STATE OF VERMONT
SUPERIOR COURT
CIVIL DIVISION

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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As permitted under Vermont Rule of Civil Procedure 56 and the Stipulated Discovery and Arbitration Scheduling Order in this case, as modified by this Court's entry orders on August 2, 2023, January 11, 2024, and January 22, 2024, Plaintiff Gregory Bombard submits his opposition to Defendants' motion for summary judgment.

INTRODUCTION

This is a case about the "freedom of individuals verbally to oppose or challenge police action without thereby risking arrest"—a freedom that "is one of the principal characteristics by which we distinguish a free nation from a police state." *City of Hous. v. Hill*, 482 U.S. 451, 462–63 (1987). Even when that speech offends, it is still fully protected by the First Amendment. *Matal v. Tam*, 582 U.S. 218, 223, 243 (2017). Gregory Bombard was exercising these First Amendment rights when, from his driver seat, he said "asshole" and "fuck you" and gave the finger to Vermont State Trooper Jay Riggen after an illegal traffic stop. In response, Riggen abused his government power to punish Bombard: He stopped, arrested, and jailed Bombard; towed Bombard's car; sent his mugshot to Vermont news outlets; and initiated criminal proceedings against Bombard that lasted nearly a year. Because of these undisputed facts, and based on clearly established law that Riggen's retaliation violated Bombard's rights, Riggen and the State of Vermont are not entitled to summary judgment.

Defendants' arguments for qualified immunity are meritless. To start, the State is not entitled to assert a qualified-immunity defense, which is available in

damages suits only to government officials, not to the State itself. *See Zullo v. State*, 2019 VT 1, ¶ 56. Nor is Riggen entitled to qualified immunity on Bombard's first claim for unreasonable seizure and false arrest (under the Fourth Amendment, Article 11 of the Vermont Constitution, and the common law of torts) or his second claim for retaliation against protected speech (under the First Amendment and Article 13 of the Vermont Constitution) because Riggen lacked reasonable suspicion or any other arguably reasonable basis to initially stop Bombard. *See, e.g.*, *Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) (denying qualified immunity "because a *reasonable* police officer would not have believed he was entitled to initiate the law enforcement process in response to giving the [middle] finger").

Moreover, Riggen is not entitled to qualified immunity on Bombard's third and fourth claims, based on Bombard's arrest and the tow of his vehicle respectively, for retaliation against protected speech (under Article 13 of the Vermont Constitution). As an initial matter, Article 13 retaliation claims are not barred by the existence of probable cause, and so qualified immunity should not account for probable cause for Bombard's retaliatory arrest and seizure claims. Even if probable cause barred Bombard's retaliation claims, Riggen lacked probable cause or arguable probable cause to arrest Bombard. Under clearly established law, the "tumultuous" prong of the disorderly conduct statute, which Riggen alleged that Bombard violated, requires physical violence or physical behavior portending violence. *See, e.g.*, *State v. Lund*, 144 Vt. 171, 171–174 (1984), *overruled on other grounds by State v. Dumont*, 146 Vt. 252 (1985), and *State v. Begins*, 148 Vt. 186

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

Lastly, Riggen is not entitled to qualified immunity on Bombard's fifth claim, that Riggen engaged in viewpoint discrimination in violation of the First Amendment and Article 13 resulting in the chilling of Bombard's speech. Riggen targeted Bombard's speech because Bombard had criticized Riggen with speech that Riggen found offensive, all in violation of clearly established law. *See, e.g.*, *Matal* , 582 U.S. at 223, 243. Contrary to Riggen's argument, even if he had probable cause to arrest Bombard—which he did not—that would not help him on this claim. This claim is based on the totality of Riggen's conduct that chilled Bombard's speech—not just the initial stop and then the arrest, but also the jailing, the tow, the berating of Bombard, and the publicity and criminal proceedings that Riggen put into motion—and Riggen cites no law establishing that probable cause insulates such conduct from liability.

Defendants have failed to establish that they are entitled to qualified immunity on any of Bombard's claims. Based on the undisputed facts and clearly established law, this Court should deny their motion for summary judgment.

FACTUAL BACKGROUND

Plaintiff adopts the facts as described in his motion for summary judgment and responses in his Response to Defendants' Statement of Undisputed Facts.

ARGUMENT

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

As an initial matter, the State cannot assert qualified immunity as a defense to the state-law claims brought against it. In two footnotes, the State nevertheless suggests that Bombard's claims against the State fail because of Riggen's qualified immunity defense. *See* Defs.' Mot. Summ. J. 12 n.4, 14 n.6. The State is doubly incorrect—first, because the State, as a matter of law, cannot assert the personal defenses, including qualified immunity, available to its employee, and second, because Riggen violated clearly established law and therefore is not entitled to qualified immunity, *see infra* Parts II–IV.

The defense of qualified immunity[1] is a personal one developed to shield "public officials" when they are named as defendants in damages suits. *Murray v. White*, 155 Vt. 621, 627 (1991). It is available to "[l]ower-level officers, employees and agents" who are sued for acts taken "during their employment and . . . within the scope of their authority." *Levinsky*, 151 Vt. at 185; *see also Zullo*, 2019 VT 1, ¶ 56 (recognizing that qualified immunity is a common-law defense of government officials, not the State). The State cannot avail itself of this personal defense, just as its employees cannot avail themselves of the State's defenses, such as sovereign

[1] Vermont cases sometimes refer to qualified immunity as "qualified official immunity," *e.g., Cook v. Nelson*, 167 Vt. 505, 509 (1998), or as one type of "official immunity," *e.g., Levinsky v. Diamond*, 151 Vt. 178, 183 (1989), *overruled on other grounds by Muzzy v. State*, 155 Vt. 279 (1990).

