STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

GREGORY BOMBARD, *Plaintiff,* v. JAY RIGGEN, Vermont State Police Trooper, and STATE OF VERMONT, *Defendants*.	Washington Unit Docket No. 21-CV-176

FOUNDATION FOR INDIVIDUAL RIGHTS
AND EXPRESSION
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damages suits only to government officials, not to the State itself. *See Zullo v. State*, 2019 VT 1, ¶ 56

(1987)); *see also* Pl.'s Mot. Summ. J. 32–39 (collecting and describing cases). The undisputed facts show that Bombard engaged in no such physical conduct but merely protected speech.

Lastly, Riggen is not entitled to qualified immunity on Bombard's fifth claim, that Riggen engaged in viewpoint discrimination in violation of the First Amendment and Article 13 resulting in the chilling of Bombard's speech. Riggen targeted Bombard's speech because Bombard had criticized Riggen with speech that Riggen found offensive, all in violation of clearly established law. *See, e.g.*, *Matal* , 582 U.S. at 223, 243. Contrary to Riggen's

ARGUMENT

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I. The State Is Not Entitled to Assert Its Employee's Qualified

immunity.[2] *See Libercent v. Aldrich*, 149 Vt. 76, 80 (1987) ("Sovereign immunity shields the state from suit in its own courts and confers immunity from liability for torts committed by its officers and employees. Official immunity, on the other hand, shields the state officials and employees themselves in certain circumstances."); *cf. Burgess v. Salmon*, No. 2007-411, 2008 WL 2793874, at *3 (Vt. Apr. 1, 2008) (mem.) (explaining distinction between the sovereign immunity defense available to the State and the personal defense of absolute immunity available to a high-ranking official sued for damages).

While a test "akin to qualified immunity" is one of two alternative avenues used to assess a plaintiffs damages claims against the State under Article 11—the Vermont Constitution's right against unreasonable or warrantless search and seizure—the

officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith." *Id.* ¶ 55. Thus, for Article 11 damages claims, a plaintiff may prevail *either* by surmounting a test "akin to qualified immunity in some respects," *id.* ¶ 56, or by showing that the officer's conduct, even if it "could be viewed as objectively reasonable, is characterized by ill will or wrongful motive, including discriminatory animus," *id.* ¶ 55. As set forth in his summary judgment motion and further below, Bombard prevails under either theory.[4]

Zullo's rule, however, does not apply to Bombard's claims for declaratory relief or for damages under Article 13, the Vermont Constitution's free speech guarantee, and there is no need for similar limitations. Bombard's request for a declaratory judgment, unlike his request for damages, is not subject to *Zullo*'s quasi-qualified immunity analysis. *See, e.g.*, *Zullo*

immunity analysis or other limitation should apply to Article 13 damages claims because they do not present the same risks of additional litigation. Nevertheless, Bombard's Article 13 claims would satisfy the full *Zullo* analysis. !

II. Defendants Do Not Have Qualified Immunity for Riggen's Initial Retaliatory Stop of Bombard.

community caretaking doctrine turns on whether there were specific and articulable facts objectively leading the officer to reasonably believe that the [driver] was in distress or needed assistance, or reasonably prompted an inquiry in that regard." *State v. Button*, 2013 VT 92, ¶

Courts have consistently disagreed: The middle finger does not constitute "unusual" behavior that could reasonably be construed as a sign of distress. Defendants correctly predict that Plaintiff can point to *Swartz*

Defendants try to circumvent *Swartz*'s clearly established law by claiming that "legal authorities are in conflict" regarding whether the middle finger can be the basis of a community caretaking stop. Defs.' Mot. Summ. J. 11 n.3. This is simply incorrect. Defendants accurately note that a community caretaking exception to reasonable suspicion exists in Vermont law but point to no precedent stretching this narrowly construed doctrine to gobble up well-established First Amendment protected speech. *See Button*, 2013 VT 92, ¶ 20 ("We have noted the danger that an expansive community caretaking doctrine presents to individuals' right to privacy and must take care not to allow the exception to 'devour the requirement of reasonable articulable suspicion.'" (quoting *Burgess*, 163 Vt. at 262)); *see also Clark v. Coleman*, 448 F. Supp. 3d 559, 577 (W.D. Va. 2020) (collecting cases from "across the country" where courts "have refused to apply qualified immunity to parallel fact patterns" to excuse an officer's unlawful reaction to a civilian making a rude gesture).

