. SUMF ¶ 103; Ex. 3 [Riggen Dep. Tr. 251:15–17]. Riggen, however, believed they were "tumultuous" because "holding a middle finger out the window, for example, with those loud profanities in front of people who aren't willfully wanting to receive that to me is tumultuous." SUMF ¶ 106; Ex. 3 [Riggen Dep. Tr. 251:18–252:4]. However, Riggen did not see anyone else observing the cursing or the middle finger, although he newly claims one driver, 50 feet from Riggen, may have heard the utterances but not been upset by them. SUMF ¶¶ 77, 92, 101, 102; Ex. 3 [Riggen Dep. Tr. 176:3–15, 180:11–15, 182:10–25, 196:1–9, 202:20–25]. There were no pedestrians in the area. SUMF ¶ 75; Ex. 1 [Bombard Dep. Tr. 82:2–19]; Ex. 3 [Riggen Dep. Tr. 197:20–198:3]; Ex. 7 [Cruiser Video 4:50–5:10]. Riggen saw only

four vehicles in the vicinity, and, on account of it being a cold day, none of those vehicles had their windows down. SUMF ¶¶ 95, 97; Ex. 3 [Riggen Dep. Tr. 174:1–13, 201:16–202:3]; Ex. 7 [Cruiser Video 4:49–5:10]. Bombard's cursing is not even audible in the recording of the incident, which captured audio from Riggen's body-worn mic. SUMF ¶ 78; Ex. 7 [Cruiser Video 4:53–5:00]; Ex. 3 [Riggen Dep. Tr. 183:1–185:15]. Nor is Bombard's middle finger visible in the recording. SUMF ¶ 90; Ex. 7 [Cruiser Video at 5:00–5:10].

After Bombard reentered the roadway and began driving away, Trooper Riggen followed him in his police cruiser. SUMF ¶¶ 79, 111 Ex. 7 [Cruiser Video 4:59–5:28]. On the cruiser video, Riggen can be heard saying to himself that when Bombard "pulled away, he called me an asshole and said fuck you. Flipped the bird. I'm going to arrest him for disorderly conduct. There were multiple people around there." SUMF ¶ 111; Ex. 7 [Cruiser Video 5:10–28]. After Bombard signaled to turn left onto a side street, Riggen turned on his siren. SUMF ¶ 114; Ex. 7 [Cruiser Video 4:59–5:25]; Ex. 2 [Riggen Aff. ¶ 12]; Ex. 3 [Rggen VDTT21 T -0.2 (.o0.2 (x) -0590.2544([R]-0.2 (i) 0

5:40–6:04].

Trooper Rigger had the discretion to cite and release Bombard for disorderly conduct, a misdemeanor, without arresting and taking him into custody. SUMF ¶ 112; Ex. 3 [Rigger Dep. Tr. 69: 22–71:18, 76:21–78:17, 208:20–216:16]. But, instead, he told Bombard that he was under arrest and ordered him out of his car. SUMF ¶ 122;

7:26–9:30]. As he secured Bombard's handcuffs, Riggen repeatedly berated Bombard for his expression. Riggen told Bombard that he now believed Bombard really had given him the middle finger before the first stop. SUMF ¶ 99;

vehicle towed. SUMF ¶ 146; Ex. 3 [

released with a citation to appear in criminal court. SUMF ¶ 155; Ex. 2 [Riggen Aff. ¶¶ 15–16].

Riggen sent media outlets information about Bombard's arrest along with Bombard's mugshot. SUMF ¶ 156; Ex. 3 [Riggen Dep. Tr. 166:4–167:21, 267:11–268:24]; Ex. 9 [Email from Jay Riggen to VSPMedia (Feb. 9, 2018)]. Many people in Bombard's community learned about his arrest from two local newspapers who covered it and from a Vermont State Police webpage. SUMF ¶ 157; Ex. 1 [Bombard Dep. Tr. 42:2–18, 124:10–125:12]. This publicity humiliated Bombard, who thereafter did not want to be seen as much in St. Albans, where he lives. SUMF ¶ 169; Ex. 1 [Bombard Dep. Tr. 41:23–42:5].