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

While a test "akin to qualified immunity" is one of two alternative avenues used to assess a plaintiffs damages claims against the State under Article 11—the Vermont Constitution's right against unreasonable or warrantless search and seizure—the State has no qualified immunity defense. *Zullo*, 2019 VT 1, ¶ 56. In *Zullo*, the Supreme Court held that "a private right of action seeking money damages for violations of Article 11 is available directly under that constitutional provision." *Id.* ¶ 47. The Court announced that Article 11 damages are available from the State only when: "(1) the officer violated Article 11; (2) there is no meaningful alternative remedy in the context of that particular case[3]; and (3) the

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[2] The State has waived its sovereign immunity, subject to exceptions and limitations, for certain common-law tort claims, *see* 12 V.S.A. § 5601, and for claims brought under self-executing provisions of the Vermont Constitution, *see Zullo*, 2019 VT 1, ¶¶ 23–32; *see also id.* at 34–36 (holding that Article 11 is self-executing); *Shields v. Gerhart*, 163 Vt. 219, 227 (1995) (holding that Article 13 is self-executing).

[3] Defendants do not suggest that Bombard has any meaningful alternative remedies and therefore is not entitled to damages. Regardless, no meaningful alternative remedies exist. This case is on all fours with *Zullo's* remedies analysis:

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

Zullo's rule, however, does not apply to Bombard's claims for declaratory relief or for damages under Article 13, the Vermont Constitution's free speech guarantee, and there is no need for similar limitations. Bombard's request for a declaratory judgment, unlike his request for damages, is not subject to *Zullo*'s quasi-qualified immunity analysis. *See, e.g.*, *Zullo*, 2019 VT 1, ¶ 53 ("We conclude that . . . [these limitations] are appropriate and necessary in civil actions seeking damages for violations of Article 11."). Likewise, Article 13 is self-executing and may support a damages remedy where there is no adequate alternative remedy. *Shields*, 163 Vt. at 226–35. And, in fact, there is no reason a quasi-qualified

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The alternative remedies the State proposed there—rejected as inadequate by the Court—are equally unavailable and inadequate here. *Id.* ¶¶ 37–47.

[4] The analysis that follows in Parts II–IV of this brief details why Riggen is not entitled to qualified immunity—he violated clearly established law. That same analysis satisfies the third *Zullo* prong's qualified-immunity-like test for the claims brought against the State. Moreover, for the reasons set forth in Bombard's summary judgment motion, he also satisfies *Zullo*'s alternative showing of bad faith. Riggen, by punishing Bombard for his exercise of his constitutional rights, acted in bad faith. *See* Pl.'s Mot. Summ. J. 41–50.

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

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

Not only is the State precluded from asserting qualified immunity on its own behalf, Riggen himself is also not entitled to qualified immunity from Bombard's unreasonable seizure or retaliatory stop claims—Counts One and Two.[5] This is because Riggen did not have reasonable suspicion to justify the initial stop, and Defendants do not claim otherwise. Instead, Defendants try—and fail—to hang their hat on the community caretaking doctrine as providing an arguable reasonable basis for the stop. But "[t]he propriety of a traffic stop based on the

[5] Mr. Bombard renews his argument that the qualified immunity doctrine should be reconsidered and the defense abolished. Federal courts have increasingly recognized that qualified immunity is neither textually nor historically justified, and its policy justifications are no longer applicable. *See, e.g.*, *Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Thompson v. Clark*, 14-CV-7349, 2018 WL 3128975, at *13 (E.D.N.Y. June 26, 2018) ("Case precedent and policy rationale fail to justify an expansive regime of immunity that would prevent plaintiff from proving a serious constitutional violation [at trial]."); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 402 (S.D. Miss. 2020) ("Just as the 19th century Supreme Court neutered the Reconstruction-era civil rights laws, the 20th century Court limited the scope and effectiveness of Section 1983 after *Monroe v. Pape.* The doctrine of qualified immunity is perhaps the most important limitation."). For similar reasons, he also challenges the application of Riggen's qualified immunity defense to his state constitutional claims. *See Levinsky*, 151 Vt. at 184 ("The doctrine of official immunity was originally used in Vermont to insulate only judges from civil liability.").

community caretaking doctrine turns on whether there were specific and articulable facts objectively leading the officer to reasonably believe that the [driver] was in distress or needed assistance, or reasonably prompted an inquiry in that regard." *State v. Button*, 2013 VT 92, ¶ 9 (citations and internal quotation marks omitted). This standard is plainly unmet here because Riggen: (1) lacked an objectively reasonable basis for the stop, and (2) has never articulated the specific distress or need Bombard was potentially expressing. Thus, Defendants' motion for summary judgment on Bombard's unreasonable seizure and retaliatory stop claims should fail.

A. The initial stop was not objectively reasonable.

For a lawful community caretaking stop, "[t]he key to such constitutionally permissible police action is reasonableness." *State v. Marcello*, 157 Vt. 657, 658 (1991) (mem.). "Stops are not justified . . . when the officer, *objectively*, has 'no indication that anything [i]s wrong' with the motorist or vehicle." *State v. Edwards*, 2008 VT 23, ¶ 5 (quoting *State v. Burgess*, 163 Vt. 259, 260 (1995)) (emphasis added). Here, Riggen stopped Bombard based on his (mistaken) belief that Bombard had displayed his middle finger. Pl.'s SUMF ¶¶ 16, 23; Pl.'s Ex. 3 [Riggen Dep. Tr. 108:11–14]. At the time, Riggen insisted Bombard's behavior was so "supremely unusual" that it rendered law enforcement intervention not merely objectively reasonable but "necessary." Defs.' Mot. Summ. J. 10–11 (citing Defs.' SUMF ¶¶ 3, 6); *see also* Pl.'s Resp. Defs.' SUMF ¶¶ 4, 6.