Indeed, the sole case Defendants cite in their attempt to show a legal conflict proves the very point they seek to undermine. In *State v. Gallagher*, the unpublished decision of New Jersey's intermediate appellate court that Defendants

constitutionality of what the court determined was not an investigatory stop but a

application to Riggen's lights-and-siren stop of Bombard's vehicle, Pl.'s SUMF ¶¶

emergency or [an] indication of *imminent threat to specific individuals*' before effectuating [the] stop." *Button*

unconstitutional stop with the community caretaking exception, his "specific and articulable facts" again fall far short of the constitutional minimum.

Furthermore, contrary to Defendants' assertion, it does not "bear[] emphasis here" that, after stopping Bombard without cause, Riggen released Bombard and "returned to his vehicle, without giving any form of criminal or civil citation." Defs.' Mot. Summ. J. 11. Essentially, Defendants suggest that Riggen's failure to cite Bombard—who all parties agree had committed no crime at that point—and his abrupt end to the interaction somehow evidence the propriety of the stop. This

III. Riggen Arrested Bombard and Towed His Vehicle Absent Probable Cause, Arguable or Otherwise, and Therefore Is Not Entitled to Summary Judgment on Bombard's Article 13 Retaliatory Arrest and Seizure Claims.

Riggen should be denied summary judgment on Bombard's Article 13 claims for retaliatory arrest and retaliatory seizure. First, Vermont has not established and should not establish that probable cause creates an exception to Article 13 retaliation claims. Second, even if Vermont adopted *Nieves v. Bartlett*'s narrow probable-cause exception to First Amendment retaliatory arrest claims, 139 S. Ct. 1715 (2019), the undisputed facts show that Riggen did not have probable cause for the arrest or seizure here. Third, Riggen is not entitled to qualified immunity on Bombard's Article 13 claims because it is undisputed that Bombard did not engage in any violent physical behavior and reasonable officers could not, therefore, believe Bombard committed disorderly conduct.

A. Article 13 retaliation claims are not barred by the existence of probable cause.

Regarding Riggen's arrest of Bombard, Defendants incorrectly claim that "it is well settled that the existence of probable cause is an absolute defense to a false arrest c2 (ex) - 1TT2 1 Tf10.1 (g) -08.3055 445.(h) 0.2 r2 (d) -0.2fa

so held by the Vermont Supreme Court. This Court should not chart a new course by applying *Nieves* to an Article 13 retaliatory arrest claim. Instead, it should forgo *Nieves*'s no-probable-cause requirement and proceed directly to the *Mt. Healthy* test, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)—the test used by Vermont's Supreme Court when reviewing speech-retaliation claims other than retaliatory prosecution.[7]

Maintaining Vermont's status quo is particularly appropriate in this context because Article 13 likely provides greater protection for speech than the First Amendment. *See State v. Kirchoff*, 156 Vt. 1, 4 (1991) ("[T]he Vermont Constitution may afford greater protection to individual rights than do the provisions of the federal charter."); *cf., e.g.*, *State v. Rheaume*, 2005 VT 106, ¶ 8 n.* ("[W]e have recognized that Article 11 affords individuaf 467.666(p) -0.2yTm /TT2 1 Tf [(2)-5290(2)-452 cm 0.24T1

Specifically, Article 13 provides broader and more particularized protection for speech "concerning the transactions of government" than the First Amendment. The text of Article 13, as adopted in the 1786 Constitution, states in pertinent part "[t]hat the people have a right to freedom of speech . . .

"the free and unhindered debate on matters of public importance . . . and lies at the very foundation of our free society." *Read*, 165 Vt. at 153 n.7 (quoting *Bennett v. Thomson*, 363 A.2d 187, 195 (N.H. 1976) (Grimes, J., dissenting)). *Nieves*'s general rule does the opposite because "probable cause does not necessarily negate the possibility that an arrest was caused by . . . retaliation." *Nieves*, 139 S. Ct. at 1732 (Gorsuch, J., concurring in part, dissenting in part). Where retaliation can go unpunished, even for criticism of government actions, Vermonters would likely avoid speaking in any way that could incur a government official's retaliation. Article 13 "core values" mean to prevent these hinderances on public debate and a free society.

Moreover, refusing to import a no-probable-cause exception to Article 13 is

prompted by a retaliatory motive." *Id*. at 1734 (Ginsburg, J., concurring in judgment in part, dissenting in part).[8]

B. Even if probable cause could

including opening the screen door to close the flyer inside it, did not provide probable cause of threatening behavior under § 1026(a)(1). 2018 VT 45, ¶¶ 22–23, 34. The flyer itself could not be construed as conduct because it was pure speech and contained no explicit or obvious implicit threat. The Court further reasoned, agreeing with the Oregon and Connecticut Supreme Courts, that the physical delivery of the flyer was an act incidental to the speech, and therefore could not "meet the requirement for physical conduct" necessary under the disorderly conduct statute. *Id*.¶¶ 30–34.