Trooper Riggen submitted an affidavit of probable cause describing his version of his encounter with Bombard to the Franklin County State's Attorney. SUMF ¶ 158; Ex. 2 [Riggen Aff.]. Riggen alleged that Bombard had committed the crime of disorderly conduct by using "loud profanity" along with an "obscene gesture" in front of "numerous members of the public." SUMF ¶ 160; Ex. 2 [Riggen Aff. ¶ 12]. In February 2018, based on Riggen's affidavit and the cruiser video, the Franklin County State's Attorney charged Bombard with disorderly conduct under 13 V.S.A. § 1026(a)(1); claiming that Bombard, "with intent to cause public annoyance, engaged in tumultuous behavior." SUMF ¶ 161; Ex. 10 [Information, , Docket No. 241-2-18 (Vt. Sup. Ct. Feb. 28, 2018)]. The court—without a hearing, viewing the facts in the light most favorable to the state, and based on assertions in Riggen's affidavit—denied Bombard's motion to dismiss the

charge for lack of prima facie case. SUMF ¶ 162; Ex. 11 [Decision on Defendant's Suppress and Dismiss at 3–4, Docket No. 241-2-18 (Vt. Sup. Ct. Aug. 31, 2018)].

The Franklin County State's Attorney subsequently filed a second charge of disorderly conduct against Bombard based on the same event, for "recklessly create[ing] a risk of public annoyance by obstructing vehicular traffic" in violation of 13 V.S.A. § 1026(a)(5)." SUMF ¶ 163; Ex. 12 [Amended Information,

, Docket No. 241-2-18 (Vt. Sup. Ct. Nov. 21, 2018)]. In December 2018, the court granted Bombard's motion to dismiss the § 1026(a)(5) charge because one

"cannot

He still respects police officers, but is now afraid to critique not only the Vermont State Police, but police generally. SUMF ¶¶ 170–72; Ex. 1 [Bombard Dep. Tr.

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allege the absence of probable cause or that Rigger's conduct was in retaliation for protected speech. . at 4. Defendants also argued, among other things, that Bombard should be collaterally estopped from arguing an absence of probable cause.

at 14. Bombard opposed the motion. Pl.'s Opp'n Mot. Dismiss, July 2, 2021. This Court denied Defendants' motion in its entirety, holding, among other things, that (1) Bombard adequately alleged a lack of probable cause, (2) collateral estoppel did not apply, and (3) the State does not have a sovereign immunity defense to Article 13 retaliation claims. Ruling on Defs.' Mot. to Dismiss ("Order"), Dec. 21, 2021.

I. Bombard Is Entitled to Summary Judgment on His Unlawful Seizure Claims Because Trooper Rigger Had No Lawful Justification for the Initial Traffic Stop and the Law Was Clearly Established.

This Court should grant summary judgment for Bombard on Count 1, his unlawful-seizure claim based on Rigger's initial stop. A driver's extended middle finger does not create reasonable suspicion of a crime or traffic violation justifying a traffic stop. Nor did Rigger have any other lawful basis to pull Bombard over. And because courts around the country—including the Second Circuit—have held that giving an officer the middle finger is not a reasonable basis for a traffic or "community care" stop, Rigger is not entitled to qualified immunity.

- A. Trooper Rigger falsely arrested Bombard in violation of the Fourth Amendment, Article 11, and common law tort of false arrest when he stopped Bombard without a lawful basis.

The Fourth Amendment of the United States Constitution, Article 11 of the Vermont Constitution, and the common law tort of false arrest all provide robust protections against unreasonable seizures.² A lawful seizure—including a traffic stop³—requires that a police officer "have, at a minimum, reasonable suspicion that criminal activity is afoot." *State v. Rigger*, 2008 VT 23, ¶ 4;

² The tort of false arrest in Vermont is analyzed like an Article 11 violation. It is an "unlawful restraint by one person of the physical liberty of another."

