**STATE OF VERMONT**
**SUPERIOR COURT**
**CIVIL DIVISION**

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

# PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT


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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." *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999) (citation omitted), *aff'd*, 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 Riggen after an illegal traffic stop. For this, and without other lawful authority, Riggen 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 Riggen's front-mounted cruiser camera and his body-worn microphone. The interaction started when, on a wintry February day in 2018, Riggen believed Bombard displayed his middle finger at him as their vehicles passed each other. Within seconds, Trooper Riggen turned around and pulled Bombard over. He detained Bombard and interrogated him for several minutes about whether Bombard "intentionally" displayed his middle finger. Bombard said no, and asked whether it would be a crime if someone did. He also questioned the constitutionality

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. *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013). The stop, arrest, and vehicle seizure were textbook First Amendment retaliation. *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (citing *Hartman v. Moore*, 547 U.S. 250 (2006)); *Long v. L'esperance*, 166 Vt. 566, 573–74 (1997); *see also Heffernan v. City of Paterson*, 578 U.S. 266 (2016) (holding punishment based on an official's mistaken perception of protected speech is actionable retaliation). Bombard's perceived and actual speech was protected, and substantially caused or motivated Riggen's actions, and Bombard suffered the degradation of being deprived of his liberty for speaking his mind. *See, e.g.*, *Dorsett v. County of Nassau*, 732 F.3d 157, 160 (2d. Cir. 2013) (describing test for First Amendment retaliation); *In re Girouard*, 2014 VT 75

(2014), ¶ 13 n. 3 (examining retaliation case under *Mt. Healthy City School Dist Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)). Riggen's actions to enforce "societal mores" also unconstitutionally chilled Bombard's speech critical of police—speech Riggen deemed "tumultuous," "profane," "ridiculous," "outrageous," "vulgar," "obscene," and "inappropriate."

To protect the right of Vermonters to speak critically of police is to protect a free society. *City of Houston v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Because there are no genuine disputes of material fact and no reasonable jury could find Riggen acted lawfully, this Court should grant summary judgement to Bombard on all counts.

## SUMMARY OF UNDISPUTED MATERIAL FACTS

Gregory Bombard lives in St. Albans, Vermont, where he was born and raised. Pl.'s Statement of Undisputed Material Facts ("SUMF") ¶ 1; Ex. 1 [Bombard Dep. Tr. 17:12–18:17]. For over 23 years, he has worked in customer service as a membership clerk at Costco Wholesale. SUMF ¶ 173; Ex. 1 [Bombard Dep. Tr. 31:2–12]. Bombard respects the police. SUMF ¶ 170; Ex. 1 [Bombard Dep. Tr. 136:14–139:3]. He is not generally politically active and is not affiliated with any groups that take positions on police or policing. SUMF ¶¶ 174–75; Ex. 1 [Bombard Dep. Tr. 98:25–100:2, 47:1–14]. He nevertheless cares about the protection of constitutional

rights. *See* 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 Riggen 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 Riggen had pulled him over without any lawful basis—cursed at Riggen and actually did flip him off. In response, Riggen 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. Trooper Riggen Stops Bombard's Vehicle Because He Mistakenly Believed Bombard Gave Him the Middle Finger.

February 9, 2018, was a cold day in St. Albans. SUMF ¶ 3; Diaz Decl.,[1] Ex 1 [Bombard Dep. Tr. 82:2–11]; Ex. 3 [Riggen. Dep. Tr. 79:11–80:2, 134:5–14]. Trooper Jay Riggen, on patrol that day, would not be surprised if it had been in the 20s. *Id.*

At around 12:15 pm, Gregory Bombard was driving south on North Main Street. SUMF ¶ 4; Ex. 2 [Riggen Aff. ¶ 1]; Ex. 3 [Riggen Dep. Tr. 80:3–9]. As he drove, Bombard was stretching his fingers over the top of the steering wheel. SUMF ¶ 57; Ex. 1 [Bombard Dep. Tr. 55:5–58:11]; Ex. 7 [Cruiser Video 1:50–2:00]. At the same time, Trooper Riggen was driving his police cruiser in the opposite direction

[1] Because all exhibits are attached to the Declaration of James Diaz, the remainder of this brief omits reference to the Diaz Declaration when citing exhibits.

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 in his direction. SUMF ¶ 10; Ex. 3 [Riggen Dep. Tr. 90:12–23, 91:7–17]. And Riggen believed that Bombard was flipping him "the bird" to express that Bombard was "not happy 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]. Riggen did not believe that it was appropriate for Bombard to express himself this way. SUMF ¶¶ 33, 34; Ex. 3 [Riggen Dep. Tr. 155:11–158:8]. So, to enforce what he believed to be society's mores and "hav[e] a conversation about what's appropriate and not appropriate," Riggen decided to stop Bombard. SUMF ¶¶ 35–37, 63; Ex. 2 [Riggen Aff. ¶¶ 2, 3]; Ex. 3 [Riggen Dep. Tr. 93:5–95:1]; Ex. 7 [Cruiser Video 0:00–0:30].

Within 20 seconds of passing Bombard's vehicle, Trooper Riggen turned his

cruiser around. SUMF ¶ 25; Ex. 2 [Riggen Aff. ¶¶ 2, 3]; Ex. 3 [Riggen Dep. Tr. 93:5–95:1]; Ex. 7 [Cruiser Video 0:00–0:30]. To catch up to Bombard, Riggen entered the lane of opposing traffic to pass other vehicles in front of him. SUMF ¶ 26; Ex. 7 [Cruiser Video 0:30–1:03]; Ex. 3 [Riggen Dep. Tr. 93:22–95:1]. Riggen then reentered the correct lane, cutting in front of two other vehicles stopped at the Lower Newton Road traffic light to get behind Bombard's vehicle. *Id.* Once Riggen's cruiser was behind Bombard's vehicle, Riggen turned on his siren. SUMF ¶ 27; Ex. 7 [Cruiser Video 1:03–1:10]; Ex. 3 [Riggen Dep. Tr. 93:22–95:1]. Bombard immediately pulled over to the side of the road. SUMF ¶ 41; Ex. 7 [Cruiser Video 1:03–1:12]; Compl. & Answer ¶ 28.

Trooper Riggen got out of his cruiser and briskly walked to Bombard's driver-side window. SUMF ¶ 26; Ex. 7 [Cruiser Video 1:12–1:36]; Ex. 2 [Riggen Aff. ¶¶ 2, 3]. Without introducing himself as he normally would, *see* SUMF ¶ 43; Ex. 3 [Riggen Dep. Tr. 40:2–8], Riggen aggressively interrogated Bombard; in Riggen's own words, he "came at" Bombard in an "Alpha" manner because Riggen wanted to "control the action." SUMF ¶ 46; Ex. 3 [Riggen Dep. Tr. 139:5–140:18]; *see also* Ex. 1 [Bombard Dep. Tr. 130:11–18]. Riggen's first words to Bombard were "You need something?" SUMF ¶ 47; Ex. 7 [Cruiser Video 1:36]; Ex. 2 [Riggen Aff. ¶ 4]. Riggen then repeated, more loudly, "Need something?" SUMF ¶ 48; Ex. 7 [Cruiser Video 1:39]. Riggen proceeded to repeatedly accuse Bombard of flipping him off. SUMF ¶¶ 50, 55; Ex. 7 [Cruiser Video 1:42–2:00].

Bombard told Trooper Riggen that he had not displayed the middle finger.

SUMF ¶ 56; Ex. 7 [Cruiser Video 1:46–2:08]. Bombard also asked Riggen 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]. Riggen 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 [Riggen Dep. Tr. 168:15–17]. Bombard told Riggen that he planned to file a complaint against him. SUMF ¶ 60; Ex. 7 [Cruiser Video 3:50]. Bombard was in the middle of asking Riggen—"So if I did flip you off . . ."—but was cut short by Riggen abruptly walking back to his police cruiser, ending the conversation. SUMF ¶ 65; Ex. 7 [Cruiser Video 4:50]; Ex. 1 [Bombard Dep. Tr. 131:19–133:4]. The stop and interrogation made Bombard feel degraded and humiliated. SUMF ¶ 167; Ex. 1 [Bombard Dep. Tr. 39:7–11].

