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Vermont Superior Court
Washington Unit
21-CV-00176

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 **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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As permitted under Vermont Rules of Civil Procedure 56(b) and this Court's January 22, 2024 Entry Order ¶ 2, Plaintiff Gregory Bombard submits his reply in support of his motion for summary judgment. Bombard requests oral argument on his motion under V.R.C.P. 7(b)(5).

INTRODUCTION

This case goes to the heart of what it means to live in a free society: Whether citizens have the right to "verbally oppose or challenge police action without thereby risking arrest." *City of Hous. v. Hill*, 482 U.S. 451, 462–63 (1987). Gregory Bombard, from his driver seat, directed two curse words and his middle finger, in protest, at Vermont State Police Trooper Jay Riggen—after Riggen illegally stopped him. Trooper Riggen responded to Bombard's protected speech by stopping Bombard (again) to arrest, berate, handcuff, jail, and publicly embarrass him in retaliation for his protected speech. Riggen also seized Bombard's car with no lawful authority to further retaliate against his speech.

Bombard's summary judgment motion explains how Riggen's actions, the material facts of which are not in genuine dispute, violated Bombard's rights to free speech and against unlawful seizures. Defendants, in their opposition brief, do not dispute that the First Amendment protects Bombard's right to give the finger or use curse words to protest police actions—nor could they. Instead, Defendants fundamentally misconstrue bedrock First and Fourth Amendment jurisprudence (and analogous Vermont Supreme Court precedent) and rely on eleventh-hour post-litigation justifications for the initial stop to misdirect from Trooper Riggen's retaliatory intent. Because Defendants' opposition fails to show a genuine dispute of

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

SUMMARY OF ARGUMENT

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

Bombard is also entitled to summary judgment on his retaliatory stop claim (Count II) because the stop was substantially motivated by Bombard's presumed middle finger. Riggen's post-litigation rationale that he stopped Bombard because he contemporaneously recalled a 2013, road-rage murder in the same area—a fact appearing for the first and *only* time in the evidentiary record at Riggen's 2023 deposition—would not convince a rational trier of fact that it was otherwise. Defendants' belated justification is inconsistent with Riggen's stated justifications contemporaneous to the stop, sworn and otherwise. The new rationale is also contradicted by the overwhelming direct and circumstantial evidence of Riggen's retaliatory purpose. Defendants offers no explanation for these inconsistencies. As a

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

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

Bombard is also entitled to summary judgment on his viewpoint-discrimination claim (Count V) because Defendants similarly fail to engage with the facts or law in Bombard's motion. Defendants' failure to address Plaintiff's legal arguments showing clearly established law and lack of arguable probable cause similarly dooms Defendants' defense of qualified immunity on all counts.

ARGUMENT

I. Bombard Is Entitled to Summary Judgment on His Unlawful Stop Claim (Count I) Because, as a Matter of Law, Generalized Concerns Cannot Justify Community Caretaking Stops.

Although Defendants correctly acknowledge that a community caretaking stop must be objectively reasonable, they misapply that standard. *See* Defs.' Opp'n

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

Riggen claims he viewed Bombard's middle finger as a sign of distress because it was "supremely unusual." Defs.' Opp'n Summ. J. 3. But the Second Circuit has rejected that exact argument. In *Swartz v. Insogna*, the court labeled the middle finger "a gesture of insult known for centuries," noting that it appeared in Ancient Greece and a 19th century baseball-team photo of the Boston Beaneaters and New York Giants. 704 F.3d 105, 107 n.1 (2d Cir. 2013). The Second Circuit determined that the middle-finger gesture is not unusual at all and an officer, therefore, cannot reasonably interpret the middle finger as a "signal of distress" justifying a traffic stop. *Id.* at 110. "[T]he nearly universal recognition that this

[1] Plaintiff agrees with Defendants that the Second Circuit looks to the "totality of the circumstances" to measure a stop's objective reasonableness. Defs.' Opp'n Summ. J. 5. However, the Second Circuit would not, as Defendants ask this Court to do, *id.* at 5–6, look to anecdotal, uncited hypothesizing on the rates of road-rage incidents in Los Angeles which, as a matter of law, cannot be part of the totality of the circumstances surrounding a traffic stop in St. Albans, Vermont.

gesture is an insult deprives such an interpretation of reasonableness." *Id.* at 110. Riggen's insistence to the contrary does not upend established law.[2]