, 551 F.3d 187, 191–93 (2d Cir. 2009). In limited circumstances, courts have permitted an exception to this constitutional threshold: An officer may perform a traffic stop without reasonable suspicion of a crime “to carry out community caretaking functions to enhance public safety.” (quoting , 157 Vt. 657, 658 (1991) (mem.)).⁴ These sole bases for a lawful motor vehicle stop are also enumerated in the Vermont State Police’s Investigative Motor Vehicle Stop Directive. SUMF ¶ 40, Ex. 6 [VSP-DIR-403 at 2.1].

There is no plausible foundation to support reasonable suspicion or the community care exception here. Rigger did not have and has never claimed to have had suspicion, reasonable or otherwise, that Bombard engaged in any criminal activity or committed a traffic infraction. SUMF ¶ 30; Ex. 3 [Rigger. Dep. Tr. 157:13–16] (regarding displaying the middle finger, “I know he’s allowed to do it”);

SUMF ¶ 22; Ex. 3 [Rigger Dep. Tr. 91:18–20] (noting Rigger saw no problems with Bombard’s driving). And, although giving the finger may be impolite, it is no crime: “This ancient gesture of insult is not the basis for a suspicion of a traffic violation or impending criminal activity.” , 704 F.3d at 110; , 448 F. Supp.,96 (F.) 0. 7SC SCd () 0.2 (7) ((W]TJ ET D0.2 (n)]T

create probable cause or reasonable suspicion that [a driver] violated any law.”)

(internal quotation marks and citations omitted). There is no dispute that Riggen

distress or needed assistance, or reasonably prompted an inquiry in that regard,”
 , 2013 VT 92, ¶ 9 (internal quotations and citations omitted).

“Specific and articulable facts” are critical. . A vague fear of an ambiguous
general threat is insufficient under the community caretaking exception:

“[C]onclusory speculations” do not pass constitutional muster. ¶ 15 (citing

, 157 Vt. at 658); , 2007 VT 20, ¶ 8 (mem.) (“[W]e
find the trooper’s actions unreasonable given the ambiguous threat, if any, created
by defendant.”). Instead, if a police officer lacks reasonable suspicion but points to

something is wrong with the motorist or vehicle, a community caretaking stop is not justified. *State v. [redacted]*, 163 Vt. 259 (1995).

To illustrate, in *State v. [redacted]*, a community caretaking investigation on Route 100 in Stowe was permissible when a car was stopped “barely off the travel lane of the highway, late at night,” just before a slight curve and narrowing of the road, with its headlights and right blinker on, impeding southbound traffic’s visibility. 2008 VT 23, ¶¶ 1, 6. The location of the defendant’s car was “abnormal and unsafe,” presenting “a potential hazard to other motorists negotiating the curve in the dark.” ¶ 6. The specific facts objectively indicated an emergency or imminent threat to other motorists, and the stop was therefore reasonable.

In contrast, in *State v. [redacted]*, the Vermont Supreme Court found the community caretaking exception inapplicable where a traffic stop was unsupported by specific and articulable facts objectively indicating distress—a holding familiar to *Riggen*, who was the trooper who made the unlawful stop. 2013 VT 92. *Riggen* had followed the driver in *State v. [redacted]* along a gravel road at night, “all the while observing no speeding, erratic driving, equipment defects, or other violations involving either the vehicle or its operation.” ¶ 3. The driver, of his own choice, pulled over along a desolate section of the road, which *Riggen* found so “unusual” that he decided to effect a seizure to provide some ill-defined form of assistance, despite the fact that the driver did not signal distress. ¶¶ 5, 15. The Vermont Supreme Court was unpersuaded by *Riggen*’s vague worry; holding that, “[i]n the absence of any specific indicia of distress” (*State v. [redacted]*, “pulling over in an unsafe place”),

Nor were Rigger's

that he nebulously classifies as “unusual” is not the benchmark for a valid traffic stop.

“It is axiomatic that officers are on abundant notice of stringent free speech protections”—including the fact that “[g]estures intended to communicate ideas are protected speech under the First Amendment of the Constitution, subject to strict limitations.” _____, 448 F. Supp. 3d at 576 (citing _____, 337 U.S. 1, 4 (1949)). Protected gestures include the middle finger. Thus, as the Second Circuit has made clear, giving a police officer the finger while in a car is not grounds for a traffic stop.