### B. Trooper Riggen Arrests, Jails, and Humiliates Bombard, and Tows His Car, Because Bombard Cursed and Displayed His Middle Finger at Riggen to Protest the Illegal Stop.

As Trooper Riggen arrived at his cruiser's driver-side door, he heard Bombard say "asshole" and "fuck you." 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]. Riggen immediately decided to arrest Bombard. SUMF ¶¶ 71 105, 107, 108; Ex. 3 [Riggen Dep. Tr. 169:20–170:8; 186:6–8; *see id.* 186:22–187:18].

About four vehicles were within 30 to 40 feet of Bombard. SUMF ¶¶ 72, 74; Ex. 3 [Riggen Dep. Tr. 174:15–21, 201:25–202:3]; Ex. 7 [Cruiser Video 4:50–5:10]. 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]. 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 [Riggen Dep. Tr. 194:7–9; 227:8–11]. After Bombard finished turning onto the side street and got past a parking lot exit, he pulled his vehicle over on the side of the road. SUMF ¶ 115; Ex. 2 [Riggen Aff. ¶ 12]; Ex. 7 [Cruiser Video 5:30–5:45]; Ex. 3 [Riggen Dep. Tr. 229:15–22]. He stopped within ten seconds of turning onto the side street. SUMF ¶ 116; Ex. 3 [Riggen Dep. Tr. 228:24–229:14]; Ex. 7 [Cruiser Video 5:30–5:45]. Riggen got out of his cruiser, quickly walked to Bombard's driver-side window, and told Bombard, "now you're under arrest." SUMF ¶¶ 118, 122; Ex. 2 [Riggen Aff. ¶ 12]; Ex. 7 [Cruiser Video

5:40–6:04].

Trooper Riggen had the discretion to cite and release Bombard for disorderly conduct, a misdemeanor, without arresting and taking him into custody. SUMF ¶ 112; Ex. 3 [Riggen 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; Ex. 7 [Cruiser Video 6:02–04]. Riggen continued: "Saying fuck you and calling me an asshole, and all the people there in the public, that's a crime sir, so get out of the car, you're under arrest." SUMF ¶ 123; Ex. 7 [Cruiser Video 6:06–6:11]. Riggen told Bombard that, by extending his middle finger and saying "asshole" and "fuck you" in public Bombard had committed "disorderly conduct 101." SUMF ¶ 124; Ex. 7 [Cruiser Video 6:20–6:43]. Riggen continued to scold Bombard, telling him that he was under arrest because of his "profane behavior in public." SUMF ¶ 125; Ex. 7 [Cruiser Video 7:00–7:20]. Riggen spoke to Bombard with an elevated voice, repeatedly gesticulating with his hands and pointing his finger at Bombard. SUMF ¶¶ 121, 132; Ex. 7 [Cruiser Video 6:00–8:50].

Bombard exited his vehicle and walked to the hood of Riggen's cruiser, as ordered. SUMF ¶ 126; Ex. 7 [Cruiser Video. 7:24–35]. As Bombard did so, Riggen told him, "It wasn't a problem until it became a problem, you understand that?" SUMF ¶ 127; Ex. 7 [Cruiser Video 7:26–7:29]; *see also* Ex. 3 [Riggen Dep. Tr. 201:5–15]. Riggen ordered Bombard to place his hands on the hood of the police cruiser, patted Bombard down, ordered Bombard to place his hands behind his back, handcuffed Bombard, and searched his clothing. SUMF ¶ 128; Ex. 7 [Cruiser Video

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; Ex. 7 [Cruiser Video 8:30–8:44]. Standing shoulder-to-shoulder with Bombard and continuing to speak loudly, gesticulate, and point his finger at Bombard, Riggen accused Bombard of having "the audacity" to "flip me the bird." SUMF ¶ 132; Ex. 7 [Cruiser Video 8:15–8:40]. Riggen also falsely claimed that there "probably were dozens of people if not over a hundred people" who had witnessed Bombard's speech and gesture. SUMF ¶ 129; Ex. 7 [Cruiser Video 7:49–8:09]; *see also* SUMF ¶ 130; Ex. 3 [Riggen Dep. Tr. 217:14–219:6] (Riggen, in deposition, conceding that no such crowd was present).

Riggen placed Bombard in his police cruiser, worsening Bombard's humiliation. SUMF ¶¶ 135, 168; Ex. 7 [Cruiser Video 9:45–9:55]; Ex. 1 [Bombard Dep. Tr. 136:6–18]. Even then, Riggen continued to berate Bombard and vent about what had happened. He told Bombard, for example, that his "behavior is ridiculous." SUMF ¶ 136; Ex. 7 [Cruiser Video 10:04]. Riggen told Sergeant Bruzzi, another officer who had arrived on the scene, that Bombard yelled "asshole," said "fuck you," and flipped Riggen off "in front of a hundred people," which Riggen described as "outrageous." SUMF ¶ 137; Ex. 7 [Cruiser Video 12:00–12:13].

During this second stop, Bombard expressed concern about his car, asking what would happen to it and if he could drive it to the barracks; Riggen refused. SUMF ¶¶ 143, 145; Ex. 7 [Cruiser Video 6:51–6:56, 9:30–9:39]; Ex. 3 [Riggen Dep. Tr. 231:19–232:1]. Riggen has discretion in deciding whether to have an unattended

vehicle towed. SUMF ¶ 146; Ex. 3 [Riggen Dep. Tr. 245:18–246:25]. Vermont State Police generally do not enforce parking violations. SUMF ¶ 147; Ex. 3 [Riggen Dep. Tr. 63:25–64:14]. When Riggen encounters a vehicle that has unlawfully stopped, but is not posing a traffic hazard, blocking a driveway, or causing complaints, he would usually allow the car to stay there indefinitely. SUMF ¶ 148; Ex. 3 [Riggen Dep. Tr. 65:22–69:4].

Bombard's vehicle was not obstructing the roadway or a nearby driveway. SUMF ¶ 150; Ex. 3 [Riggen Dep. Tr. 222:17–223:8]. But when Bombard asked Riggen what would happen to his car, Riggen pointed to a "no parking" sign and told Bombard, without hesitation: "Well, it says no parking this side of the street, so it's gonna get towed." SUMF ¶ 143; Ex. 7 [Cruiser Video 9:30–9:39]; *see also* Ex. 3 [Riggen Dep. Tr. 231:19–232:1]. At Riggen's direction, Bombard's car was towed, SUMF ¶ 151; Ex. 2 [Riggen Aff. ¶ 14], even though Riggen believed Bombard would be back from the barracks and return to his car within an hour, SUMF ¶ 149; Ex. 3 [Riggen Dep. Tr. 222:1–6, 222:21–223:3].

### C. Trooper Riggen Jails Bombard, Submits His Mugshot to Vermont Media Outlets, and Ensures He is Charged with Disorderly Conduct.

Riggen transported Bombard to the St. Albans barracks and locked him in a cell. SUMF ¶ 138; Ex. 7 [Cruiser Video 13:35–19:20]; Ex. 2 [Riggen Aff. ¶ 15]. Bombard was held at the barracks for over an hour. SUMF ¶ 152; Ex. 8 [Barracks Video 12:22:00 PM–1:25:15 PM]. Bombard's mugshot and fingerprints were taken. SUMF ¶ 154; Ex. 8 [Barracks Video 1:04:00 PM–1:16:00 PM]. Bombard was then

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, *State v. Bombard*, 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, *State v. Bombard*, 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 be convicted of obstructing traffic by simply conveying offensive messages or ideas" and because the video of the incident did "not show any time when the Defendant or his vehicle physically obstructed traffic." SUMF ¶ 164; Ex. 13 [Ruling on Motion to Dismiss Count Two, Docket No. 241-2-18 (Vt. Sup. Ct. Dec. 18, 2016)]. In January 2019, eleven months after the arrest, the Franklin County State's Attorney dismissed the "tumultuous behavior" charge against Bombard. SUMF ¶ 164; Ex. 13 [Docket sheet of 241-2-18 (Vt. Sup. Ct. Dec. 18, 2016)].