Courts have consistently disagreed: The middle finger does not constitute "unusual" behavior that could reasonably be construed as a sign of distress. Defendants correctly predict that Plaintiff can point to *Swartz*, 704 F.3d 105, as clearly established law holding that "a stop in response to the middle finger gesture is not objectively reasonable," Defs.' Mot. Summ. J. 11 n.3. But their footnoted attempt to brush aside binding, on-point Second Circuit precedent misses the mark. In *Swartz*, a person in a car displayed his middle finger without committing any traffic violations while passing a police officer, who then effected a traffic stop. 704 F.3d at 107, 110. Although the officer claimed that the middle finger gesture seemed to be "trying to get [the officer's] attention for some reason" or prompted concern for the driver's and passengers' safety, *Swartz*, 704 F.3d at 108—the very same excuses that Riggen has proffered, Defs.' SUMF ¶ 6 [Riggen Aff. ¶ 2]—the Second Circuit was unpersuaded. Instead, the court denied the officer qualified immunity and explicitly held that this rationale was not a reasonable justification for the stop:

> Perhaps there is a police officer somewhere who would interpret an automobile passenger's giving him the finger as a signal of distress, creating a suspicion that something occurring in the automobile warranted investigation. And perhaps that interpretation is what prompted [the officer] to act, as he claims. But the nearly universal recognition that this gesture is an insult deprives such an interpretation of reasonableness.

Id. at 110. "[B]ecause a *reasonable* police officer would not have believed he was entitled to initiate law enforcement process in response to giving the finger," *id.*, Riggen is likewise not entitled to qualified immunity for the traffic stop here.

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

Indeed, the sole case Defendants cite in their attempt to show a legal conflict proves the very point they seek to undermine. In *State v. Gallagher*, the unpublished decision of New Jersey's intermediate appellate court that Defendants rely upon, a police officer encountered a parked vehicle blocking an icy roadway and initiated a consensual conversation with the driver. A-0559-12T1, 2014 WL 940784, at *1, *4 (N.J. Super. Ct. App. Div. Mar. 12, 2014). The court noted that, through the frosted-over window, the officer was unsure if the driver had given him the finger *or* was waving him over for help—but this was ultimately irrelevant to the

constitutionality of what the court determined was not an investigatory stop but a consensual "field inquiry." *Id.* at *1, *3–4. The court further held, in the alternative, that the community caretaking doctrine justified an investigatory stop based on the "totality of the circumstances." *Id.* at *4. Specifically, that included "the circumstances of *an occupied vehicle parked on an icy roadway early in the morning in bad weather*." *Id*. (emphasis added). Such facts—"pulling over in an unsafe place [ ] and the danger to other drivers"—are "objective indicia of distress" entirely consistent with Vermont community caretaking jurisprudence—and are entirely lacking here. *Button*, 2013 VT 92, ¶ 17 (citing *Edwards*, 2008 VT 23, ¶ 6).

Moreover, and contrary to Defendants' description of *Gallagher*, *see* Defs.' Mot. Summ. J. 10 & 11 n.3, the "permissible inquiries" related to the possible middle-finger gesture were not in the context of an investigative stop but instead of a "field inquiry"—there, approaching an individual in an already-parked car and asking if the person was willing to answer questions. A field inquiry is "not a Fourth Amendment event" and "is permissible so long as the questions [are] not harassing, overbearing, or accusatory in nature." *Gallagher*, 2014 WL 940784, at *3 (citation and internal quotation marks omitted). Because the officer's initial interaction with the driver "was clearly a field inquiry" and he "made no demand, issued no orders, his questions were not overbearing or harassing in nature, and he did not impede defendant's ability to leave if she so chose," the Fourth Amendment was not implicated, and the inquiries were permissible. *Id.* at *4. This portion of *Gallagher*—the only discussion of the possible middle-finger gesture—has no

application to Riggen's lights-and-siren stop of Bombard's vehicle, Pl.'s SUMF ¶¶ 26–27. It also fails to demonstrate that *Swartz* is not clearly established law.

Defendants argue that Riggen's experience responding to the scene of a murder in 2013 outside a gym on North Main Street in St. Albans "legitimately informed in large part" his decision to stop Bombard.[6] Defs.' Mot. Summ. J. 10 (citing Defs.' SUMF ¶ 5). But this experience—which Riggen concedes is not mentioned in his affidavit of probable cause and was never written down before he described it at his September 2023 deposition, and was not part of his explanations to Bombard for the initial stop, *see* Pl.'s Resp. Defs.' SUMF, ¶ 5—does not make the stop objectively reasonable. A tragic act of violence by different parties does not transmogrify that location, nearly five years after the fact, into a First-and-Fourth-Amendment-free zone, and Defendants provide no citations to the contrary. A reasonable police officer would know better. *See, e.g.*, *Clark*, 448 F. Supp. 3d at 576 ("It is axiomatic that officers are on abundant notice of stringent free speech protections. Gestures intended to communicate ideas are protected speech under the First Amendment of the Constitution, subject to strict limitations."); *see also Button*, 2013 VT 92, ¶ 15.

B. There were no specific and articulable facts to justify the stop.

Defendants further flounder when attempting to describe the necessary specific and articulable facts that must underpin a permissible community caretaking stop. These stops require the officer to "particularly describe 'a perceived

[6] *See State v. Webster*, 2017 VT 98, ¶¶ 3–4.

emergency or [an] indication of *imminent threat to specific individuals*' before effectuating [the] stop." *Button*, 2013 VT 92, ¶ 9 (quoting *State v. St. Martin*, 2007 VT 20, ¶ 6) (mem.)) (emphasis added). Even if an officer believes a driver creates an "ambiguous threat," that is constitutionally insufficient. *St. Martin*, 2007 VT 20, ¶ 8.