For example, in _____ after a man in a passing car gave a police officer the middle finger, the officer effected a traffic stop, ultimately arresting the man for disorderly conduct. 704 F.3d at 108. Although the officer provided myriad excuses for the stop (ranging from a familiar refrain that the officer wanted to assure everyone’s safety to theorizing that the man might have been trying to get the officer’s attention), the court was unpersuaded. _____. The officer was not entitled to qualified immunity on a Fourth Amendment claim “because a _____ police officer would not have believed he was entitled to initiate the law enforcement process in response to giving the finger.” _____. at 110.

The Second Circuit is in good company. “Courts across the country . . . have refused to apply qualified immunity to parallel fact patterns” to excuse an officer’s unlawful reaction to a civilian making a rude gesture. _____, 448 F. Supp. 3d

because he made an offensive gesture? The court finds that he does.” . at 576.

This Court should likewise find that Rigger is not entitled to qualified immunity here.⁵

II. Bombard Is Entitled to Summary Judgment on His Retaliation Claims Because Rigger Pulled Him Over, Arrested Him, and Seized His Vehicle to Punish His Protected Speech.

Rigger’s unconstitutional stop, arrest, and vehicle seizure violate bedrock First Amendment and Article 13 principles. Government officials who retaliate against an individual for protected speech violate the First Amendment. , 139 S. Ct. at 1722 (citing

¶ 10. That Bombard engaged in protected speech and suffered injuries as a result cannot be disputed.⁶

This Court should grant summary judgment on Bombard's retaliation claims because a reasonable jury could only determine Bombard's protected speech motivated or substantially caused Riggen's retaliatory actions. First, it is undisputed that Riggen performed a traffic stop because he mistakenly believed Bombard had engaged in protected speech—displaying his middle finger in Riggen's direction as their vehicles passed each other. Compl. & Answer ¶¶ 2, 84; SUMF ¶ 28. Riggen's mistake of fact does not impact the retaliation analysis. Second, it is not disputed that Riggen arrested Bombard because he directed two curse words and his middle finger—protected speech—at Riggen after the first stop concluded. A reasonable jury could not decide otherwise. Third, there can be no genuine dispute that Riggen seized Bombard's vehicle without lawful authority and in retaliation for the protected speech. Summary judgment is, therefore, warranted on Bombard's First Amendment and Article 13 retaliation claims (Counts 2, 3, and 4).

⁶ Because law enforcement actions such as detentions, arrests, and vehicle seizures meet the third prong of the retaliation analysis, plaintiff forgoes discussion on this point. *g.*, , 732 F.3d at 160 (citing the "additional scrutiny at [a] border crossing" present in , 509 F.3d 89, 102 (2d Cir. 2007)—

A. Rigger mistakenly perceived protected speech, and Bombard then engaged in protected speech to protest the illegal stop.

Rigger first stopped Bombard because he wrongly believed Bombard gave him the middle finger and then arrested Bombard because he actually gave him the middle finger. Like spoken insults, the middle-finger gesture is protected speech. “The United States Supreme Court has long recognized that non-verbal gestures and symbols may be entitled to First Amendment protection.”

, No. 2:07cv157, 2009 WL 10728584, at *3 (W.D. Pa. Mar. 23, 2009)

(citing , 491 U.S. 397, 404 (1989)). For example, in

, the Supreme Court held that a jacket inscribed with “Fuck the Draft” was protected speech. 403 U.S. 15, 16, 26 (1971); , 110 F. Supp. 2d 1099, 1104

Amendment does not vary its protections for speech depending on how listeners react. *Brandenburg v. Ohio*, 505 U.S. 123, 134–35 (1992)

(“Speech cannot . . . be punished or banned[] simply because it might offend a hostile mob.”); *United States v. Alvarez*, 582 U.S. 218, 250 (2017) (Kennedy, J., concurring in part and concurring in judgment) (noting the First Amendment’s prohibition on burdening speech based on “whether the relevant audience would find the speech offensive”).