Trooper Riggen's alleged belief that a middle-finger directed at him created "the possibility" of an incident like a 2013 "road rage" murder cannot change this outcome. As a matter of law, no community caretaking stop can be justified by officers' generalized "concern for those in the community at large." Defs.' Resp. to Pl.'s Statement of Undisputed Material Facts (SUMF) ¶ 23; *see also* Defs.' Opp'n Summ. J. 5. Community caretaking stops require facts that "objectively indicate a danger to the driver or passengers of the vehicle, *rather than the general public*," and the Vermont Supreme Court has specifically "decline[d] to extend the doctrine to situations . . . where a [driver's] actions *might* pose some danger to some member of the motoring public at some indefinite time in the future." *State v. St. Martin*, 2007 VT 20, ¶ 8 (citation omitted) (first emphasis added). To make a lawful community caretaking stop, therefore, officers must "particularly describe 'a perceived emergency or [an] indication of imminent threat to specific individuals.'" *State v. Marcello*, 157 Vt. 657, 658 (1991) (mem.) (quoting *St. Martin*, 2007 VT 20, ¶ 6). In lieu of a specific emergency or threat to specific individuals, Riggen now claims he supposedly speculated that Bombard "need[ed] someone to talk to,

[2] Defendants' purported concern that officers' "fear of retaliation" will prevent them from making good-faith community caretaking stops, Defs.' Opp'n Summ. J. 7, should be assuaged by *Swartz*'s clear holding—there is no good-faith basis for making a stop based on the middle-finger gesture. *See* Pl.'s Mot. Summ. J. 25–26, 29–31. Moreover, Vermont's own law similarly provides clear warning to Vermont officers that stops must be objectively reasonable. Pl.'s Mot. Summ. J. 20–25; Pl.'s Opp. Defs.' Mot. Summ. J. 7–14. The courts have eliminated any guesswork.

need[ed] some action, need[ed] something regarding this conversation"—which, as Riggen correctly stated, "may sound ridiculous." Ex. 3 [Riggen Dep. Tr. 139:1–4]. And Defendants presents no facts to support the existence of an emergency or imminent threat to specific individuals here. No objective, reasonable officer would have thought the middle-finger gesture was a sign of distress, emergency, or imminent threat to specific individuals.

Furthermore, by Defendants' logic, an officer could stop any driver if their (purported) speech reminds the officer of a past crime that occurred in the area. But the Vermont Supreme Court has already warned Trooper Riggen to "take care not to allow the [community caretaking] exception to 'devour the requirement of reasonable articulable suspicion.'" *State v. Button*, 2013 VT 92, ¶ 20 (quoting *State v. Burgess*, 163 Vt. 259, 262 (1995)) (ruling unlawful another of Riggen's alleged community caretaking stops). The Court should decline Defendants' invitation to so distort and boundlessly broaden this exception to justify the initial traffic stop here. Clearly established Second Circuit and Vermont Supreme Court precedent show conclusively that Riggen's stop of Bombard was not justified.

Defendants next attempt to downplay this unconstitutional seizure as a "limited inconvenience." Defs.' Opp'n Summ. J. 7. On the contrary, it is, as a matter of law, a constitutional violation. Defendants claim this stop "did not result in an arrest or any other adverse consequence to the driver," and so is distinguishable from other community caretaking cases. *Id*. This conclusion disregards that an unlawful seizure is, in and of itself, a constitutional violation. "The law on vehicle

stops is well-settled." *Zullo v. State*, 2019 VT 1, ¶ 58. "The temporary stop of a vehicle is a seizure," subject to protection under both the Fourth Amendment of the U.S. Constitution and Article 11 of the Vermont Constitution. *Id*. This is because unreasonable seizures themselves—whether or not followed by an arrest—violate important rights. Indeed, "[t]he essential purpose of the proscriptions" in those constitutional provisions "is to impose a standard of reasonableness upon the exercise of discretion by government officials, including law enforcement agents, in order to safeguard the *privacy and security of individuals against arbitrary invasions*." *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979) (cleaned up) (emphasis added). As the United States Supreme Court has explained, traffic stops are "physical and psychological intrusion[s]" that "interfere with the freedom of movement, are inconvenient,[ ] consume time," and "may create substantial anxiety." *Id*. at 657. Police motor vehicle stops *always* trigger constitutional scrutiny. Characterizing the unlawful seizure here as "merely check[ing]" on Bombard without "any other adverse consequence to the driver," Defs.' Opp'n Summ. J. 6–7, ignores the fact that the stop constitutes a seizure and *was* an unjustified, adverse consequence for Bombard.