Here, Defendants fail to articulate a specific perceived emergency or imminent threat to specific individuals. Defs.' Mot. Summ. J. 11. In his affidavit of probable cause, Riggen admitted he "was unsure if this was a mental health crisis or other need." Pl.'s SUMF ¶ 23; Pl.'s Ex. 2 [Riggen Aff. ¶ 2]. At his deposition, Riggen conceded that he first believed Bombard "was expressing his unhappiness" with the Vermont State Police but claimed he later wondered if the gesture was "an iceberg of escalating despondency." Pl.'s Resp. Defs.' SUMF ¶ 4. This poetic supposition lacks the specificity necessary to render the traffic stop constitutional. Even if Riggen's rationale were objectively reasonable based on the circumstances—and it is not—the Vermont Supreme Court has held that a community caretaking seizure cannot rest on such flimsy speculation as whether a driver's "actions *might* pose some danger to some member of the motoring public at some indefinite time in the future," *St. Martin*, 2007 VT 20, ¶ 8. And, as that Court ruled in *Button* when finding another of Riggen's purported community caretaking stops unconstitutional, "'specific and articulable facts,' not conclusory speculations, are required to support a traffic stop under the community caretaking exception." 2013 VT 92, ¶ 15 (quoting *Marcello*, 157 Vt. at 658). Like Riggen's previous attempt to excuse an

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

Furthermore, contrary to Defendants' assertion, it does not "bear[] emphasis here" that, after stopping Bombard without cause, Riggen released Bombard and "returned to his vehicle, without giving any form of criminal or civil citation." Defs.' Mot. Summ. J. 11. Essentially, Defendants suggest that Riggen's failure to cite Bombard—who all parties agree had committed no crime at that point—and his abrupt end to the interaction somehow evidence the propriety of the stop. This further reveals Defendants' misreading of the community caretaking doctrine. An officer's decision to eventually terminate an unlawful detention and forgo an additional abuse of authority cannot retroactively justify the initial seizure.

In this case, Riggen is not "entitled to the benefit of the doubt," Defs.' Mot. Summ. J. 11 n.3, when controlling precedent clearly established otherwise: The specific fact of giving the middle finger—"a gesture of insult known for centuries," *Swartz*, 704 F.3d at 107—is not an objectively reasonable basis for a community caretaking stop. In such circumstances, there is "a clearly established right against seizure by an officer who is concerned about [a driver's] welfare and the welfare of others simply because he made an offensive gesture." *Clark*, 448 F. Supp. 3d at 576. Because Riggen's unreasonable initial stop of Bombard violated clearly established law, Defendants are not entitled to summary judgment on Bombard's unreasonable seizure or retaliatory stop claims.

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

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

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

Regarding Riggen's arrest of Bombard, Defendants incorrectly claim that "it is well settled that the existence of probable cause is an absolute defense to a false arrest claim." Defs.' Mot. Summ. J. 12 (citations and internal quotation marks omitted). Bombard did not bring a *false* arrest claim for Riggen's arrest of him, and nowhere is it settled that probable cause is an "absolute defense" to First Amendment or Article 13 *retaliatory* arrest claims. While the U.S. Supreme Court created a qualified exception to the First Amendment in *Nieves*, generally foreclosing retaliatory arrest claims where probable cause exists, it has never been

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

Maintaining Vermont's status quo is particularly appropriate in this context because Article 13 likely provides greater protection for speech than the First Amendment. *See State v. Kirchoff*, 156 Vt. 1, 4 (1991) ("[T]he Vermont Constitution may afford greater protection to individual rights than do the provisions of the federal charter."); *cf., e.g.*, *State v. Rheaume*, 2005 VT 106, ¶ 8 n.* ("[W]e have recognized that Article 11 affords individuals greater privacy rights than its federal counterpart in certain circumstances."); *State v. Brunelle*, 148 Vt. 347, 353 (1987) ("[T]he due process clause of the Vermont Constitution gives a defendant greater rights than are afforded under [specific federal caselaw] . . . ."). It would also comport with Article 13's core values, as well as Vermont Supreme Court doctrinal and empirical concerns, commonly used to interpret state constitutional provisions. *See State v. Read*, 165 Vt. 141, 153 n.7 (1996) (citing *State v. Jewett,* 146 Vt. 221, 227 (1985)).

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[7] As this Court noted in its decision denying Defendants' partial motion to dismiss, even in the First Amendment context, *Nieves* did not supplant the *Mt. Healthy* test, but merely added a preliminary step in the case of retaliatory arrests. Once the no-probable-cause bar is overcome, courts proceed to the typical *Mt. Healthy* analysis. Ruling on State's Mot. Dismiss 3 (Dec. 12, 2021).

Specifically, Article 13 provides broader and more particularized protection for speech "concerning the transactions of government" than the First Amendment. The text of Article 13, as adopted in the 1786 Constitution, states in pertinent part "[t]hat the people have a right to freedom of speech . . . concerning the transactions of government." Vt. Const. ch. I, art. 13; *see also* Peter R. Teachout, "*Trustees and Servants": Government Accountability in Early Vermont*, 31 Vt. L. Rev. 857, 877 (2007). Although the plain language may be subject to multiple interpretations, *see* Teachout, *supra*, at 873–78, Article 13's history illuminates that "concerning the transactions of government" was intended to emphasize speech about government actions as worthy of special protection, *id*. at 877 ("The most plausible explanation is that those responsible for the 1786 amendments wanted to underscore the importance of protecting freedom of speech and press when the exercise of that freedom took the form of examining and criticizing the transactions of government."). In contrast to the language and history of the First Amendment—that "Congress shall make no law . . . abridging the freedom of speech"—Vermont's Framers intended to emphasize protecting speech concerning the government, illuminating Article 13's "core values." *See Read*, 165 Vt. at 153 n.7 (noting that a Vermont constitutional right's "core values" guide the Vermont Supreme Court's analysis of distinctions between state and federal constitutional rights).