At the time Bombard cursed and displayed his middle finger, Rigger saw only four other vehicles and there were no pedestrians. SUMF ¶¶ 72, 95; Ex. 3 [Rigger Dep. Tr. 201:16–202:3]. The vehicles were 30 to 40 feet away from Bombard.

bus. SUMF ¶ 99; Ex. 3 [Riggen Dep. Tr.182:15–183:9]. By Riggen’s estimate, the back of the bus was also 40 feet from Bombard’s driver seat. SUMF ¶ 98; Ex. 3 [Riggen Dep. Tr. 173:17–25, 174:19–21]; Ex. 7 [Cruiser Video 4:48–5:00]. Bombard rightly believed that no one could hear his utterances. SUMF ¶ 70; Ex. 1 [Bombard Dep. Tr. 81:22–82:7]. Because Bombard did not have the requisite intent—acting intentionally or recklessly—Riggen did not have probable cause to believe Bombard intended to cause or recklessly risked “public inconvenience or annoyance.” 13 V.S.A. § 1026(a).

Second, probable cause of “tumultuous . . . behavior” requires a “violent outburst” or act of physical aggression portending violence—and it is undisputed that Bombard’s expressions were not violent. SUMF ¶¶ 103–04; Ex. 3 [Riggen Dep. Tr. 251:15–17]. The Vermont Supreme Court has consistently, for decades, required an element of physical violence to uphold disorderly conduct convictions based on “tumultuous . . . behavior.” For example, in *State v. [redacted]*, the Vermont Supreme Court upheld the conviction of a defendant who had not merely yelled profanities at a police officer, but also repeatedly refused to comply with the officer’s instructions and attempted to bite the officer’s hand—having to then be dragged into a holding cell. 144 Vt. 171, 171–74 (1984), *cert. denied*, 146 Vt. 252 (1985) and *State v. [redacted]*, 148 Vt. 186 (1987). In *State v. [redacted]*, the Court upheld the disorderly conduct conviction because the defendant had continuously yelled “loud and boisterous” profanities at officers outside a motel at night, twice attempted to physically block officers from entering the motel, and physically

he likely intended to physically harm another. “Tumultuous” behavior is only that which includes violence or an act of physical aggression portending violence.

It is undisputed that Bombard did not engage in violence, SUMF ¶¶ 103–04; Ex. 3 [Riggen Dep. Tr. 251:15–17], and there can be no genuine dispute that Bombard’s conduct did not indicate an intent to “physically injure someone or become violent,” *State v. Riggen*, 2019 VT 37, ¶ 4. Riggen walked away from Bombard’s car as Bombard was asking what would happen if he had displayed his middle finger. SUMF ¶ 65; Ex. 7 [Cruiser Video 4:50]; Ex. 1 [Bombard Dep. Tr. 131:19–133:4]. Riggen returned to his cruiser’s driver-side door. SUMF ¶ 70; Ex. 2 [Riggen Aff. ¶ 9]; Ex. 3 [Riggen Dep. Tr. 69:1–23, 169:13–20]; Ex. 1 [Bombard Dep. Tr. 71:11–16]. While standing next to his closed door, Riggen heard Bombard say “fuck you” and “asshole.” Riggen immediately thought “now it’s become disorderly conduct . . . well, I’m going to have to arrest this guy.” SUMF ¶ 71; Ex. 3 [Riggen Dep. Tr. 169:20–170:8]. But Riggen admitted he did not view Bombard’s words as violent:

Q: You didn’t think Mr. Bombard’s expressions here were violent, did you?

A: No.

