STATE OF VERMONT SUPERIOR COURT CIVIL DIVISION

GREGORY BOMBARD,

Plaintiff,

٧.

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

Defendants.

Washington Unit Docket No. 21-CV-176

ORAL ARGUMENT REQUESTED

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material fact and cannot overcome longstanding clearly established precedent, the Court should grant Plaintiff's motion for summary judgment.

SUMMARY OF ARGUMENT

Bombard is entitled to summary judgment on his unlawful stop claim (Count I), relating to Trooper Riggen's first vehicle stop of Bombard. Binding Second Circuit precedent holds that no reasonable officer can interpret a middle finger as a "signal of distress" to support a vehicle stop. Swartz v. Insogna , 704 F.3d 105, 110 (2d Cir. 2013). Defendants also cannot justify the stop based on Riggen's supposed concern for public safety, in general —Vermont Supreme Court precedent explicitly forbids such stops. And Defendants' assertion that the initial stop is excused from constitutional scrutiny because it did not result in arrest flouts U.S. Supreme Court and Vermont Supreme Court caselaw demonstrating that motor vehicle stops are seizures implicating constitutional rights.

Bombard is also entitled to summary judgment on his retaliatory stop00 0.1 (u) 0.2 (p45 cm

result, no rational trier of fact would believe the tale Defendants now spin, and the Court may, therefore, disregard it.

So too is Bombard entitled to summary judgment on Article 13 retaliatory arrest and vehicle seizure claims (Counts III and IV). Defendants fail to engage with the arguments in Bombard's motion showing that probable cause for the arrest and vehicle seizure in retaliation for Bombard's protected speech—two curse words and the middle finger as he started to drive away from the initial stop—did not exist. Defendants argue only that the criminal court found Bombard had the requisite intent for disorderly conduct and offer the conclusory statement that he violated criminal law. But, as Plaintiff described in his opening brief, Judge Maley's decision about the disorderly-conduct arrest of Bombard was based on the nowexposed false narrative in Riggen's probable cause affidavit and under a standard of review that accepted only Riggen's narrative as true.

Bombard is also entitled to summary judgment on his viewpointdiscrimination claim (Count V) because Defendants similarly fail to engage with the facts or law in Bombard's motion. Defendants' failure to address Plaintiff's legal

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Summ. J. 5. As Trooper Riggen conceded at his deposition, he made the initial stop because he (1) believed that Bombard gave him the middle finger; and (2) recalled a 2013 "road rage incident" involving other people in the same area as his 2018 stop of Bombard. Ex. 3 [Riggen Dep. Tr. 108:11–14].¹ First, Defendants do not contest that the middle-finger gesture is protected speech. Second, even if Riggen had the recollection he claims—which no reasonable jury would believe, see infra Section II—it would not provide an objectively reasonable basis for the stop.

Riggen claims he viewed Bombard's middle finger as a sign of distress because it was "supremely unusual." Defs.' Opp'n Summ. J. 3. But the Second Circuit has rejected that exact argument. In Swartz v. Insogna , the court labeled the middle finger "a gesture of insult known for centuries," noting that it appeared in Ancient Greece and a 19th century baseball-team photo of the Boston Beaneaters and New York Giants. 704 F.3d 105, 107 n.1 (2d Cir. 2013). The Second Circuit determined that the middle-finger gesture is not unusual at all and an officer, therefore, cannot reasonably interpret the middle finger as a "signal of distress" justifying a traffic stop.

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gesture is an insult deprives such an interpretation of reasonableness." Id. at 110

stops is well-settled." Zullo v. State, 2019 VT 1, ¶ 58. "The temporary stop of a vehicle is a seizure," subject to protection under both the Fourth Amendment of the U.S. Constitution and Article 11 of the Vermont Constitution. Id. This is because unreasonable seizures themselves—whether or not followed by an arrest—violate important rights. Indeed, "[t]he essential purpose of the proscriptions" in those constitutional provisions "is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the privacy and security of individuals against arbitrary invasions." Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) (cleaned up) (emphasis added). As the United States Supreme Court has explained, traffic stops are "physical and psychological intrusion[s]" that "interfere with the freedom of movement, are inconvenient, [] consume time," and "may create substantial anxiety." Id. at 657. Police motor vehicle stops always trigger constitutional scrutiny. Characterizing the unlawful seizure here as "merely check[ing]" on Bombard without "any other adverse consequence to the driver,,

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violation. The community caretaking doctrine makes this distinction plain by requiring an officer to "particularly describe" the specific emergency or imminent threat "before effecting the stop." Marcello , 157 Vt. 657, 658 (1991) (mem.) (emphasis added) (quoting St. Martin , 2007 VT 20, ¶ 6). What happens later in the stop may certainly compound the injustice, but the legality of a stop is based on the facts when the stop occurs. In the initial stop here,

II. Bombard Is Entitled to Summary Judgment on His Retaliatory Stop Claim (Count II) Because No Rational Factfinder Would View the Unlawful Stop as Substantially Motivated by Anything Other Than Bombard's Protected Speech.