To be sure, discussions of the community caretaking exception often arise in cases in which a defendant is challenging an arrest following a stop. *See* Defs.' Opp'n Summ. J. 4. But a subsequent arrest is not relevant to the legality of the initial stop or required to make the initial stop actionable. An unlawful arrest following an unlawful seizure constitutes a separate and additional constitutional

violation. The community caretaking doctrine makes this distinction plain by requiring an officer to "particularly describe" the specific emergency or imminent threat "*before effecting the stop*." *Marcello*, 157 Vt. 657, 658 (1991) (mem.) (emphasis added) (quoting *St. Martin*, 2007 VT 20, ¶ 6). What happens later in the stop may certainly compound the injustice, but the legality of a stop is based on the facts when the stop occurs. In the initial stop here, it is undisputed that Trooper Riggen seized Bombard. Defs. Resp. Pl.'s SUMF ¶¶ 26, 27; Ex. 7 [Cruiser Video 0:30–1:15]; Ex. 3 [Riggen Dep. Tr. 93:22–95:1]. Because there was no objectively reasonable basis for that stop, it violated Bombard's rights. No further indignity is required to find it unconstitutional.

Defendants' opposition to Plaintiff's motion for summary judgment on his unreasonable stop claim rests entirely on a mangling of the community caretaking doctrine and an immaterial post-litigation rationale that Riggen stopped Bombard because Riggen speculated—based on his mistaken belief that Bombard gave him the finger—that a violent road-rage incident could ensue. Defendants then repeat "legal authorities are in conflict" despite citing none correctly. Defs.' Opp'n Summ. J. 7; *see also* Pl.'s Opp'n Summ. J. 10–12. Defendants do not identify any case suggesting a community caretaking stop is justified when a police officer perceives a driver giving him the finger. Indeed, none exist. With no lawful basis for the stop, no objectively reasonable basis for a valid community care stop, and qualified immunity thus clearly inapplicable, Plaintiff is entitled to summary judgment on his unreasonable stop claim (Count I).

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

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

A court may grant summary judgment notwithstanding a defendant's contrary deposition testimony. *See Salter v. Douglas MacArthur State Tech. Coll.*, 929 F. Supp. 1470, 1482 (M.D. Ala. 1996). Indeed, there can be no genuine issue of material dispute for trial when a rational factfinder could not find one. *Kelly v. Town of Barnard*, 155 Vt. 296, 305 n.5 (1990) ("Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." (quoting *Matushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). When "a reasonable factfinder could come to only one conclusion" and direct or "circumstantial evidence"—including a defendant's

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

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

Here, the evidence of Trooper Riggen's true retaliatory motive is overwhelming. The direct evidence alone is dispositive. As an initial matter, the U.S. Supreme Court has held that the absence of a lawful basis for the retaliatory act, as is the case here, "will generally provide weighty evidence that the officer's animus caused [it]." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1724 (2019). On top of that, Riggen readily admitted at his deposition that he stopped Bombard in response to his "inappropriate" protected speech and to fulfill what Riggen believes is a police officer's role to enforce "social mores." *See* Defs.' Resp. Pl.'s SUMF ¶¶ 33–36. Indeed, it is not genuinely disputed that, in the 24 minutes after the stop, Riggen repeatedly said he stopped Bombard because Bombard "flipped [him] off." *See id.* ¶¶ 8, 10, 28,

50, 52, 55, 58, 133; Pl.'s Reply to Defs.' Resp. to Pl.'s SUMF ¶¶ 62–64.[3] It is also undisputed that Riggen views the middle-finger gesture as a "negative," "obscene," and "profane" gesture—indeed that is what Riggen called it in his probable-cause affidavit. *See* Defs.' Resp. Pl.'s SUMF ¶¶ 9, 28, 140, 160. And it is undisputed that Riggen believed, when he first mistakenly thought he saw the middle-finger gesture, it was signifying a "sign of displeasure" intended to communicate that Bombard was "not happy with something that [Riggen] represent[ed]"; something related to "police or State Police or the government at large." *Id.* ¶¶ 11, 28. Riggen has repeated this earlier reasoning for the stop, even in his own deposition testimony. *Id.* ¶ 11.

The undisputed circumstantial evidence of Trooper Riggen's own behavior, both when he initially approached and after he arrested Bombard, also demonstrate his true retaliatory motive and expose the dubious nature of Defendants' post-litigation rationale. As Riggen conceded, he "came at" Bombard "more assertively" and "more Alpha instead of more collegial." *Id.* ¶ 46. Within seconds of approaching Bombard, Riggen told him "it looked like you flipped me off." *Id.* ¶ 50. He did not ask if Bombard was okay or was in distress. *Id.* ¶¶ 66–67. And during the second stop Riggen stood "shoulder-to-shoulder" with Bombard and "continu[ed] to speak loudly and gesticulate" about Bombard having "the audacity" to "flip [him] the bird."