SUMF ¶¶ 103–04; Ex. 3 [Riggen Dep. Tr. 251:15–17]. Riggen nevertheless thought he had probable cause that Bombard’s expressions were “tumultuous” because he engaged in “profanity” that was “somewhat perhaps exaggerated”—i.e., “loud profanities in front of people who aren’t willfully wanting to receive that.” SUMF ¶ 106; Ex. 3 [Riggen Dep. Tr. 251:18–252:4]. “[T]he tumultuous behavior was

exemplified through the profanity and the middle finger.” Ex. 3 [Riggen Dep. Tr. 249:22–250:9]. But this is not the well-established definition of tumultuous. As in

, Bombard did not engage in any violence and his conduct did not portend violence. All he did was say curse words while sitting in his driver’s seat. No reasonable officer could have believed probable cause existed that Bombard engaged in “tumultuous . . . behavior” under § 1026(a)(1).

Furthermore, Riggen did not acquire probable cause for “tumultuous behavior” following Bombard’s utterances. After a southbound vehicle had passed and Bombard started to merge into southbound traffic, Riggen saw Bombard briefly put his middle finger just outside his driver-side window for no more than 6 seconds. Ex. 2 [Riggen Aff. ¶ 10]; Ex. 3 [Riggen Dep. Tr. 171:15–22, 191:19–25]. Riggen did not see anyone witness or react to Bombard putting his middle finger out of the window. SUMF ¶ 92; Ex. 3 [Riggen Dep. Tr. 176:3–15, 196:1–9]. Again, nothing about Bombard’s gesture was violent or portended violence. A reasonable officer, therefore, would not have believed probable cause of “tumultuous behavior” existed.

Third, a reasonable officer would not believe probable cause existed for “abusive or obscene language.” 13 V.S.A. § 1026(a)(3). Vermont Supreme Court precedent is exceedingly clear that “abusive” language only pertains to “fighting words” unprotected by the First Amendment. , 2015 VT 111, ¶ 28 (“[T]he abusive language provision . . . is properly construed as proscribing only fighting words, and can apply only when a defendant’s spoken words, when directed

to another person in a public place, tend to incite an immediate breach of the peace,
as required by

9:30–9:39]; Ex. 3 [Riggen Dep. Tr. 231:19–232:1]. Vermont statutes prohibit motorists from stopping, standing, or parking “at any place where official signs prohibit” it. 23 V.S.A. § 1104(a)(1)(H). But that law provides a common-sense exception for a motorist who stops, stands, or parks at “no parking” signs “in

- C. Bombard's protected speech motivated or substantially caused the stop, arrest, and vehicle seizure, entitling him to summary judgment on his retaliation claims.

Summary judgment is appropriate on plaintiff's' retaliation claims when:

- (1) protected speech was the substantial or motivating cause for the defendant's actions, (2) the defendant's actions would not have occurred without the speech, and

reviews retaliatory motive in the same way. , 2004
VT 15, ¶ 30 (showing causation, in the employment discrimination context, requires
“plaintiff [to] come forward with evidence to show that the circumstances
surrounding [the alleged discrimination] permit an inference of unlawful
discrimination”) , 163 Vt. 83, 93 (Vt. 1994) (noting that
plaintiffs may establish a causal link indirectly by, for example, showing that the
timing of the complaint and the retaliatory action was suspect).

Circumstantial evidence of retaliatory motive falls generally into two
categories: (1) officials' statements showing a retaliatory state of mind, and
(2) temporal proximity between the speech and the adverse action.¹⁰

"outrageous and ridiculous," in combination with temporal proximity between the officer's speech and his suspension, supported finding a retaliatory motive. at 56–57. As a result, "a reasonable jury would be obliged to find that [the plaintiffs]

...

immediately followed the speech, and additional statements and circumstantial evidence further demonstrate his retaliatory motive. The evidence and the lack of lawful basis oblige a reasonable juror to find that Bombard's speech was a substantial or motivating cause for the stop, arrest, and vehicle seizure.

1. Bombard's perceived speech was the motivating cause for the initial vehicle stop and no reasonable jury could find otherwise, entitling Bombard to summary judgment on Count 2.

to control the action” and “came at” Bombard “more assertively” and “more Alpha.” SUMF ¶ 46; Ex. 3 [Riggen Dep. Tr. 139:5–140:18]; Ex. 1 [Bombard Dep. Tr. 130:11–18]. His “assertive” and “Alpha” demeanor, particularly when viewed in the video, shows Riggen’s immediate animus toward Bombard, SUMF ¶ 121; Ex. 7 [Cruiser Video 6:00–8:50], as does his accusation that “it looked like you stuck your middle finger right up in my face,” SUMF ¶¶ 54, 55; Ex. 7 [Cruiser Video 1:59]. It is not surprising that Bombard perceived Riggen as rude, angry, and unprofessional.