Albarelli is similarly instruct

In this case, the undisputed facts show that there was no "physical conduct" or "behavior" outside of Bombard's speech. As Riggen arrived back at his vehicle and Bombard was sitting in his stopped car, Riggen heard Bombard say "asshole." Riggen turned around and saw Bombard look at him in a sideview mirror and say "fuck you." Pl.'s Resp. Defs.' SUMF ¶¶ 18–20. No physical behavior is alleged. As Bombard began to merge into traffic and drive away, he engaged in the protected expression of displaying his middle finger just outside his driver-side window to communicate his displeasure with the initial stop. Again, no nonspeech physical behavior occurred.

As in *Schenk* and *Albarelli*, Bombard's speech did not include "any significant physical component." Like the defendant in *Schenk*, Bombard did nothing more than communicate. And like the defendant in *Albarelli*, Bombard's words and gesture, while possibly demonstrating that he was angry or "agitated," did not turn his speech into "significant physical conduct" regulated by the disorderly conduct statute. Moreover, driving while displaying a middle-finger gesture just outside his window for "no less than five seconds" does not turn Bombard's speech into conduct. Speaking while walking, standing, sitting, running, gesticulating, or doing some other action incidental to speech does not transform the speech into conduct. *See Schenk*, 2018 VT 45, ¶ 33. At most, Bombard's driving was incidental to his speech, similar to the hand delivery of the KKK flyer in *Schenk* or the gesticulating while speaking in *Albarelli*. *See id*; *Albarelli*, 2011 VT 24, ¶ 24. This incidental act cannot bring Bombard's speech within the ambit of § 1026(a)(1). Therefore, no reasonable

officer would think that Bombard violated § 1026(a)(1) because no physical behavior occurred.

2. "Tumultuous" disorderly conduct requires violence or physical aggression, neither of which were present here.

Second, even if the act of driving while displaying the middle finger could be construed as relevant conduct, this act could not constitute "tumultuous behavior." As detailed in Bombard's summary judgment motion, probable cause of "tumultuous

defendant's leaping up from seated position, communicating threats and ethnic slurs, while clenching fists in close proximity to officer and then physically resisting arrest); *see also McEachin*, 2019 VT 37, ¶¶ 2–4, 17 (minutes after a verbal confrontation with police officers, defendant walked directly toward the same officers, yelled profanities at them, and refused to leave the area; absent clenched fists or other physical movements suggesting he would become violent, there was no probable cause of tumultuous behavior).

Defendants' lone citation for the meaning of "tumultuous," *Lebert*, is in lockstep with the precedent described above. 2015 WL 9275488, at *3 (finding tumultuous behavior because "defendant's *physical* altercation with [the victim] was a continuation of the verbal altercation, that defendant did put his hands on [the victim], and that it was enough to knock [the victim] down." (emphasis added and quotation marks omitted)).

oncoming southbound vehicle" behind their stopped vehicles, requiring that Bombard "stop short to avoid a collision" as he initially attempted to merge into traffic. Defs.' SUMF ¶ 25. However, Riggen's cruiser video shows that Bombard *did* see the oncoming vehicle and yielded to it long before the passing southbound vehicle approached—and there can be no genuine dispute otherwise. Pl.'s Resp. Defs.' SUMF ¶ 25 (citing Pl.'s Ex. 7 [Cruiser Video 4:59–5:06]). But, regardless, purportedly having to "stop short to avoid a collision" is neither a "violent outburst" nor does it indicate a likelihood of becoming violent, as required to provide probable cause for tumultuous behavior. Because Defendants present no facts showing Bombard engaged in a "violent outburst" or act of physical aggression portending violence, they are not entitled to summary judgment.

3. Probable cause that Bombard intended to cause public inconvenience or annoyance did not exist.

Third, the undisputed circumstances do not objectively indicate probable cause that Bombard had the requisite intent to cause public inconvenience or

criminal court.[11] But Judge Maley's decision was for a different purpose and based on different "facts" under a different evidentiary standard. Defendants quote Judge Maley's decision, which was based only on Riggen's affidavit, stating that Bombard "decided to drive erratically while raising his middle finger." *See* Defs.' Mot. Summ. J. 14. This portion of Judge Maley's decision is intended to refute an argument not at issue in thi 110.2 ( ) 0.2 (t) -0.2 ala—Q q 0.24 0 0 0.24 11.9055 590.2545cm BT 50 0 0 50 426.33

There is no support for the contention that Bombard "drove erratically while raising his middle finger." Instead, the evidence in this case demonstrates that Bombard did not "stop short to avoid a collision." Pl.'s Resp. Defs.' SUMF ¶ 25 (citing Pl.'s Ex. 7 [Cruiser Video 4:59–5:06]). He saw the oncoming vehicle and yielded before it had even begun to pass by his car's back bumper. *Id.*

Defendants argue that, where a trial court denies a motion to suppress,

Reasonable officers would be aware of the law related to "tumultuous" disorderly conduct, and that it required violent physical behavior, because that law was clearly established. Officers of reasonable competence could not, therefore, believe that probable cause existed here because the undisputed facts allege none. Riggen is not entitled to qualified immunity for his retaliatory arrest of Bombard.