Adopting *Nieves* here would contradict Article 13's core values. At its most fundamental, Article 13 protects the "right of the people to make themselves heard" regarding their government. *Shields*, 163 Vt. at 227. This protection provides for

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

Moreover, refusing to import a no-probable-cause exception to Article 13 is consistent with the ample doctrinal and empirical considerations that factor into the Vermont Supreme Court's constitutional analyses. Article 13 cannot countenance *Nieves*'s doctrinal shortcomings that mistakenly treat probable cause as negating any possibility of retaliatory motive. This interpretation would doom Article 13 retaliatory arrest claims even where officers "demonstrably retaliat[e] for protected speech, notwithstanding probable cause of some coincidental infraction." *Id.* at 1735–36 (Sotomayor, J., dissenting). And, importantly here, a no-probable-cause bar would allow vague infractions that can implicate speech, like disorderly conduct, to "justify an arrest as based on probable cause when the arrest was in fact

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

Similarly, *Nieves*'s doctrinal approach wrongly imports a rule from false arrest jurisprudence into the free speech analysis—an awkward fit, as false arrest claims are meant to remedy "arrests and imprisonments effected *without lawful authority*," while retaliatory arrest claims seek protect free speech by "guard[ing] against officers who *abuse* their authority by making an otherwise lawful arrest for an unconstitutional *reason*." *Id.* at 1731 (Gorsuch, J., concurring in part, dissenting in part). The *Nieves* majority also overstated empirical concerns about "overwhelming litigation risks" and "broad-ranging discovery" were they to refuse to create a no-probable-cause exception to the First Amendment, *id.* at 1725 (maj. op.). But courts "already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives," *id.* at 1738 (Sotomayor, J., dissenting), and these risks from retaliatory arrest cases are, regardless, thus far not evidenced in Vermont. These concerns cannot justify interpreting Article 13 to include a no-probable-cause exception. This Court should, therefore, decline Defendants' implicit invitation to interpret Article 13 to adopt *Nieves*'s no-probable-cause exception.

[8] The *Nieves* rule also perversely incentivizes officers, particularly unscrupulous ones, to punish speech they do not like as long as they can find probable cause for one of these common and easily justified minor infractions.

B. Even if probable cause could defeat Article 13 retaliatory arrest claims, probable cause did not exist here.

On the undisputed material facts, Trooper Riggen did not have probable cause to justify arresting Bombard.[9] "[P]robable cause . . . is evaluated under an objective standard," *State v. Morse*, 2019 VT 58, ¶ 13, and 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 analysis is "a practical, commonsense evaluation made by looking at the totality of the circumstances." *Id.* ¶ 13 (citation and internal quotation marks omitted).

Defendants incorrectly claim that probable cause existed to arrest Bombard for a violation of 13 V.S.A. § 1026(a)(1): ("tumultuous . . . behavior").[10] To succeed,

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[9] Other than stating Bombard was stopped in front of a no-parking sign, Defendants fail to make a substantive argument that probable cause or arguable probable existed to defeat Bombard's retaliatory seizure claim (Count 4) regarding Riggen's order to tow Bombard's car. Defendants' claim of any such probable cause or arguable probable cause fails for the same reasons articulated in Bombard's summary judgment motion—the relevant statute authorizing the towing of vehicles parked in "no parking" areas includes an exception for vehicles parked there "in compliance with law or directions of an enforcement officer." Pl.'s Mot. Summ. J. 39–40 (quoting 23 V.S.A § 1104(a)). That is what happened here. By the plain language of the statute, no officer of reasonable competence could believe they had legal authority to seize Bombard's vehicle in this case.

[10] Defendants appear to suggest that probable cause also existed for a violation of § 1026(a)(3) (use of abusive or obscene language in a public place). *See* Defs.' Mot. Summ. J. 13 n.5 (quoting and italicizing this part of the statute). They are wrong. Clearly established law limits that provision to the regulation of "fighting words" and "obscenity," speech excluded from First Amendment and Article 13 protection. Based on longstanding U.S. Supreme Court and Vermont Supreme Court precedent, Bombard did not engage in either form of unprotected speech. *See, e.g.*, *State v. Tracy*, 2015 VT 111, ¶¶ 21, 38; *see also* Pl.'s Mot. Summ. J. 54–55. Because Bombard provided detailed argument on this point in his motion for summary judgment, Pl.'s Mot. Summ. J. 38–39, 55, he forgoes further discussion here.

Defendants must show that an objective, reasonable officer would believe the particular circumstances showed Bombard had (1) "engage[d] in . . . tumultuous . . . behavior," and (2) recklessly created a risk of "public inconvenience or annoyance." § 1026(a); *see also State v. McEachin*, 2019 VT 37, ¶ 14. But their claim falters for three independently sufficient reasons: (1) Bombard engaged in only speech, while physical conduct is required under § 1026(a)(1); (2) even if there had been relevant physical conduct, Bombard engaged in none that was "tumultuous"; and (3) nothing indicated that Bombard had the requisite intent to cause public inconvenience or annoyance.

1. Vermont's disorderly conduct statute criminalizes only conduct, and Bombard only engaged in speech.

First, probable cause could not exist because the disorderly conduct statute does not criminalize speech—which is all that happened here. The Vermont Supreme Court has clarified that § 1026(a)(1) "criminalizes conduct that is not speech." *State v. Schenk*, 2018 VT 45, ¶ 33; *see also State v. Albarelli*, 2011 VT 24, ¶ 9 (§ 1026(a)(1) "proscribes conduct, not speech, and therefore does not penalize speech"). It does not extend even to speech unprotected by the First Amendment. *Schenk*, 2018 VT 45, ¶ 27. "[S]peech can be relevant to explain whether [tumultuous] *behavior* has occurred but only where the behavior is *physical conduct* and not speech." *Id.* ¶ 30 (emphasis added).

Tumultuous physical conduct, in addition to any speech, is crucial to a disorderly conduct charge. In *Schenk*, for example, the Court held that physically delivering a Ku Klux Klan flyer to the front door of a Black woman's home,

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

Albarelli is similarly instructive. There, the Vermont Supreme Court overturned a § 1026(a)(1) (threatening behavior) conviction despite the defendant, on Church Street in Burlington, "yelling aggressively," gesticulating with his hands, and yelling at one person while only two feet away. 2011 VT 24, ¶¶ 18, 22. "[M]ere anger or forcefulness" was insufficient to turn his speech into conduct. *Id.* ¶ 21. Indeed, the Court found Albarelli did not engage in "any significant physical component" to indicate he intended to harm another. *Id.* ¶ 22. Thus, the State's reliance on Albarelli "escalat[ing] from calm to angry or agitated and on the forcefulness of his assertions," even while he gesticulated, yelled, and yelled directly in the face of another, did not constitute threatening "behavior" under the statute. *Id.* ¶ 24 (internal quotation marks omitted). While this case arose under the disorderly conduct statute's "threatening behavior" prong, the Court, in essence, overturned the conviction because all that Albarelli did was engage in speech—not criminal *conduct*.