SUMF ¶ 176; Ex. 1 [Bombard Dep. Tr. 64:8–67:20, 83:23–84:10, 130:11–21, 131:19–134:7, 133:6–15].

As further evidence of retaliatory motive, Riggen did not follow his own practices for conducting vehicle stops. When conducting vehicle stops, Riggen’s practice is to introduce himself and ask the driver “do you know why I stopped you.” SUMF ¶ 43; Ex. 3 [Riggen Dep. Tr. 40:2–8]. He did not do that for Bombard. SUMF ¶ 47; Ex. 7 [Cruiser Video 1:36]; Ex. 2 [Riggen Aff. ¶ 4]; Ex. 3 [Riggen Dep. Tr. 168:11–14]. Typically, upon response, Riggen then asks the driver for license, registration, and insurance. SUMF ¶ 68; Ex. 3 [Riggen Dep. Tr. 40:15–41:3]. He never asked this of Bombard. SUMF ¶ 69; Ex. 7 [Cruiser Video 1:36–4:50]; Ex. 3 [Riggen Dep. Tr. 168:15–17]. Instead, he interrogated Bombard. SUMF ¶ 84; Ex. 1 [Bombard Dep. Tr. 130:11–18].

Riggen's statements and behavior over the next twenty minutes provide additional evidence of the same. When Bombard asked, "what if I did flip you off?," Riggen responded, "then we'd be having a conversation about what's appropriate and not appropriate." SUMF ¶ 63; Ex. 7 [Cruiser Video 4:40–49]; Ex. 3 [Riggen Dep. Tr. 155:11–156:16]. Riggen intended to stop Bombard to tell him that showing an officer the middle finger is not "an appropriate way to express yourself." SUMF ¶ 64; Ex. 3 [Riggen Dep. Tr. 156:8–12]. As described , Riggen did not think Bombard was signaling him for assistance. SUMF ¶ 12; Ex. 3 [Riggen Dep. Tr. 151:15–153:22]. He wanted to tell Bombard that the middle-finger gesture was not "appropriate," and he abused his authority to do so through an unconstitutional traffic stop.

After the arrest, Riggen repeatedly told Bombard that he now believed Bombard gave him the finger before their first interaction—claiming Bombard had "the audacity" to flip the bird. SUMF ¶ 132; Ex. 7 [Cruiser Video 8:15–8:44]. Riggen also expressed outrage to Sergeant Bruzzi that Bombard "obviously" gave him the finger before the first interaction. SUMF ¶ 137; Ex. 7 [Cruiser Video 12:00–12:14]. Riggen repeated the false accusation to Bombard after they arrived at the barracks. Ex. 7 [Cruiser Video 19:40–22:00].

The lack of objective reasonable suspicion and the undisputed direct and circumstantial evidence demonstrates conclusively that Riggen stopped Bombard because he mistakenly perceived the middle-finger gesture—protected speech—and

nothing else. A reasonable jury could only conclude the same, and this Court should therefore grant summary judgment to Bombard on Count 2.

2. Bombard's speech motivated the arrest and no reasonable jury could find otherwise, entitling Bombard to summary judgment on Count 3.

Trooper Rigger's statements and behavior before, during, and after the initial interaction, in addition to the absence of probable cause, demonstrate Rigger's retaliatory motive for arresting Bombard. As described , Rigger immediately decided to arrest Bombard after hearing

and calling me an asshole, and all the people there in the public, that's a crime sir, get out of the car you're under arrest." SUMF ¶ 123; Ex. 7 [Cruiser Video 6:06–6:11]. Rigger then repeated his reasoning, claiming Bombard's expressions were "disorderly conduct 101." SUMF ¶ 124; Ex. 7 [Cruiser Video 6:20–6:43].