This Court should reject Trooper Riggen's eleventh-hour daim that he stopped Bombard the first time because Riggen thought (mistakenly) that Bombard gave him the middle finger, reminding Riggen of a 2013 road-rage murder. Defs.' Opp'n Summ. J. 3, 6. The direct and circumstantial evidence leads to only one conclusion: Bombard's protected speech substantially motivated Riggen to make the initial stop. Thus, Riggen violated Bombard's First Amendment rights. He also admits that this post-litigation rationale does not appear in his past documented statements—for example, in his repeated explanations in the video of the stop, in his sworn probable cause affidavit, in his email to superiors and the media. It is also not supported anywhere else in the evidentiary record. The Court should therefore ignore this post-litigation rationale.

A court may grant summary judgment notwithstanding a defendant's contrary deposition testimony. See Salter v. Douglas MacArthur State Tech. Coll. , 929 F. Supp. 1470, 1482 (M.D. Ala. 1996). Indeed, there can be no genuine issue of material dispute for trial when a rational factfinder could not find one. Kelly v. o 0.1 (-0.e.2 14 11

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admission that he deviated from normal practices—outweighs a defendant's unsubstantiated deposition testimony, a court may thus decline to waste judicial resources by sending the question to the jury." Salter, 929 F. Supp. at 1479 & n.45.

Courts may similarly avoid submitting questions of credibility to the jury when a party suddenly introduces deposition testimony that is inconsistent their own earlier statements without an explanation for the inconsistency. SeePointdujour v. Mount Sinai Hosp. , 121 F. App'x 895, 898 n.2 (2d Cir. 2005) ("[A] party opposing summary judgment does not create a triable issue by denying his previously sworn statements." (quoting Heil v. Santoro , 147 F.3d 103, 110 (2d Cir. 1998))); cf. Richardson v. Bonds , 860 F.2d 1427, 1433 (7th Cir. 1988) ("A party may not create a genuine issue of fact by contradicting his own earlier statements, at least without a plausible explanation for the sudden change of heart.").

Here, the evidence of Trooper Riggen's true retaliatory motive is overwhelming. The direct evidence alone is dispositive. As an initial matter, the U.S. Supreme Court has held that the absence of a lawful basis for the retaliatory act, as is the case here, "will generally provide weighty evidence that the officer's

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50, 52, 55, 58, 133; PI.'s Reply to Defs.' Resp. to PI.'s SUMF ¶¶ 62–64.³ It is also undisputed that Riggen views the middle-finger gesture as a "negative," "obscene," and "profane" gesture—indeed that is what Riggen called it in his probable-cause affidavit. SeeDefs.' Resp. PI.'s SUMF ¶¶ 9, 28, 140, 160. And it is undisputed that Riggen believed, when he first mistakenly thought he saw the middle-finger gesture, it was signifying a "sign of displeasure" intended to communicate that Bombard was "not happy with something that [Riggen] represent[ed]"; something related to "police or State Police or the government at large." Id. ¶¶ 11, 28. Riggen has repeated this earlier reasoning for the stop, even in his own deposition testimony. Id. ¶ 11.

The undisputed circumstantial evidence of Trooper Riggen's own behavior, both when he initially approached and after he arrested Bombard, also demonstrate his true retaliatory motive

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Id. ¶ 133. No rational trier of fact could view this as anything but Riggen being angered or insulted by the middle finger—circumstantial evidence of his true retaliatory motive for the initial stop.

Trooper Riggen also admits that he deviated from normal practice—his own and the practices he was trained to follow. At traffic stops, his own practice is to first say hello and ask drivers if they know why he stopped them. Id. ¶ 43. He was trained to be warm and collegial when he approaches a person he believes is in distress. Id. ¶ 44. He did nothing of the sort here. Id. ¶¶ 47–48, 50; Pl.'s Reply to Defs.' Resp. to Pl.'s SUMF ¶ 49. Riggen also never asked for Bombard's license, registration, or insurance, although that is his practice. Pl.'s Reply to Defs.' Resp. to Pl.'s SUMF ¶ 68; Defs.' Resp. Pl.'s SUMF ¶ 69. Riggen's statements, behavior, and failure to follow normal practice conclusively show that he was not concerned about deescalating a potentially fatal road-rage incident. Pl.'s Resp. Defs.' SUMF ¶ 4.

Second, Defendants have failed to explain the inconsistency between Trooper Riggen's past statements, sworn and otherwise, and his newfound story of recollecting the 2013 road-rage murder. As he admits, his description of recalling the 2013 road-rage murder suddenly originates and appears only at his September 2023 deposition. PL's Resp. Defs.' SUMF ¶ 5. Critically, Riggen admits he did not include this supposedly crucial story in his probable-cause affidavit or any of his multiple writings about this case, and it was not part of his repeated explanations during the stop, arrest, and jailing of Bombard. Seeid.