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

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

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

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

Second, even if the act of driving while displaying the middle finger could be construed as relevant conduct, this act could not constitute "tumultuous behavior." As detailed in Bombard's summary judgment motion, probable cause of "tumultuous behavior" generally requires a "violent outburst" or act of physical aggression portending violence. *See State v. Lebert*, No. 2015-120, 2015 WL 9275488, at *3 (Vt. Dec. 18, 2015) (quoting *Lund*, 144 Vt. at 179). It is undisputed that Bombard's expressions were not violent. *See* Pl.'s Mot. Summ. J. 35–38 (citing Pl.'s SUMF ¶¶ 103–04; Pl.'s Ex. 3 [Riggen Dep. Tr. 251:15–17]).

In *State v. Lund*, for example, a defendant's disorderly conduct conviction stood because he 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. at 173–74. Similarly, in *Morse,* 2019 VT 58, and *State v. Amsden,* 2013 VT 51, the Vermont Supreme Court upheld disorderly conduct convictions because the defendants repeatedly or continuously yelled profanities at officers *and* engaged in physically violent behavior, such as physically resisting arrest, blocking the officers, and banging against a wall. Tumultuous behavior also includes physical behavior that reasonably portends violence. *See State v. Pickett*, 137 Vt. 336, 337–39 (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); *see also McEachin*, 2019 VT 37, ¶¶ 2–4, 17 (minutes after a verbal confrontation with police officers, defendant walked directly toward the same officers, yelled profanities at them, and refused to leave the area; absent clenched fists or other physical movements suggesting he would become violent, there was no probable cause of tumultuous behavior).

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

In this case, it is undisputed that Bombard engaged in neither violent conduct nor any other physical conduct that reasonably indicated he would become violent. As described above, Riggen concedes he did not believe Bombard's expressions were violent, *see* Pl.'s Mot. Summ. J. 35–38 (citing Pl.'s SUMF ¶¶ 103–04; Pl.'s Ex. 3 [Riggen Dep. Tr. 251:15–17]), and nothing in Defendants' submission indicates that Bombard engaged in a "violent outburst" or had an intent to become physically violent. In fact, Defendants describe only one potentially physical act—that, after the initial traffic stop concluded, Bombard was looking at Riggen in his sideview mirror while driving away and that he consequently "did not notice an

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

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

Third, the undisputed circumstances do not objectively indicate probable cause that Bombard had the requisite intent to cause public inconvenience or annoyance. Section 1026(a) demands, at a minimum, that a defendant recklessly created a risk of public inconvenience or annoyance. Vermont has adopted the Model Penal Code's definition of criminal recklessness:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding

person would observe in the actor's situation. *Albarelli*, 2016 VT 119, ¶ 22 (quoting Model Penal Code § 2.02(c)). Here, no undisputed fact indicates that Bombard, through his public utterances and gesture, "consciously disregard[ed] a substantial and unjustifiable risk" of public inconvenience or annoyance—and there was limited public to inconvenience or annoy. Further, Defendants present no undisputed facts that, by cursing twice and displaying his middle finger, Bombard displayed a conscious disregard of the risk of public inconvenience that was "a gross deviation from the standard of conduct that a law-abiding person would observe" in the same situation. The undisputed circumstances preclude a reasonable finding of probable cause of recklessness.

It is undisputed that only four vehicles were in the area, 30 to 40 feet from Bombard, with their windows up because it was a chilly winter day. Pl.'s Resp. Defs.' SUMF ¶ 21. Riggen saw no one on the school bus that had already passed by, the back of which was 40 feet from Bombard. *Id.* There were no pedestrians in the area, and, at most, Riggen may have seen *one* person modestly reacting to Bombard's speech. *Id.* ¶ 22; Pl.'s SUMF ¶¶ 75, 76, 93, 94. An officer of reasonable caution, viewing the situation through a commonsense lens, could not find that Bombard "consciously disregarded" the risk of public annoyance—an independent reason that probable cause that Bombard engaged in "tumultuous behavior" did not exist. Defendants' summary judgment motion on this ground must be denied.

C. Riggen is not immune from suit on Bombard's retaliatory arrest claims because, based on the undisputed facts, no reasonable officer would believe probable cause existed.

Defendants argue that Riggen is immune from suit because "officer[s] can make a mistake in finding probable cause." Defs.' Mot. Summ. J. 12 (quoting *Long v. L'Esperance*, 166 Vt. 566, 571 (1997)). But, as *Long* also notes, for qualified immunity to attach to an arrest, "the arrest must be one a reasonable police officer could have believed was lawful, given the established law and circumstances at the time." 166 Vt. at 571. Only "if officers of reasonable competence could disagree as to whether there was probable cause" is a grant of qualified immunity appropriate. But, importantly, where "[a] reasonable police officer would have understood that arresting plaintiff . . . violated plaintiff's clearly established right to free speech, and in turn, his right not to be arrested without probable cause," qualified immunity cannot attach. *Id*. at 574–75.

Here, the clearly established law and circumstances demonstrate that reasonable officers could not disagree about the lack of probable cause. As described above and in Bombard's summary judgment motion, Vermont Supreme Court precedent clearly established that the mere use of offensive words or gestures that were protected by the First Amendment and Article 13, absent violent physical behavior, could not constitute disorderly conduct. Therefore, an objective officer could not have reasonably believed that Bombard had violated either § 1026(a)(1) or § 1026(a)(3). *See supra* Part III.B; Pl.'s Mot. Summ. J. 31–39; *see also, e.g.*, *Lund*, 144 Vt. at 173–74, 178.

Defendants' cited cases illustrate this point. In *Long*, the Vermont Supreme Court denied summary judgment on qualified immunity because clearly established

law demonstrated that Long's cursing during a discussion with a trooper was constitutionally protected speech. As a result, there was no probable cause for the arrest, and officers of reasonable competence could not disagree. *See Long*, 166 Vt. at 574–75.