Because of Trooper Riggen's conduct, Bombard incurred more than $6,800 in attorney's fees defending against the criminal charges, paid a $150 towing fee to get his car back, endured violations of his federal and state constitutional rights, and suffered humiliation and embarrassment from the stops and arrest themselves and from their subsequent publicization in his community. SUMF ¶¶ 165–69; Ex. 1 [Bombard Dep. Tr. 39:7–11, 41:23–42:5, 116:25–118:10, 136:6–18]. Since the stops and arrest, Bombard also feels differently about police officers than he did before:

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. 136:14–139:3].

## PROCEDURAL HISTORY

On February 3, 2021, Bombard filed his civil rights complaint against Jay Riggen and the State of Vermont, alleging the following claims:

1) Unlawful seizure and false arrest (based on the first stop), under 42 U.S.C. § 1983, Article 11 of the Vermont Constitution, and the tort of false arrest;
2) Retaliation for protected speech (based on the first stop), under 42 U.S.C. § 1983 and Article 13 of the Vermont Constitution;
3) Retaliation for protected speech (based on the arrest), under Article 13 of the Vermont Constitution;
4) Retaliation for protected speech (based on the seizure of Bombard's vehicle), under Article 13 of the Vermont Constitution; and
5) Viewpoint discrimination resulting in the chilling of protected speech (based on both stops, the arrest, and the seizure of Bombard's vehicle, as well as Riggen's repeated admonishments, being handcuffed, being locked in a cell, having his fingerprints and mugshot taken, and having his mugshot sent to Vermont media outlets, among other actions), under 42 U.S.C. § 1983 and Article 13 of the Vermont Constitution.

Compl. ¶¶ 82–113.

Bombard brought all federal claims against Riggen and all state claims against the State of Vermont. *Id.* Bombard seeks relief including a declaration that Riggen's actions were illegal, compensatory damages, and costs and expenses of this action, including attorneys' fees. *Id.* at 14.

Defendants moved to partially dismiss the complaint, seeking dismissal of the false arrest tort claim in Count 1 and all claims in Counts 2–5. Defs.' Mot. Dismiss 1, May 17, 2021. Defendants argued that the complaint failed to adequately

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

Defendants answered the complaint, *see* Defs.' Answer, Jan. 11, 2021, and the parties engaged in discovery. The discovery period ended on November 15, 2023, and the deadline for dispositive motions is December 15, 2023. *See* Entry Order ¶ 2, August 2, 2023.

## ARGUMENT

The Court should grant summary judgment to Bombard on all claims. Courts "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a); *accord Civetti v. Turner*, 2022 VT 64, ¶ 7. A fact is "material" only when "it could affect the outcome of the case." *Gates v. Mack Molding Co., Inc.*, 2022 VT 24, ¶ 14, (citation omitted). There is no "genuine issue" for trial when "the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Kelly v. Town of Barnard*, 155 Vt. 296, 305 n.5 (1990) (cleaned

up) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*, 475 U.S. 574, 587 (1986)).

Here, the material facts are not disputed. Riggen performed a seizure of Bombard without lawful authority because Riggen mistakenly believed Bombard had given him the middle finger. And Riggen's seizure of Bombard was done in retaliation for what Riggen viewed as a "negative gesture" of "displeasure" with "something [Riggen] represented" such as "police or the State Police or the government." But the U.S. and Vermont constitutions prohibit government officials' retaliation against protected speech regardless of whether the victim actually spoke.

When Bombard protested Riggen's unlawful retaliatory stop and subsequent interrogation by saying two curse words and then displaying his middle finger as he drove away, Riggen pulled him over again and arrested him to retaliate further. After handcuffing, searching, and berating Bombard for his expressions, Riggen decided to retaliate yet again—ordering Bombard's car to be towed because he pulled over Bombard in front of a "no parking" sign. Not only did Riggen's seizures violate Bombard's rights, humiliate him, and cost him thousands of dollars, but they have also chilled Bombard from speaking critically of police. In addition to retaliation, Riggen engaged in viewpoint discrimination—the most "egregious" form of First Amendment violation. No reasonable jury, armed with the undisputed material facts and clearly established law, could find otherwise.

## I. Bombard Is Entitled to Summary Judgment on His Unlawful Seizure Claims Because Trooper Riggen 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 Riggen'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 Riggen 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, Riggen is not entitled to qualified immunity.

### A. Trooper Riggen 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 stop[3]— requires that a police officer "have, at a minimum, reasonable suspicion that criminal activity is afoot." *State v. Edwards*, 2008 VT 23, ¶ 4; *accord United States*

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[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." *State v. May*, 134 Vt. 556, 559 (1976) (citation omitted). "It is similar to false imprisonment in that: (1) the defendant must have intended to confine the plaintiff; (2) the plaintiff was conscious of the confinement; and (3) the plaintiff did not consent to the confinement." *Whiting v. Lillicrap*, No. 35-1-15 Oscv, 2015 WL 5470172, at *3 (Vt. Super. Ct. Sept. 8, 2015) (citing Restatement (Second) of Torts § 35(1)).

[3] *See Zullo v. State*, 2019 VT 1, ¶ 58 ("The temporary stop of a vehicle is a seizure subject to Article 11 protection from governmental invasions of privacy.") (citations omitted).

*v. Stewart*, 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." *Id.* (quoting *State v. Marcello*, 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. Riggen did not have and has never claimed to have had *any* suspicion, reasonable or otherwise, that Bombard engaged in any criminal activity or committed a traffic infraction. *See* SUMF ¶ 30; Ex. 3 [Riggen. Dep. Tr. 157:13–16] (regarding displaying the middle finger, "I know he's allowed to do it"); *see also* SUMF ¶ 22; Ex. 3 [Riggen Dep. Tr. 91:18–20] (noting Riggen 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 *reasonable* suspicion of a traffic violation or impending criminal activity." *Swartz*, 704 F.3d at 110; *see also Clark v. Coleman*, 448 F. Supp. 3d 559, 569 (W.D. Va. 2020) ("[D]isplaying one's middle finger is not illegal, nor does the gesture on its own

[4] Federal courts, however, have not similarly held that community caretaking functions generally obviate the need for reasonable suspicion to perform a traffic stop. *See Caniglia v. Strom*, 593 U.S. 194, 196–99 (2021) (discussing limits to the extent to which "community caretaking functions" can obviate the Fourth Amendment's warrant requirement); *id.* at 200 (Alito, J., concurring) (characterizing the majority opinion as holding that "there is no special Fourth Amendment rule for a broad category of cases involving 'community caretaking'").

create probable cause or reasonable suspicion that [a driver] violated any law.") (internal quotation marks and citations omitted). There is no dispute that Riggen seized Bombard: Riggen drove behind Bombard and activated his blue lights, instructing Bombard to pull over and effecting a motor vehicle stop. SUMF ¶¶ 26, 27; Ex. 7 [Cruiser Video 0:30–1:10; Ex. 3 [Riggen Dep. Tr. 93:22–95:1]; *see also Button v. State*, 2013 VT 92, ¶ 9 (Riggen pulling over behind driver's already-stopped car and activating blue lights constituted a seizure). There is also no dispute that Riggen stopped Bombard without reasonable suspicion of a crime or traffic violation. In fact, as Riggen conceded, his sole reason for initially stopping Bombard was Riggen's belief that Bombard had displayed his middle finger at him. SUMF ¶ 28. Compl. & Answer ¶¶ 2, 84; Ex. 3 [Riggen Dep. Tr. 83:10–11].

Any attempt to justify the stop with the community care exception fares no better. Importantly, the community caretaking exception is construed narrowly: Because of "the danger that an expansive community caretaking doctrine presents to individuals' right to privacy," the Vermont Supreme Court has consistently emphasized the need to "take care not to allow the exception to 'devour the requirement of reasonable articulable suspicion.'" *Button*, 2013 VT 92, ¶ 20 (quoting *State v. Burgess*, 163 Vt. 259, 262 (1995)). To ensure that those "natural, inherent, and unalienable" rights are protected, *State v. Wood*, 148 Vt. 479, 487 (1987) (quoting Vt. Const. Ch. I, Art. 1), "[t]he propriety of a traffic stop based on the 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," *Button*, 2013 VT 92, ¶ 9 (internal quotations and citations omitted).