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In addition, before Riggen's September 2023 deposition in this case, Plaintiff deposed every member of the Vermont State Police whom Defendants identified as either having spoken with Riggen about the Bombard stop or having "discoverable information that the defendants may use to support [their] claims or defenses," Diaz Decl.,⁴ Ex. 15 [Defs.' Resp. to Pl.'s Interrogs. ¶¶ 3, 4]. Defendants, tellingly, cite none of those Vermont State Police-personnel deposition transcripts to support Riggen's justification for the stop, his being concerned about a repeat of the 2013 road-rage incident. Diaz Decl. Exs. 17–21 (cover and signature pages of depositions transcripts about the basis for the 2018 Bombard stop and swearing "yes" that she told Plaintiff's attorney everything that she recalled about that discussion). Nor did Lieutenant Thomas, after reviewing with Riggen the facts relevant to the stop, mention Riggen's supposed recollection in her written report to Vermont State Police leadership summarizing the conversation about the bases for the stop and arrest. Id. [Thomas Dep. Tr. 75:18–77:2 (referring to Thomas Deposition Exhibit AGO-00079)].

The Court should disregard Defendants'last-ditch effort to create a genuine dispute of fact by belatedly contradicting Trooper Riggen's own previous statements) -0.2 (c) 00.60v0den 21(ae) e0/den e1e055655) w0n1e1 2654455 (cmTol 560780210(p)1-107.23(a63)80-16 7–8. But

Summ. J. 20–27.⁵ Defendants' claim of probable cause is belied by their lack of evidentiary support and total failure to engage with Bombard's legal arguments. "[P]robable cause . . . members of the public." Defs.' Opp'n Summ. J. 8. The undisputed facts, however, demonstrate that Riggen could not have had probable cause that Bombard had the intent necessary to violate 13 V.S.A. § 1026. See PI.'s Mot. Summ. J. 33–35; PI.'s Opp'n Summ. J. 26–27. The lesser of the statute's two mens rea standards, to "recklessly risk creating public inconvenience or annoyance," requires "a gross deviation from the standard of conduct that a law-abiding person would observe" in the same situation. State v. Albarelli , 2016 VT 119, ¶ 22 (quoting Model Penal Code § 2.02(c)). It is undisputed that Bombard did no more than say two curse words and briefly display his middle finger as he merged into the road. Defs.' Resp. PI.'s SUMF ¶¶ 70, 87–88. Bombard's utterances were quiet enough as to not be audible in the recording of the incident. Id . ¶ 78. Bombard's middle-finger gesture, displayed "just outside the window" for no more than six seconds, id. ¶¶ 87–88, is not visible in the recording of the incident, id. ¶ 90, with the camera directly behind and facing his vehicle, id

crash with a passing vehicle. But no rational trier of fact would view Bombard's yielding for a passing vehicle as "a gross deviation from the standard of conduct that a law-abiding person would observe." Kelly v. Town of Barnard , 155 Vt. 296, 305 n.5 (1990) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial."). Indeed, it is undisputed that Bombard's method of merging into traffic—"go a little bit, stop, check, go a little bit, stop, check"—was the way that most people merge into traffic. Defs.' Resp. Pl.'s SUMF ¶¶ 85, 86. On the undisputed facts, probable cause of any intentional or recklessness mens rea did not exist.

Based on the undisputed material facts, Defendants' argument for probable cause fails as a matter of law. Because they failed to argue that Trooper Riggen was not substantially motivated by something other than Bombard's protected speech which they, regardless, cannot do absent illegal conduct—and the undisputed facts and law provide clear evidence of Riggen's retaliatory purpose, Bombard is entitled to summary judgment on his retaliatory arrest and vehicle seizure claims (Counts III and IV).

IV. Bombard Is Entitled to Summary Judgment on His Viewpoint Discrimination Claim (Count V).

As Bombard described in his summary judgment motion, the undisputed facts show that Trooper Riggen engaged in unlawful viewpoint discrimination. See Pl.'s Mot. Summ. J. 50–53; see alsoPl.'s Opp'n Summ. J. 32–38. When

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discrimination. See Pl.'s Mot. Summ. J. 51 (citing Matal v. Tam, 582 U.S. 218, 223, 243 (2017); Velazquez v. Legal Servs. Corp., 164 F.3d 757, 771 (2d Cir. 1999)). The undisputed material facts demonstrate that Riggen targeted Bombard's speech on both of these unlawful bases—because he believed Bombard's speech was offensive and because he believed it criticized the government.

appeal of a criminal conviction addressing a motion to suppress evidence, regarding the alleged illegality of a police officer's striking up a conversation with two people—concerning the fruit-of-the-poisonous-tree doctrine. See State v. McDermott, 135 Vt. 47, 47–50 (1977). That case has nothing to do with Bombard's claim.⁷

Defendants also fail to counter Bombard's points regarding the many additional ways that Trooper Riggen, in addition to stopping and arresting Bombard, engaged in viewpoint-discriminatory acts and chilled Bombard's speech. SeePI.'s Mot. Summ. J. 52–53; PI.'s Opp'n Summ. J. 34–35. The U.S. and Vermont Constitutions protect speakers from public officials who seek to intimidate them into silenceVermont Bar No. 5014 FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION 510 Walnut Street; Suite 900 Philadelphia, PA 19106 Tel: (215) 717-3473 jay.diaz@thefire.org

<u>/s/ Gary Sarachan*</u> G