As Bombard exited his vehicle, Rigger told him: "It wasn't a problem until it became a problem." SUMF ¶ 127; Ex. 7 [Cruiser Video 7:26–7:29]; (h) 0.2 (i) 0.1 (s) 0.1 () 0.2 (v 59

open, in front of all those people, you yelled asshole, said fuck you, and held your middle finger out the window as you drove away." SUMF ¶ 139; Ex. 7 [Cruiser Video 19:40–19:56]. Rigger then repeated his justifications for the arrest again; this time r

Amendment violation. *Id.*, 515 U.S. 819, 829 (1995). Viewpoint discrimination occurs when government officials seek to suppress criticism of government officials or actions; speech that receives the “strongest protection” because it is “at the core of First Amendment values.” *Id.*, 164 F.3d at 771 (citation omitted). Government suppression of “ideas that offend” is also an “egregious” form of viewpoint discrimination because “[g]iving offense is a viewpoint.” *Id.*, 582 U.S. at 223, 243. And the potential for the speech to negatively affect listeners is an invalid basis for viewpoint discrimination. *Id.*, 505 U.S. at 134 (“Listeners’ reaction to speech is not a content-neutral basis for regulation.”); *Id.*, 582 U.S. at 250 (Kennedy, J., concurring in part and concurring in judgment) (“[A] speech burden based on audience reactions is simply government hostility and intervention in a different guise. The speech is targeted, after all, based on the government’s disapproval of the speaker’s choice of message.”).

There can be no genuine dispute that Rigger

Dep. Tr. 90:12–23, 91:7–17]. He believed Bombard intended to communicate his “displeasure” “with something that [Riggen] represent[ed]”; something related to “police or State Police or the government at large.” SUMF ¶ 11; Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17].

As a result, Riggen decided he would stop Bombard to have “a conversation about what’s appropriate and not appropriate,” SUMF ¶ 63; Ex. 7 [Cruiser Video 4:40–49]; Ex. 3 [Riggen Dep. Tr. 155:11–156:16], because, in his words: “I don’t think that’s an appropriate way to express yourself” to a police officer. SUMF ¶ 37; Ex. 3 [Riggen Dep. Tr. 155:11–156:16]. Riggen generally thinks it is “inappropriate for a civilian to give a middle finger to a police officer.” SUMF ¶ 34; Ex. 3 [Riggen Dep. Tr. 157:17–158:8]. Riggen also believes that it is a police officer’s role to enforce “societal mores,” and that he has the authority to do so, and he admitted that he stopped Bombard’s car to do just that. SUMF ¶¶ 35, 36; Ex. 3 [Riggen Dep. Tr. 158:1–23]. In addition to Riggen’s many statements that he stopped and arrested Bombard because of his protected speech, along with Riggen’s emotionally charged behavior, Riggen confirmed that he does not like Bombard’s speech and believes it was his role to stop it from happening in the future. Riggen’s statements and actions demonstrate axiomatic viewpoint discrimination. No reasonable juror could conclude otherwise.

There is similarly no dispute that Riggen’s conduct—the stops, the arrest, the jailing, the tow, and the publicity and criminal proceedings that Riggen put into motion—chilled Bombard’s speech. As Bombard testified, after these repeated

degradations and humiliations, Bombard feels afraid to speak his mind about the police and even avoids going out in public like he used to. SUMF ¶¶ 169–72; Ex. 1 [Bombard Dep. Tr. 41:23–42:5, 136:14–139:3]. As he said at deposition, “I would never express the way I feel again, ever again, like I did in 2018. I feel like I would never do that because it would cause an arrest –

constitutional right was “clearly established” at the time of the violation. ,

457 U.S. at 818 (1982); , 934 F.3d 97, 103 (2d Cir. 2019).¹¹

pp 50–53; s , , 515 U.S. at 829. Qualified immunity cannot help Trooper Rigger.

CONCLUSION

For the foregoing reasons, this Court should grant Gregory Bombard's motion for summary judgment on his unlawful seizure, speech retaliation, and viewpoint-discrimination claims.

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