"Specific and articulable facts" are critical. *Id*. A vague fear of an ambiguous general threat is insufficient under the community caretaking exception: "[C]onclusory speculations" do not pass constitutional muster. *Id.* ¶ 15 (citing *Marcello*, 157 Vt. at 658); *see also State v. St. Martin*, 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 the community caretaking exception to justify a traffic stop, that officer must be able to "particularly describe 'a perceived *emergency* or [an] indication of *imminent threat to specific individuals* before effectuating [the] stop." *Button*, 2013 VT 92, ¶ 9 (quoting *St. Martin*, 2007 VT 20, ¶ 6) (emphasis added). Hammering home the importance of specificity, in situations "where a [civilian's] actions *might* pose some danger to some member of the motoring public at some indefinite time in the future," Vermont has held that the community caretaking exception does not permit a seizure. *St. Martin*, 2007 VT 20, ¶ 8.

Moreover, those specific and articulable facts must reasonably suggest that a community caretaking stop is justified. *See Marcello*, 157 Vt. at 658 ("The key to such constitutionally permissible police action is reasonableness."); *Swartz*, 704 F.3d at 110 (determining that common knowledge deprives viewing middle-finger as sign of distress of its reasonableness). Where there is no objective indication that

something is wrong with the motorist or vehicle, a community caretaking stop is not justified. *Burgess*, 163 Vt. 259 (1995).

To illustrate, in *State v. Edwards*, 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." *Id.* ¶ 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. Button*, 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 *Button*. 2013 VT 92. Riggen had followed the driver in *Button* 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." *Id.* ¶ 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. *Id.* ¶¶ 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" (*i.e.*, "pulling over in an unsafe place"),

the "objective facts" did not support a reasonable belief that the driver needed help, and the lawfully parked car presented no danger to other vehicles. *Id*. ¶¶ 12–13, 17. Thus, Riggen's "concern for the well-being of the occupants was not sufficient to justify the intrusion of a seizure." *Id*. ¶ 12.

The community caretaking exception is likewise plainly inapplicable to Riggen's stop here. Bombard gave no signal to Riggen to indicate he "was in distress or needed assistance," as the exception requires. *Edwards*, 2008 VT 23, ¶ 8. Rather, Riggen interpreted Bombard as giving him "a sign of displeasure," SUMF ¶ 11; Ex. 3 [Riggen Dep. Tr. 87:10], "to communicate that he was not happy," SUMF ¶ 11; Ex. 3 [Riggen Dep. Tr. 90:15]. Riggen further admits he did not believe Bombard was asking for assistance. SUMF ¶ 12; Ex. 3 [Riggen Dep. Tr. 151:18–152:1] ("I don't think he was looking for help, no."). Additionally, the vague and inarticulable concern Riggen alluded to in his probable cause affidavit is an insufficient basis for a community caretaking stop. *See* Ex. 2 [Riggen Aff. ¶ 2]. Riggen acknowledged that he did not know if Bombard was experiencing "a mental health crisis or other need," SUMF ¶ 23; Ex. 3 [Riggen Dep. Tr. 114:4–10], and that the middle finger itself "could be as benign as expressing one's opinion about something," SUMF ¶ 29; Ex. 3 [Riggen Dep. Tr. 152:2–153:1]—a far cry from "specific and articulable facts" of "a perceived emergency or [an] indication of imminent threat to specific individuals" necessary to justify such a stop, *Button*, 2013 VT 92, ¶ 9 (quoting *St. Martin*, 2007 VT 20, ¶ 6).

Nor were Riggen's "conclusory speculations" objectively reasonable. *Id.* ¶ 15 (citing *Marcello*, 157 Vt. at 658). The Second Circuit has said, in no uncertain terms, that a motorist's displayed middle finger, alone, is not a justification for a traffic stop of any kind. *See Swartz*, 704 F.3d at 110. "[T]he nearly universal recognition that this gesture is an insult" deprives an interpretation of the middle finger as a sign of distress of its reasonableness. *Id*. Riggen's supervisors agree. Having reviewed Riggen's probable cause affidavit and discussed the Bombard stop with him, Lieutenant Tara Thomas, Riggen's former supervisor, stated that she would not have made the stop. SUMF ¶ 38; Ex. 4 [Thomas Dep. Tr. 27:22–28:17, 56:7–57:1, 98:23–100:2]. Likewise, Maurice Lamothe Jr., the St. Albans Police Chief and former Vermont State Police St. Albans barracks station commander at the time of the stop, confirmed that people have given him the finger while he was in his car on patrol, but he "wouldn't think much of it. . . . It's another day." SUMF ¶ 39; Ex. 5 [Lamothe Dep. Tr. 12:19–13:4].

Although Riggen implausibly claimed that he did not know what most people believe the middle-finger gesture means or that it could mean "anything under the umbrella of 'negative,'" Ex 3 [Riggen Dep. Tr. 87:6–90:9], reasonable officers know what it means based on common knowledge and court decisions. The Second Circuit has described "giving the finger" as "a gesture of insult known for centuries." *Swartz*, 704 F.3d at 107; *see, e.g., id*. n.1 (referencing Second Circuit precedent, literature, and a law review article noting the gesture's use as an insult in Ancient Greece). And as the Vermont Supreme Court has already informed Riggen, behavior

that he nebulously classifies as "unusual" is not the benchmark for a valid traffic stop. *Button*, 2013 VT 92, ¶ 5. Consequently, Riggen's seizure of Bombard had no lawful basis, and summary judgment should be granted in Bombard's favor on Count 1.

### B. It is clearly established that no reasonable officer could view showing the middle finger from a vehicle to provide a lawful basis to justify a motor vehicle stop.

To be sure, "[f]its of rudeness or lack of gratitude may violate the Golden Rule. But that doesn't make them illegal or for that matter punishable or for that matter grounds for a seizure." *Cruise-Gulyas v. Minard*, 918 F.3d 494, 495 (6th Cir. 2019). A reasonable police officer would be well aware of precedent clearly establishing an individual's right to convey their displeasure to a police officer using the middle finger. Thus, Riggen is not entitled to qualified immunity.

A state police trooper like Riggen is granted qualified immunity only when he was "1) acting during the course of [his] employment and within the scope of [his] authority; 2) acting in good faith; and 3) performing discretionary, as opposed to ministerial acts." *Sutton v. Vt. Reg'l Ctr.*, 2019 VT 71A, ¶ 46. An officer is not acting in good faith when his discretionary acts violate the "clearly established . . . rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Therefore, where an officer's actions are contrary to clearly established law, qualified immunity does not shield him from liability. *See Sabia v. Neville*, 165 Vt. 515, 521 (1996).

"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." *Clark*, 448 F. Supp. 3d at 576 (citing *Terminiello v. City of Chicago*, 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 *Swartz* 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. *Id*. The officer was not entitled to qualified immunity on a Fourth Amendment claim "because a *reasonable* police officer would not have believed he was entitled to initiate the law enforcement process in response to giving the finger." *Id*. 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. *Clark*, 448 F. Supp. 3d at 577 (listing cases). Or, as *Clark* neatly summarized while denying qualified immunity, "[i]n other words, does [a driver] have a clearly established right against seizure by an officer who is concerned about his own welfare and the welfare of others simply

because he made an offensive gesture? The court finds that he does." *Id*. at 576. This Court should likewise find that Riggen is not entitled to qualified immunity here.[5]

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

Riggen'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. *Nieves*, 139 S. Ct. at 1722 (citing *Hartman v. Moore*, 547 U.S. 250 (2006)); *Long*, 166 Vt. at 572. In the Second Circuit, First Amendment retaliation claims require: (1) that the speaker has a right protected by the First Amendment; (2) that the government official's actions were motivated or substantially caused by the speaker's exercise of that right; and (3) the defendant's actions caused the speaker some injury. *Dorsett*, 732 F.3d at 160. Although the Vermont Supreme Court has not addressed a specific standard for retaliatory police seizures, its First Amendment retaliation cases adhere to the similar test described in *Mount Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *See, e.g.*, *In re Girouard*, 2014 VT 75, ¶ 13 n.3 (using *Mt. Healthy* to evaluate prisoner's challenge to furlough requirements in retaliation for speech); *Grievance of Rosenberg v. Vt. State Colleges*, 2004 VT 42,

[5] For similar reasons, the State is liable for Riggen's violation of Bombard's for Article 11 rights under *Zullo*, 2019 VT 1.