[3] There is also no genuine dispute that Riggen stopped Bombard to discuss "what's appropriate and not appropriate" about displaying the middle-finger gesture. *See* Defs.' Resp. Pl.'s SUMF ¶ 37; Pl.'s Reply to Defs.' Resp. to Pl.'s SUMF ¶¶ 63, 64.

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

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

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

In addition, before Riggen's September 2023 deposition in this case, Plaintiff deposed every member of the Vermont State Police whom Defendants identified as either having spoken with Riggen about the Bombard stop or having "discoverable information that the defendants may use to support [their] claims or defenses," Diaz Decl.,[4] Ex. 15 [Defs.' Resp. to Pl.'s Interrogs. ¶¶ 3, 4]. Defendants, tellingly, cite none of those Vermont State Police-personnel deposition transcripts to support Riggen's justification for the stop, his being concerned about a repeat of the 2013 road-rage incident. Diaz Decl. Exs. 17–21 (cover and signature pages of depositions transcripts of Patno, Desany, Bruzzi, Wood, and Lamothe). Moreover, during 18 months of discovery before Riggen's deposition, Defendants produced over 800 pages of documents related to the 2018 stop, the 24-minute video of Riggen repeatedly telling Bombard why he stopped him, and a video of Bombard's processing at the St. Albans barracks. Defendants again cite none to prop up Riggen's post-litigation rationale.

At deposition, Trooper Riggen claimed he told Lieutenant Tara Thomas about his "recollection" rationale for the stop. Ex. 2 [Riggen Dep. Tr. 163:19–24]. But, at her deposition, she did not mention this rationale in her sworn testimony about her conversation with Riggen about the basis for the Bombard stop—testimony which she deemed a complete account of the conversation. Ex. 16 [Thomas Dep. Tr. 41:14–45:5] (providing information about the phone call she had with Trooper Riggen

[4] Exhibits 15–21 are attached to the Declaration of James Diaz accompanying this reply. Exhibits 1–14 are attached to the Declaration of James Diaz that accompanied Bombard's motion for summary judgment.

about the basis for the 2018 Bombard stop and swearing "yes" that she told Plaintiff's attorney everything that she recalled about that discussion). Nor did Lieutenant Thomas, after reviewing with Riggen the facts relevant to the stop, mention Riggen's supposed recollection in her written report to Vermont State Police leadership summarizing the conversation about the bases for the stop and arrest. *Id.* [Thomas Dep. Tr. 75:18–77:2 (referring to Thomas Deposition Exhibit AGO-00079)].

The Court should disregard Defendants' last-ditch effort to create a genuine dispute of fact by belatedly contradicting Trooper Riggen's own previous statements when the evidence overwhelmingly shows his retaliatory motive. With no lawful basis for the stop and no meaningful reason for the stop other than Riggen's belief that Bombard engaged in protected speech, there is only one conclusion: The initial stop was substantially driven by Riggen's retaliatory motive against Bombard's protected speech. *See* Pl.'s Mot. Summ. J. 44–47 (describing evidence of Riggen's true retaliatory motive). No rational trier of fact could view it differently. The Court should grant Bombard's motion for summary judgment on his retaliatory stop claim (Count II).

III. Even Assuming Vermont Adopts *Nieves*'s Probable-Cause Exception for Article 13 Retaliatory Arrests, Bombard Is Entitled to Summary Judgment on His Retaliatory Arrest and Retaliatory Vehicle-Seizure Claims (Counts III and IV) Because Probable Cause Did Not Exist.

Defendants argue that the Court should adopt the First Amendment's probable-cause exception, articulated in *Nieves*, because this Court applied it previously in *denying* Defendants' Partial Motion to Dismiss. Defs.' Opp'n Summ. J.

7–8. But Defendants omit any discussion of the weighty constitutional decision before this Court—whether to adopt a new exception to Article 13, the Vermont Constitution's unique free speech protection. As Bombard has extensively briefed, Article 13's sui generis text, history, and core values, as well as *Nieves*'s structural, doctrinal, and empirical flaws, demonstrate that the probable-cause exception for First Amendment retaliatory arrests claims should not be extended to similar Article 13 claims, at least not as to speech about officer misconduct— because that speech "concern[s] the transactions of government," as explicitly protected by Article 13. Pl's Opp'n Defs.' Mot. Summ. J. 15–19; Pl.'s Mot. Summ. J. 31–32 (citing Pl.'s Opp'n Defs.' Mot. Dismiss 13–25).