The same is true here. As described above, before February 9, 2018, the Vermont Supreme Court had repeatedly ruled, over the course of decades, that the "tumultuous" prong of the disorderly conduct statute required physical violence or physical behavior portending violence, and Bombard engaged in no such physical conduct. *See supra* Part III.B (collecting cases). Even if Riggen could "make a mistake in finding probable cause," any such mistake was not a reasonable one; he was simply wrong about the clearly established law. *See* Pl.'s Resp. Defs.' SUMF, ¶ 23; Pl.'s Ex. 3 [Riggen Dep. Tr. 251:15–25] (Riggen stating that "'[t]umultuous' means behavior that involves profanity and is somewhat perhaps exaggerated or . . . wound up"). And officers of reasonable competence are expected to know the law. *Long*, 166 Vt. At 572. Because the law clearly established these crucial elements of "tumultuous" disorderly conduct and the undisputed facts do not arguably match those elements, no officer of reasonable competence could have believed probable cause existed to arrest Bombard.

Defendants further mistakenly rely on Judge Maley's nonbinding denial of Bombard's V.R.Cr.P. 41(g) motion to suppress submitted to the Franklin County

criminal court.[11] But Judge Maley's decision was for a different purpose and based on different "facts" under a different evidentiary standard. Defendants quote Judge Maley's decision, which was based only on Riggen's affidavit, stating that Bombard "decided to drive erratically while raising his middle finger." *See* Defs.' Mot. Summ. J. 14. This portion of Judge Maley's decision is intended to refute an argument not at issue in this case—whether the fruit of the poisonous tree doctrine required suppression of Bombard's subsequent utterances. Bombard has never argued that the poisonous tree doctrine should apply in his civil case.

Regardless, Defendants' Statement of Undisputed Material Facts does not claim that Bombard drove "erratically while raising his middle finger." Indeed, their Statement of Undisputed Material Facts states only that Bombard had to "stop short to avoid a collision," Defs.' SUMF ¶ 25, and that he "extend[ed] his hand and middle finger outside of his window as Bombard entered southbound traffic," *id.* ¶ 26. Furthermore, on a motion to suppress, the criminal court judge views the evidence in the light most favorable to the State and excludes all modifying evidence. *See Rheaume*, 2005 VT 106, ¶ 6. The logic of Judge Maley's decision, therefore, does not show the existence of arguable probable cause in this civil case:

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[11] Defendants misattribute the decision to Judge Rainville, but it was Judge Maley who denied Bombard's criminal court motions related to Count 1 (tumultuous disorderly conduct). Judge Rainville granted Bombard's later 12(d) motion against a second charge of disorderly conduct, § 1026(a)(5) (obstructing pedestrian or vehicular traffic), because the evidence viewed in the light most favorable to the State did "not show any time when the Defendant or his vehicle physically obstructed traffic." Pl.'s SUMF ¶ 164 (quoting Pl.'s Ex. 13 [Ruling on Motion to Dismiss Count Two, Docket No. 241-2-18 (Vt. Sup. Ct. Dec. 18, 2016)]).

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

Defendants argue that, where a trial court denies a motion to suppress, arguable probable cause must be found in a subsequent civil case, relying on an unpublished out-of-circuit federal district court decision. *See* Defs.' Mot. Summ. J. 13 (citing *Cornell v. City of Cleveland*, No. 1:06CV526, 2007 WL 1342529 (N.D. Ohio May 4, 2007)). *Cornell* says nothing of the sort. It is, plainly, not a qualified immunity decision. While *Cornell*, in describing the relevant facts, briefly references the grant of qualified immunity in an earlier Ohio Court of Common Pleas *civil* case between the same parties, that is the extent of the discussion regarding qualified immunity. And, in that earlier civil case, the court found that probable cause existed "after reviewing the evidence before it," not simply based on a criminal court's earlier probable-cause finding. *Cornell*, 2007 WL 1342529, at *6; *see also id.* at *2. *Cornell*'s legal subject matter is the rather esoteric question of whether the Northern District of Ohio could *revisit* that probable-cause finding in the prior civil case before the Ohio Court of Common Pleas. It decided it could not, and thus the plaintiffs' malicious prosecution claim could not proceed. *Id.* at *6. Simply put, *Cornell* has no relevance here.

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

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

Riggen is not entitled to qualified immunity on Count 5, Bombard's claim that Riggen engaged in unconstitutional viewpoint discrimination that chilled Bombard's speech. Contrary to Riggen's argument, *see* Defs.' Mot. Summ. J. 12, probable cause or arguable probable cause cannot shield him from this claim as it relates to the stop, arrest, and car seizure because neither existed here, as described *supra* Parts I–III. And even if Riggen had probable cause or arguable probable cause to stop and arrest Bombard and seize his car—and even if that would entitle him to qualified immunity on Bombard's retaliation claim—it would not save Riggen from the viewpoint discrimination claim. Viewpoint discrimination is a distinct First Amendment violation that, in this case, arises not just from the stop, arrest, and vehicle seizure, but from the totality of Riggen's conduct chilling Bombard's speech—much of which is in addition to the stop, arrest, and vehicle seizure.

A. Riggen engaged in unlawful viewpoint discrimination, separate and apart from his retaliation claims.

Bombard's retaliation claims do not subsume his viewpoint discrimination claim. Viewpoint discrimination and First Amendment retaliation are two distinct First Amendment violations with distinct requirements. *See, e.g.*, *Grossbaum v. Indianapolis-Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1294–99 (7th Cir. 1996) (separately analyzing First Amendment retaliation claim and viewpoint discrimination claim). Viewpoint discrimination is a "blatant" and "egregious" First Amendment violation; all a plaintiff must show is that government officials sought to suppress particular viewpoints. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Suppressing criticism of government officials or actions is a form of viewpoint discrimination, and speech critical of government receives the "strongest protection" because it is "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). Government suppression of "ideas that offend" is also an "egregious" form of viewpoint discrimination because "[g]iving offense is a viewpoint." *Matal v. Tam*, 582 U.S. 218, 223, 243 (2017). And the potential for the speech to negatively affect listeners is an invalid basis for viewpoint discrimination. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("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."). Moreover, even if the governmental conduct falls short of directly prohibiting speech, governmental action that discriminates on the basis of viewpoint violates the First Amendment when it creates a "chilling effect" on speech. *See Husain v. Springer*, 494 F.3d 108, 127–28 (2d Cir. 2007) (holding that a public university could not "censor, retaliate, or otherwise chill" student speech "on the basis of content or viewpoints").