¶ 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; *see* 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. *See, e.*g., *Dorsett*, 732 F.3d at 160 (citing the "additional scrutiny at [a] border crossing" present in *Tabbaa v. Chertoff*, 509 F.3d 89, 102 (2d Cir. 2007)—which involved plaintiffs who had been "detained for a lengthy period of time, interrogated, fingerprinted, and photographed," *id.* at 102—as an example of harm that suffices for a retaliation claim). Plaintiff nevertheless reserves the right to respond to any arguments that Defendants put forth to the contrary.

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

Riggen 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." *Hackbart v. City of Pittsburgh*, No. 2:07cv157, 2009 WL 10728584, at *3 (W.D. Pa. Mar. 23, 2009) (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). For example, in *Cohen v. California*, the Supreme Court held that a jacket inscribed with "Fuck the Draft" was protected speech. 403 U.S. 15, 16, 26 (1971); *see also Nichols v. Chacon*, 110 F. Supp. 2d 1099, 1104–1110 (W.D. Ark. 2000) (collecting cases), *aff'd*, 19 F. App'x 471 (8th Cir. 2001) (collecting cases); *State v. Schenk*, 2018 VT 45, ¶¶ 33, 34 ("pure speech" and "speech . . . behavior" cannot violate Vermont's disorderly conduct statute).

The use of gestures to criticize government officials, especially law enforcement officers, is similarly protected. *See Cohen*, 403 U.S. at 26 ("[O]ne of the prerogatives of American citizenship is the right to criticize public men and measures.") (quoting *Baumgartner v. United States*, 322 U.S. 665, 673–674 (1944)); *Hill*, 482 U.S. at 462–63 ("The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state."). Law enforcement officials must tolerate protected speech, even when it takes the form of

insults toward them. *See Duran v. City of Douglas, Ariz.*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment."); *Nichols*, 110 F. Supp. 2d at 1106 (same).

Accordingly, courts have held that cursing at or giving a police officer the middle finger is protected speech—and have not hesitated to grant summary judgment against police officers who retaliate in violation of that First Amendment right. *See, e.g.*, *Nichols*, 110 F. Supp. 2d at 1110 ("While we agree the gesture . . . was crude, insensitive, offensive, and disturbing to [defendant's] sensibilities, it . . . was protected as 'free speech' under the First Amendment."). And, importantly here, this Court has already held that First Amendment and Article 13 protections extend to non-speakers where an officer mistakenly perceives protected speech. Order, 5–6 (adopting the rationale of *Heffernan v. City of Paterson*, 578 U.S. 266 (2016)—that punishment based on an official's mistaken perception that plaintiff engaged in protected expressive conduct is actionable retaliation—because it is "eminently sensible").

It is undisputed that Riggen stopped Bombard because he perceived protected speech, and then arrested him for actually engaging in protected speech. For the initial stop, Riggen believed Bombard displayed the middle-finger gesture at him to communicate protected speech. *See* SUMF ¶¶ 29–31; Ex. 3 [Riggen Dep. Tr. 35:23–36:2, 105:5–7, 152:2–153:1, 157:13–16] Riggen knew it was a "negative

gesture" and interpreted it as Bombard communicating his displeasure "with something [Riggen] represents," such as "police or the State Police or the government." SUMF ¶¶ 11, 28; Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17]. For purposes of the retaliatory arrest and vehicle-seizure analysis, there is no dispute that Bombard directed the words "asshole," "fuck you," and his middle-finger gesture at Riggen after the initial stop concluded. SUMF ¶ 91; Ex. 3 [Riggen Dep. Tr. 252:7–10]. This is protected speech. The first prong of the retaliation analysis is satisfied.

### B. Riggen had no lawful authority to stop and arrest Bombard or seize his vehicle.

As an initial matter, reasonable suspicion or probable cause do not excuse Article 13 retaliatory seizures. While the U.S. Supreme Court, in *Nieves ,* created a probable cause exception to First Amendment retaliatory arrest claims, Vermont has not adopted that exception and should not. *Nieves*, a heavily criticized decision, held that objective probable cause to arrest will automatically defeat retaliatory arrest claims in most circumstances. 139 S. Ct. at 1725. Although this Court previously applied *Nieves* to this case,[7] this Court should not continue to impute *Nieves*'s holding to Article 13—Vermont's state constitutional free speech protection.

[7] Bombard acknowledges that, at the motion-to-dismiss stage, the Court applied *Nieves* to his Article 13 claims. Order 2–3. He raises this issue now because the Court has inherent authority to modify its prior rulings, *see, e.g.*, *Nevitt v. Nevitt*, 155 Vt. 391, 396 (1990) ("[T]he court's order at the first hearing was not a final order because it did not dispose of all the issues between the parties. The matter thus remained within the jurisdiction of the trial court, which had inherent, discretionary power to open and correct, modify or vacate its judgment." (citation omitted)), and to ensure the issue is preserved for appeal.

As explained in Plaintiff's Opposition to Defendant's Motion to Dismiss, Article 13 is unique in its text, history, and core values. Pl.'s Opp. to Defs.' Mot. Dismiss, 13–25. It may provide even greater protection for speech "concerning the transactions of government" than the First Amendment. *Id*. Moreover, *Nieves's* structural, doctrinal, and empirical flaws—which are many—make its holding a poor fit for Vermont's unique free speech protection and constitutional jurisprudence. *See id*.

Assuming *arguendo* that this Court adopts *Nieves's* First Amendment exception—that the existence of probable cause bars retaliatory-arrest claims—for all First Amendment and Article 13 retaliatory seizures, Riggen did not have probable cause here. As described in Section I, the law clearly established that the middle-finger gesture alone cannot justify a vehicle stop under any circumstances.[8] Similarly, officers have no authority to arrest a person for voicing protest against their actions: Using two curse words and displaying the middle finger at a police officer in public is protected by clearly established law. Vermont statute, furthermore, explicitly removes authority for an officer to seize a vehicle parked in a "no parking" area when the motorist stopped there pursuant to police order. Riggen had no probable cause to justify his actions.

#### 1. Riggen did not have probable cause that Bombard engaged in disorderly conduct.

Riggen heard Bombard say "fuck you" and "asshole" and immediately decided to arrest him for that protected speech, maintaining this decision after Bombard

[8] Plaintiff will not rehash Section I and refers the Court to that section *supra* at 18–25, showing no lawful basis for the initial stop.

briefly displayed the middle-finger gesture. As established in Part II.A., curse words and the middle-finger gesture are protected speech, whether communicated in a private conversation or to a police officer in public. But Riggen decided otherwise—that "profane behavior in public" constituted "disorderly conduct 101." His affidavit purported to show probable cause of two crimes: 13 V.S.A. § 1026(a)(1) (arguing that Bombard engaged in "tumultuous declarations" and "tumultuous profanity"), and 13 V.S.A. § 1026(a)(3) ("abusive or obscene language").

Riggen lacked lawful authority because no reasonable officer would have believed that probable cause existed for either crime. "[P]robable cause . . . is evaluated under an objective standard." *State v. Morse*, 2019 VT 58, ¶ 13. Therefore, "the court must examine whether a reasonable officer would believe there to be probable cause based on the circumstances present at the time of the arrest." *Id.* ¶ 15 n.3. The finding of probable cause is a practical, fact-specific determination, that "turn[s] on whether the particular circumstances establish a nexus between the crime [and] the suspect. . . ." *Zullo*, 2019 VT 1, ¶ 77 (quoting *State v. Bauder*, 2007 VT 16). The totality of the circumstances here did not provide probable cause that Bombard violated Vermont's disorderly conduct statute.