IV. Clearly Established Law and the Undisputed Facts Do Not Support Qualified Immunity on Bombard's Viewpoint Discrimination Claim.

Riggen is not entitled to qualified immunity on Count 5, Bombard's claim that Riggen engaged in unconstitutional viewpoint discrimination that chilled

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disapproval of the speaker's choice of message."). Moreover, even if the governmental conduct falls short of directly prohibiting speech, governmental action that discriminates on the basis of viewpoint violates the First Amendment when it creates a "chilling effect" on speech. *See Husain v. Springer*, 494 F.3d 108, 127–28 (2d Cir. 2007) (holding that a public university could not "censor, retaliate, or otherwise chill" student speech "on the basis of content or viewpoints").

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and then the arrest, but also of the jailing, the tow, the berating of Bombard for his speech, and the publicity and criminal proceedings that Riggen put into motion. In other words, even if the stop and arrest had been lawful or arguably lawful, Riggen took further action to deter Bombard from engaging in similar speech in the future.

For example, Riggen had the discretion to cite Bombard without arresting him but chose to arrest and jail him. Pl.'s SUMF ¶ 112; Pl.'s Ex. 3 [Riggen Dep. Tr. 69:22–71:18, 76:21–78:17, 208:20–216:16]. Riggen also had discretion whether to have an unattended vehicle towed but opted to have Bombard's vehicle towed—based on a "No Parking" sign, even though Bombard pulled over at Riggen's direction, and even though Riggen does not usually enforce parking violations.[12] Pl.'s SUMF ¶¶ 143, 144, 146, 147, 151; Pl.'s Ex. 2 [Riggen Aff. ¶ 14]; Pl.'s Ex. 7 [Cruiser Video 9:30–9:39]; Pl.'s Ex. 3 [Riggen Dep. Tr. 222:21–223:2, 231:19–232:1, 238:22–239:2, 245:18–246:25, 63:25–64:14]. All the while, Riggen repeatedly and angrily reprimanded Bombard for his speech—scolding Bombard for having "the audacity" to "flip me the bird"; lecturing him that his "behavior is ridiculous"; and telling Bombard back at the barracks, like a parent to a child, that Riggen would "let you just sit here and let you think about what you did"—further making clear that Bombard's speech motivated Riggen's conduct throughout and further chilling

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[12] As previously discussed, the statute authorizing the towing of vehicles parked in "no parking" areas includes an exception for vehicles parked there "in compliance with law or directions of an enforcement officer." Pl.'s Mot. Summ. J. 40 (quoting 23 V.S.A); *see also* n.9.

Bombard's speech. Pl.'s SUMF ¶¶ 133, 136, 142; Pl.'s Ex. 7 [Cruiser Video 8:15–8:44, 10:04, 21:37–21:48].

Lastly, Riggen's conduct chilled Bombard's speech. As Bombard testified, after these repeated humiliations and punishments, he feels afraid to speak his mind about the police and even avoids going out in public like he used to. Pl.'s SUMF!¶¶ 169–71; Pl.'s 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 – it would cause an arrest for me to say how I feel or show how I feel." Pl.'s SUMF ¶¶ 170–71; Pl.'s Ex. 1 [Bombard Dep. Tr. 137:8–22]. Before the 2018 stop and arrest, Bombard had made, at most, a half-dozen posts on Vermont State Police Facebook pages, measuredly criticizing their practices on constitutional grounds. Pl.'s Mot. Summ. J. 53. Since the encounter with Riggen, Bombard has not posted on Vermont State Police Facebook pages or even on his own Facebook page about police. Pl.'s SUMF ¶ 172; Pl.'s Ex. 1 [Bombard Dep. Tr. 136:14–139:3].

In sum, the evidence shows that Riggen engaged in viewpoint discrimination in violation of the First Amendment. And Riggen's argument that he cannot be liable because of probable cause for the arrest does not help him. Even if Riggen had probable cause or arguable probable cause, it would not insulate him from liability for his entire course of conduct suppressing Bombard's speech on account of Bombard's viewpoint.

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