Here, the undisputed facts support Bombard's viewpoint discrimination claim. For example:

(1) Riggen believed Bombard's presumed middle-finger gesture intended to show "displeasure" with (i.e., criticize) Riggen, Pl.'s SUMF ¶ 11; Pl.'s Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17];

(2) Riggen believed the presumed middle-finger gesture was "not appropriate" (i.e., could have offended others) in public, Pl.'s SUMF ¶ 33; Pl.'s Ex. 3 [Riggen Dep. Tr. 155:11–157:25];

(3) Riggen recognized the "negative gesture," Pl.'s SUMF ¶ 9; Pl.'s Ex. 2 [Riggen Aff. ¶ 2]; Pl.'s Ex. 3 [Riggen Dep. Tr. 87:11–24];

(4) Riggen believed the gesture was directed at him, Pl.'s SUMF ¶ 10; Pl.'s Ex. 3 [Riggen Dep. Tr. 90:12–23, 91:7–17];

(5) Riggen 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," Pl.'s SUMF ¶ 11; Pl.'s Ex. 3 [Riggen Dep. Tr. 87:6–10, 90:7–23, 91:11–17].

(6) Riggen decided he would stop Bombard to have "a conversation about what's appropriate and not appropriate," Pl.'s SUMF ¶ 63; Pl.'s Ex. 7 [Cruiser Video 4:40–49]; Pl.'s Ex. 3 [Riggen Dep. Tr. 155:11–156:16];

(7) Riggen does not "think that's an appropriate way to express yourself" to a police officer, Pl.'s SUMF ¶ 37; Pl.'s Ex. 3 [Riggen Dep. Tr. 155:11–156:16];

(8) Riggen generally thinks it is "inappropriate for a civilian to give a middle finger to a police officer," Pl.'s SUMF ¶ 34; Pl.'s Ex. 3 [Riggen Dep. Tr. 157:17–158:8]; and,

(9) Riggen believes that it is a police officer's role to enforce "societal mores," that he has the authority to do so, and that he stopped Bombard to do just that, Pl.'s SUMF ¶¶ 35, 36; Pl.'s Ex. 3 [Riggen Dep. Tr. 158:1–23].

Targeting speech on any of these bases is viewpoint discrimination. *See Velazquez*, 164 F.3d at 771 (concerning speech critical of government officials); *Matal*, 582 U.S. at 223, 243 (concerning offensive speech). By Riggen's own admissions, he targeted Bombard's speech because of the viewpoint Riggen believed it expressed.

Furthermore, because Bombard's viewpoint discrimination claim is not predicated solely on Riggen's constitutionally unreasonable law enforcement actions, even if Riggen had probable cause or arguable probable cause for the stop, arrest, and vehicle seizure, he cannot evade Bombard's viewpoint discrimination claim. The cases Defendants cite, which concern Fourth Amendment false arrest claims, do not say otherwise. *See, e.g.*, *Jaegly v. Couch*, 439 F.3d 149 (2d Cir. 2006). Riggen's conduct targeting Bombard's speech consisted not only of the initial stop

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

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

[12] As previously discussed, the statute authorizing the towing of vehicles parked in "no parking" areas includes an exception for vehicles parked there "in compliance with law or directions of an enforcement officer." Pl.'s Mot. Summ. J. 40 (quoting 23 V.S.A § 1104(a)); *see also supra* n.9.

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

Lastly, Riggen's conduct chilled Bombard's speech. As Bombard testified, after these repeated humiliations and punishments, he feels afraid to speak his mind about the police and even avoids going out in public like he used to. Pl.'s SUMF ¶¶ 169–71; Pl.'s Ex. 1 [Bombard Dep. Tr. 41:23–42:5, 136:14–139:3]. As he said at deposition, "I would never express the way I feel again, ever again, like I did in 2018. I feel like I would never do that because it would cause an arrest – it would cause an arrest for me to say how I feel or show how I feel." Pl.'s SUMF ¶¶ 170–71; Pl.'s Ex. 1 [Bombard Dep. Tr. 137:8–22]. Before the 2018 stop and arrest, Bombard had made, at most, a half-dozen posts on Vermont State Police Facebook pages, measuredly criticizing their practices on constitutional grounds. Pl.'s Mot. Summ. J. 53. Since the encounter with Riggen, Bombard has not posted on Vermont State Police Facebook pages or even on his own Facebook page about police. Pl.'s SUMF ¶ 172; Pl.'s Ex. 1 [Bombard Dep. Tr. 136:14–139:3].

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

B. The law prohibiting viewpoint discrimination was clearly established.

By February 2018, binding precedent had long established that censorship discriminating against a point of view violates the First Amendment. *See, e.g.*, *Rosenberger*, 515 U.S. at 829. Binding 1999 Second Circuit precedent had also more specifically established that discriminating against speech critical of the government is viewpoint discrimination. *Velazquez*, 164 F.3d at 771. And *Matal*, in 2017, established that discriminating against speech on the basis that one finds it offensive is viewpoint discrimination. 582 U.S. at 223, 243. Given that precedent, no officer could reasonably believe that targeting someone because they criticized a government official using offensive language or gestures, and then using government power to deter them from engaging in that protected speech in the future, comports with the First Amendment. Riggen is not entitled to qualified immunity on Bombard's viewpoint discrimination claim.

CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motion for summary judgment.

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