First, Riggen did not have probable cause that Bombard possessed the intent necessary to violate Vermont's disorderly conduct statute. The statute requires a defendant to intend to cause or recklessly risk public inconvenience or annoyance. 13 V.S.A. § 1026(a). Importantly, it is Bombard's intent—not whether any listener happened to hear or react in a particular way—that matters here because the First

Amendment does not vary its protections for speech depending on how listeners react. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134–35 (1992) ("Speech cannot . . . be punished or banned[] simply because it might offend a hostile mob."); *Matal v. Tam*, 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, Riggen saw only four other vehicles and there were no pedestrians. SUMF ¶¶ 72, 95; Ex. 3 [Riggen Dep. Tr. 201:16–202:3]. The vehicles were 30 to 40 feet away from Bombard. SUMF ¶ 74; Ex. 3 [Riggen Dep. Tr. 174:15–21]; Ex. 7 [Cruiser Video 4:50–5:10]. Riggen did not know how many people were in the vehicles. SUMF ¶ 96; Ex. 3 [Riggen Dep. Tr. 202:4–9]. Riggen did not see any vehicles with their windows open or cracked on that cold wintry day. SUMF ¶ 97; Ex. 3 [Riggen Dep. Tr. 174:1–13]; Ex. 7 [Cruiser Video 4:49–5:10]. Aside from one driver who Riggen believes *may* have heard Bombard,[9] Riggen did not see anyone react to Bombard's utterances. SUMF ¶ 102; Ex. 3 [Riggen Dep. Tr. 180:11–15, 182:10–25]. And despite his affidavit's reference to a school bus in the vicinity, Riggen never saw anyone on the

[9] Although not present in his affidavit, press release, police report, statements in the cruiser video to Bombard or Sergeant Bruzzi, nor in the recounting of any other deponent he spoke to about the stop, Riggen alleged at his deposition that a driver in a car 50 feet away looked at him after Bombard's utterances; without gesturing, expression, or other form of communication. SUMF ¶ 102; Ex. 3 [Riggen Dep. Tr. 174:22–178:18]. Riggen consequently—and even if true, unreasonably—believed the driver had somehow heard Bombard's utterances.

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. Lund*, 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), *overruled on other grounds by State v. Dumont*, 146 Vt. 252 (1985) and *State v. Begins*, 148 Vt. 186 (1987). In *State v. Morse*, 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

resisted arrest. 2019 VT 58, ¶¶ 2–3, 15. Similarly, in *State v. Amsden*, the Court found tumultuous behavior where a handcuffed woman refused to obey officer commands, dropped to the ground, refused to move, later refused to exit the cruiser, and then repeatedly banged the bed in a hospital "safe room" with such force that the bed had to be moved to avoid damage. 2013 VT 51, ¶¶ 17–18; *see also State v. Lebert*, No. 2015-120, 2015 WL 9275488 (Vt. Dec. 18, 2015) (holding physically fighting with two other men at a bar to be sufficient evidence to support a conviction for tumultuous behavior); *State v. Pickett*, 137 Vt. 336, 337 (1979) (upholding conviction for "tumultuous and threatening behavior" based on the 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).

By contrast, in *State v. McEachin*, no probable cause existed for tumultuous behavior because no behavior "indicate[d] defendant might physically injure someone or become violent." 2019 VT 37, ¶ 4. There, on New Year's Eve in downtown Burlington, the defendant was "verbally combative" with officers, but walked away at their order. Minutes later the defendant returned, walked directly toward the officers, made eye contact with one officer, and got within four feet before an officer pushed him back. *Id*. ¶¶ 2–3. The defendant then yelled profanities in public at the officers and refused to leave the area, and officers arrested him. *Id*. ¶ 4. The Court rejected the tumultuous behavior charge because, despite his yelling, the defendant's physical appearance and conduct did not indicate at any point that

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," *McEachin*, 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." *Id.* 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 *McEachin*, 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]; *see also* 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. *State v. Tracy*, 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 *Chaplinsky* [v. New Hampshire, 315 U.S. 568 (1942)]." (cleaned up) (quoting *State v. Read*, 165 Vt. 141 (1996))). "[M]outhing off and bluster—however obnoxious, disrespectful, and angry—[a]re not sufficient behavior to violate the statute." *Tracy*, 2015 VT 111, ¶ 34 (cleaned up). "The use of foul language and vulgar insults is insufficient. . . . The provision only reaches speech that, in the context in which it is uttered, is so inflammatory that it is akin to dropping a match into a pool of gasoline." *Id.* ¶ 38 No reasonable officer could view Bombard's speech as violating § 1026(a)(3)'s "abusive" language prohibition.

Likewise, the First Amendment's exception for obscenity applies only to speech that, among other requirements, "depicts or describes, in a patently offensive way, sexual conduct" and that "appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 24 (1973). The Vermont Supreme Court has held the same. *Long*, 166 Vt. at 573–74 (quoting *Cohen*, 403 U.S. at 20 and citing *Roth v. United States*, 354 U.S. 476, 487 (1957)). Just as there was no chance an officer would believe probable cause existed for "tumultuous behavior" or "abusive language," there was no chance Bombard's speech violated § 1026(a)(3)'s "obscene language" prohibition.

**2. Riggen had no lawful authority to seize Riggen's vehicle.**

Riggen similarly had no lawful authority to seize Bombard's vehicle. At the second stop, Riggen told Bombard he would seize his car because it was in front of a sign that said "no parking this side of the street." SUMF ¶ 143; Ex. 7 [Cruiser Video

9:30–9:39]; *see also* 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 compliance with law or directions of an enforcement officer." *Id*. § 1104(a).

Bombard stopped in front of the no parking sign because Trooper Riggen pulled him over. *See* SUMF ¶ 117; Ex. 3 [Riggen Dep. Tr. 222:17–224:5]. He would not have stopped there otherwise. Indeed, to avoid criminal consequences, motorists must stop when they see an officer "operating a law enforcement vehicle sounding a siren and displaying" flashing lights. *Id*. § 1133(a)(2). There is no dispute that Riggen sounded his siren after Bombard was in the process of turning left from Main Street onto Brainerd Street. SUMF ¶ 114; Ex. 7 [Cruiser Video 4:59–5:25]; Ex. 2 [Riggen Aff. ¶ 12]; Ex. 3 [Riggen Dep. Tr. 194:7–9; 227:8–11]. Riggen agrees Bombard stopped his vehicle within seconds of Riggen sounding his siren. SUMF ¶ 116; Ex. 3 [Riggen Dep. Tr. 228:24–229:14]; Ex. 7 [Cruiser Video 5:30–5:45]. Riggen also knew that Bombard had to drive past a driveway before stopping. Ex. 3 [Riggen Dep. Tr. 15–19]. Riggen towed Bombard's vehicle even though Bombard stopped in that location only because Riggen required him to do so. *See* SUMF ¶ 117; Ex. 3 [Riggen Dep. Tr. 222:17–224:5]. But, by law, Riggen had no authority to tow the vehicle because Bombard's vehicle fell under a sensible and explicit legal exception.

### 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 (3) a reasonable jury could not find otherwise. Even if this Court applies *Nieves* here, once a plaintiff has shown the absence of lawful cause for police seizures, "then the *Mt. Healthy* test governs." Order, 3 n.3; *Nieves*, 139 S. Ct. at 1725. To access summary judgment under *Mt. Healthy*, plaintiffs generally must: (1) show that the protected speech was a substantial or motivating factor behind the adverse action, and (2) that the defendant could not meet their burden to convince a reasonable jury that they would have initiated the adverse action absent retaliatory motive. *See Nieves*, 139 S. Ct. at 1725.

Retaliatory motive can be shown in several ways. The absence of a lawful basis for a law enforcement action "provide[s] weighty evidence that the officers' animus caused" the adverse action. *Id*. at 1724; *see Hartman*, 547 U.S. at 265 (lack of probable cause is sufficient for a prima facie inference that the unconstitutional motive caused prosecution). Retaliatory motive may also be proven by other direct or circumstantial evidence. *Wrobel v. Cnty. of Erie*, 692 F.3d 22, 32 (2d Cir. 2012) ("A causal relationship can be demonstrated either indirectly by means of circumstantial evidence, including that the protected speech was followed by adverse treatment, or by direct evidence of animus."). The Vermont Supreme Court

reviews retaliatory motive in the same way. *See Robertson v. Mylan Labs, Inc.*, 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")*; Gallipo v. City of Rutland*, 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] For example, in *Meaney v. Dever*, the Massachusetts federal district court granted summary judgment on an officer's employment-retaliation claim because both direct and circumstantial evidence supported the causal connection between his protest of the mayor's policies and the adverse employment action. 170 F. Supp. 2d 46, 58 (D. Mass. 2001), *rev'd on other grounds*, 326 F.3d 283 (1st Cir. 2003). The mayor's statements that "there will be repercussions" if he could "identify the perpetrators" and the police chief's comments that the officer's expressive conduct was

[10] The same is true for retaliatory arrest claims. *See, e.g.*, *Webster v. City of New York*, 333 F. Supp. 2d 184, 202 & n.6 (S.D.N.Y. 2004) (holding that temporal proximity and officers' statements to plaintiffs, including "Who has got the smart mouth" and "Now, you are going to be locked up instead of him," supported First Amendment retaliation claim); *Costello v. McEnery*, No. 91 Civ. 3475 (PKL), 1994 WL 410885, at *3 (S.D.N.Y. Aug. 3, 1994), *aff'd*, 57 F.3d 1064 (2d Cir. 1995); *Charles v. City of New York*, No. 12CV6180SLTSMG, 2017 WL 530460, at *18 (E.D.N.Y. Feb. 8, 2017) (same, noting temporal proximity and an officer's post-arrest statement that "this is what happens when you get involved").

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

In *Minten v. Weber*, the court similarly granted a deputy sheriff's summary judgment motion against a sheriff who fired the deputy for offering to testify against the sheriff. *See* 832 F. Supp. 2d 1007, 1011 (N.D. Iowa 2011). The court, observing that circumstantial evidence can prove retaliatory motive, reviewed evidence that the sheriff: (1) failed to list any reason, other than the deputy's offer to testify, on a form memorializing the reasons for the firing; (2) had mentioned no reason for the firing, other than the deputy's offer to testify, in related administrative-hearing testimony; and, (c) conceded in his brief that the deputy's offer to testify was the "last straw" when combined with other reasons to fire the deputy. *Id.* at 1024–26. Because the sheriff's statements showed his retaliatory state of mind and implied a link between the speech and adverse action, the court concluded that no reasonable juror could find that the deputy's speech was not a substantial or motivating cause for his firing. *Id.* at 1025–26.

In Bombard's case, overwhelming direct and circumstantial evidence demonstrate that Bombard's speech was a substantial or motivating cause for Riggen's stop, arrest, and vehicle seizure. Riggen repeatedly stated that his actions were in direct response to Bombard's protected speech, Riggen's actions

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.**

The direct and circumstantial evidence shows that the perceived middle finger was a substantial or motivating cause for the initial stop. Riggen admitted in his Answer and acknowledged at deposition that he stopped Bombard because he believed that Bombard had directed the middle finger at him. SUMF ¶¶ 9, 28 Ex. 3 [Riggen Dep. Tr. 83:10–11]; Compl. & Answer ¶¶ 2, 84. Riggen believed the gesture communicated a message about "unhappiness with something related to police or the government . . . [that Bombard was] not happy with something that [Riggen] represent[ed]." SUMF ¶ 11; Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17]. Within 15 or 20 seconds, Riggen turned his cruiser around, put on his blue lights, moved across the double-yellow line into the other lane to catch up to and get directly behind Bombard's vehicle to pull him over. SUMF ¶ 25; Ex. 2 [Riggen Aff. ¶¶ 2, 3]; Ex. 3 [Riggen Dep. Tr. 93:5–95:1]; Ex. 7 [Cruiser Video 0:00–0:30].

Riggen's animus toward Bombard is apparent and cannot be genuinely in dispute. Within 30 seconds of pulling Bombard over, Riggen was at Bombard's driver-side door. *See* SUMF ¶ 118; Ex. 2 [Riggen Aff. ¶ 12]; Ex. 7 [Cruiser Video 5:40–6:02]. Riggen approached "thinking about the presence of conflict"; he "desired

to control the action" and "came at" Bombard "more assertively" and "more Alpha." SUMF ¶ 46; Ex. 3 [Riggen Dep. Tr. 139:5–140:18]; *see also* 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, *see* 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. *See* 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. *See* 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 for several minutes about whether he had given Riggen the finger. Riggen's statements and failure to follow his own protocols further demonstrate Riggen's retaliatory motive for stopping Bombard.

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 *supra*, 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. *See* 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 Riggen's statements and behavior before, during, and after the initial interaction, in addition to the absence of probable cause, demonstrate Riggen's retaliatory motive for arresting Bombard. As described *supra*, Riggen immediately decided to arrest Bombard after hearing Bombard say "asshole" and "fuck you." SUMF ¶ 71; Ex. 3 [Riggen Dep. Tr. 169:20–170:8] ("I'm like now it's become disorderly conduct . . . I'm going to have to arrest this guy."). Riggen then entered his cruiser and "wanted to reinitiate the stop." SUMF ¶ 109; Ex. 3 [Riggen Dep. Tr. 171:1–4]. After Bombard "was pulling away," he briefly displayed his middle finger "just outside the window." SUMF ¶ 87; Ex. 2 [Riggen Aff. ¶ 10]; Ex. 3 [Riggen Dep. Tr. 172:21–173:15]. Riggen follows Bombard and, on the video, Riggen states to himself: "He 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]. Riggen turns on his siren, pulls Bombard over again, exits his vehicle, orders Bombard out of the car, and arrests him.

Over the next fifteen minutes, Riggen repeatedly told Bombard and Sergeant Bruzzi that Bombard was being arrested because of the profanities and middle-finger gesture in public. For example, Riggen informed Bombard: "saying fuck you

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]. Riggen 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, Riggen told him: "It wasn't a problem until it became a problem." SUMF ¶ 127; Ex. 7 [Cruiser Video 7:26–7:29]; Ex. 3 [Riggen Dep. Tr. 201:5–15. In describing the meaning of this statement, Riggen testified that:

> I think what I meant was that the middle finger that was part of the reason for the initial contact was not the problem. The arrest has to do with what happened since then, which was the profanity and the middle finger in front of all those people.

*Id.*

Riggen repeated these same or similar statements several times during the arrest—while gesticulating, tripping over his words, raising his voice, and pointing his finger at Bombard's face—throughout the remainder of the interaction. *See, e.g.*, SUMF ¶¶ 129, 13234; Ex. 7 [Cruiser Video 7:49–9:58]. With Bombard locked in the cruiser's backseat, Riggen relayed the events to Sergeant Bruzzi. He described Bombard's expressions—saying "asshole" and "fuck you" and extending his middle finger out of the window—as the justification for the arrest, calling Bombard's speech "outrageous." SUMF ¶ 137; Ex. 7 [Cruiser Video 12:00–12:13].

Riggen continued to accuse and berate Bombard after they arrive at the barracks. When Riggen and Bruzzi put Bombard in a cell, Bombard asked Riggen to explain again, why Riggen arrested him. Riggen responded: "So, with your window

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]. Riggen then repeated his justifications for the arrest again; this time raising his voice and exaggerating the articulation of his words. Riggen ended the conversation by telling Bombard, "I'm just going to let you just sit here and let you think about what you did." SUMF ¶ 142; Ex. 7 [Cruiser Video 21:37–21:48].

Riggen repeatedly told Bombard and Bruzzi that Bombard's expressions were the reason for the arrest and confirmed the same at deposition. Bombard's protected speech was the substantial or motivating cause of the arrest. No reasonable jury could find otherwise and, therefore, this Court should grant Bombard summary judgment on Count 3.

**3. Bombard's speech motivated the vehicle seizure and no reasonable jury could find otherwise, entitling Bombard to summary judgment on Count 4.**

Riggen's statements, the speed of his reaction, and his demeanor related to the vehicle seizure, as well as his lack of lawful authority, demonstrate retaliatory motive on Count 4. In addition to the many other statements showing Riggen's animus toward Bombard, cited above, when a handcuffed Bombard asked what would happen to his car, Riggen immediately pointed to a "no parking" sign in front of Bombard's car. He answered: "Well, it says no parking this side of the street, so it's gonna get towed." SUMF ¶ 143; Ex. 7 [Cruiser Video 9:30–9:39]; *see also* Ex. 3 [Riggen Dep. Tr. 231:19–232:1]. Riggen offered no other explanation for the vehicle seizure to Bombard.

He confirmed this reasoning several times at deposition. SUMF ¶¶ 144, 150; Ex. 3 [Riggen Dep. Tr. 222:21–223:2, 238:22–239:2 ("I'm saying that the sign says don't park, and that's the end of the debate for me."); *id.* at 222:17–223:8 (Bombard's car was not blocking the roadway or nearby driveway). When Riggen decided to tow Bombard's car, Riggen also knew that Bombard would be released in about an hour, so the car was going to be in that location for only a short time. SUMF ¶ 149; Ex. 3 [Riggen Dep. Tr. 222:1–6, 222:21–223:3]. Riggen also acknowledged that he does not normally tow vehicles in a no-parking zone unless there is a safety concern, and he refused Bombard's request that Bombard be permitted to drive his car to the barracks. SUMF ¶ 149; Ex. 3 [Riggen Dep. Tr. 65:22–69:4].

Riggen had no good reason to tow Bombard's car. His statements and behavior, circumstantial evidence, and lack of lawful authority strongly support only one finding: that Riggen towed Bombard's car because of Bombard's protected speech. No reasonable jury could believe that Riggen was motivated to seize Bombard's vehicle for any other reason, and the Court should grant him summary judgment on Count 4.

## III. Bombard Is Entitled to Summary Judgment on His Viewpoint Discrimination Claim Because Riggen Acted to Chill His Protected Speech.

Riggen's actions also constitute First Amendment-prohibited viewpoint discrimination. Viewpoint discrimination—which occurs when the government seeks to suppress particular viewpoints—is a "blatant" and "egregious" First

Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 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." *Velazquez*, 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." *Matal*, 582 U.S. at 223, 243. And the potential for the speech to negatively affect listeners is an invalid basis for viewpoint discrimination. *See Forsyth*, 505 U.S. at134 ("Listeners' reaction to speech is not a content-neutral basis for regulation."); *Matal*, 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 Riggen sought to target Bombard's speech because he believed: (1) that it expressed "displeasure" with (i.e., criticized) Riggen, SUMF ¶ 11; Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17]; and (2) it was "not appropriate" (i.e., could have offended others) in public, SUMF ¶ 33; Ex. 3 [Riggen Dep. Tr. 155:11–157:25]. After the first stop, Riggen repeatedly accused Bombard of flipping him off. SUMF ¶¶ 50, 52; Ex. 7 [Cruiser Video 1:42–1:47]. He recognized the "negative gesture," SUMF ¶ 9 Ex. 2 [Riggen Aff. ¶ 2]; Ex. 3 [Riggen Dep. Tr. 87:11–24], and believed it was directed at him, SUMF ¶ 10; Ex. 3 [Riggen

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 – it would cause an arrest for me to say how I feel or show how I feel." Ex. 1 [Bombard Dep. Tr. 137:8–22]. Before the 2018 stop and arrest, Bombard had made, at most, a half-dozen critical posts on Vermont State Police Facebook pages. *Id.* at 138:5–139:2. Since the encounter with Riggen, Bombard has not posted on Vermont State Police Facebook pages or even on his own Facebook page about police. SUMF ¶ 172; Ex. 1 [Bombard Dep. Tr. 136:14–139:3]. This Court should grant summary judgment for Bombard on Count 5.

## IV. The Law Clearly Established that Displaying the Middle Finger or Cursing at a Police Officer in Public Is Speech Protected from Retaliation and Viewpoint Discrimination.

Having established that Riggen violated Bombard's First Amendment and Article 13 rights, Bombard must show that clearly established law, coupled with the lack of arguably lawful bases for the stop, arrest, or vehicle seizure, dooms Riggen's qualified immunity defense. In assessing claims of qualified immunity, courts consider (1) whether the official violated a constitutional right, and (2) whether that

constitutional right was "clearly established" at the time of the violation. *Harlow*, 457 U.S. at 818 (1982); *Reyes v. Fischer*, 934 F.3d 97, 103 (2d Cir. 2019).[11]

A right is "clearly established" if "the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *McKinney v. City of Middletown*, 49 F.4th 730, 738 (2d Cir. 2022) (cleaned up); *see also Nelson v. Town of Johnsbury Selectboard*, 2015 VT 5, ¶ 65, 198 Vt. 277, 304, 115 A.3d 423, 441. "Clearly established rights are not limited to federal laws, but may also be found in state statutes." *Sabia*, 165 Vt. at 522 (1996). A case "directly on point" is not required. *McKinney* 49 F.4th at 739 (citing *White v. Pauly*, 580 U.S. 73 (2017)). In other words, the law is clearly established when reasonable officers have "fair warning" that their actions are unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014).

For the reasons discussed in Parts II and III, Bombard's right to be free from retaliatory stop, arrest, and vehicle seizure for his speech, and his right to be free

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[11] Vermont has adopted *Harlow's* qualified immunity analysis. *Levinsky v. Diamond*, 151 Vt. 178, 190 (1989), *overruled on other grounds by Muzzy v. State*, 155 Vt. 279 (1990). In this case, however, Mr. Bombard's Article 13 claims are self-executing against the State. *Shields v. Gerhart*, 163 Vt. 219, 227 (1995). The State generally cannot impute Riggen's qualified immunity defense for a state constitutional tort. *Zullo*, 2019 VT 1 ¶¶ 55–58 (rejecting State's claim to qualified immunity for Article 11 violation). Although the Vermont Supreme Court has yet to decide whether Article 13 provides a private damages remedy, this Court has followed and should continue to follow standards similar to those articulated in *Zullo*. *See* Dec., 6 ("The rationale of *Zullo* applies equally to the Article 13 constitutional tort claims that Mr. Bombard brings in this case."). This would mean that damages are available if "the officer either knew or should have known that the officer was violating clearly established law or the officer acted in bad faith." *Zullo*, 2019 VT 1 ¶ 55. Bombard satisfies both options here.

from viewpoint discrimination, were clearly established as of February 2018. First, precedent clearly established that the First Amendment protects offensive words (including cursing) and gestures (including extending the middle finger). *See supra* Part II.A. at pp. 29–31; *see, e.g.*, *Cohen* 403 U.S. at 26 (holding that "Fuck the Draft" was protected speech). Second, it has long been clearly established that the First Amendment forbids retaliating (including stopping, arresting, or otherwise initiating a seizure) against someone who swears or directs an insulting gesture at a police officer or other government official. *See supra* Section II. at pp. 27–28; *see, e.g.*, *Barboza v. D'Agata*, 151 F. Supp. 3d 363, 369–72 (S.D.N.Y. 2015) (holding that the right to be free from arrest in retaliation for writing "fuck your shitty town bitches" on a parking ticket was clearly established); *Clark*, 448 F. Supp. 3d at 577 (collecting cases "across the country"). Third, Vermont Supreme Court precedent clearly established that the mere use of offensive words or gestures does not constitute disorderly conduct, and therefore an objective officer could not have reasonably believed that Bombard had committed a crime. *See supra* Part II.B.1. at pp. 31–39; *see, e.g.*, *Lund*, 144 Vt. 171 at 171–74, 178. Fourth, any officer would have had "fair warning," based on the plain language of 23 V.S.A. § 1104(a), that seizing Bombard's vehicle when he stopped in a "no parking" area "in compliance with law or the directions of an enforcement officer" would be unconstitutional. *See supra* Section II.B.2. at pp. 39–40. Fifth, binding precedent had also long established that censorship that discriminated against a point of view violated the First Amendment—and is an "egregious" violation at that. *See supra* Section III. at

pp 50–53; s*ee, e.g.*, *Rosenberger*, 515 U.S. at 829. Qualified immunity cannot help Trooper Riggen.

## 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.

Respectfully submitted,

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