Indeed, this case is a paradigmatic example of how adopting the *Nieves* exception would thwart Article 13's core values. It is undisputed that Trooper Riggen, within seconds of hearing Bombard say "asshole" and "fuck you," decided to arrest Bombard. Defs.' Resp. Pl.'s SUMF ¶¶ 70–71, 106, 108–110. And Defendants do not even bother to argue that Riggen was not substantially motivated to arrest Bombard because of his protected speech. They seek instead to use *Nieves'*s narrow loophole only to escape liability. This Court should not sanction the inevitable degradation of Vermonters' unique free-speech protection that would result from adopting the *Nieves* exception.

Even so, as Bombard has thoroughly briefed, Riggen did not have probable cause to arrest Bombard or seize his vehicle. Pl.'s Mot. Summ. J. 32–40; Pl.'s Opp'n

Summ. J. 20–27.[5] Defendants' claim of probable cause is belied by their lack of evidentiary support and total failure to engage with Bombard's legal arguments. "[P]robable cause . . . is evaluated under an objective standard." *State v. Morse*, 2019 VT 58, ¶ 13. Probable cause of a violation of the disorderly conduct statute first requires conduct—not speech, which is all that happened here. *See* Pl.'s Opp'n Summ. J. 21–24. Second, probable cause of "tumultuous" disorderly conduct, under 13 V.S.A § 1026(a)(1), requires a "violent outburst" or similar act of physical aggression foreshadowing imminent violence—and it is undisputed that neither existed here. *See* Pl.'s Mot. Summ. J. 35–38; Pl.'s Opp'n Summ. J. 24–26. Third, probable cause did not exist for disorderly conduct by "abuse or obscene language" under 13 V.S.A. § 1026(a)(3), which requires speech "so inflammatory that it is akin to dropping a match into a pool of gasoline." *State v. Tracy*, 2015 VT 111, ¶ 38; *see also* Pl.'s Mot. Summ. J. 38–39. Defendants fail to argue against any of these points in their opposition.

Moreover, Defendants present just a single sentence to argue that Trooper Riggen had probable cause of Bombard's *mens rea*, a necessary element of the offense, claiming only that "the Criminal Court determined that a finder of fact could conclude that Bombard had the intent to cause annoyance to the surrounding

[5] Defendants' opposition fails to address Bombard's argument that Trooper Riggen's discretionary seizure of his vehicle violated 23 V.S.A. § 1104(a)(1). That law provides an explicit protection for motorists who stop, stand, or park at "no parking" signs "in compliance with law or directions of an enforcement officer"—exactly what happened here. Pl.'s Mot. Summ. J. 39–40. As a result of forgoing any response, Defendants forfeit any argument regarding § 1104(a) as it relates to Bombard's Article 13 retaliatory seizure claim (Count IV).

members of the public." Defs.' Opp'n Summ. J. 8. The undisputed facts, however, demonstrate that Riggen could not have had probable cause that Bombard had the intent necessary to violate 13 V.S.A. § 1026. *See* Pl.'s Mot. Summ. J. 33–35; Pl.'s Opp'n Summ. J. 26–27. The lesser of the statute's two *mens rea* standards, to "recklessly risk creating public inconvenience or annoyance," requires "a gross deviation from the standard of conduct that a law-abiding person would observe" in the same situation. *State v. Albarelli*, 2016 VT 119, ¶ 22 (quoting Model Penal Code § 2.02(c)). It is undisputed that Bombard did no more than say two curse words and briefly display his middle finger as he merged into the road. Defs.' Resp. Pl.'s SUMF ¶¶ 70, 87–88. Bombard's utterances were quiet enough as to not be audible in the recording of the incident. *Id.* ¶ 78. Bombard's middle-finger gesture, displayed "just outside the window" for no more than six seconds, *id.* ¶¶ 87–88, is not visible in the recording of the incident, *id.* ¶ 90, with the camera directly behind and facing his vehicle, *id.* No pedestrians were in the area to hear Bombard's utterances, *id.* ¶¶ 75–76, and no more than four vehicles, *id.* ¶ 72, with their windows rolled up, *id.* ¶ 73, were in the area—and they were all 30 to 40 feet from Bombard, *id.* ¶ 74. Bombard then yielded to wait for a passing vehicle to go by before starting to reenter the roadway. *Id.* ¶ 79. None of this presents any fact that would provide a reasonable officer with probable cause that Bombard recklessly risked public inconvenience or annoyance.

Defendants attempt to manufacture an immaterial controversy by claiming that, as Bombard started to pull away from the traffic stop, he almost caused a

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

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

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

As Bombard described in his summary judgment motion, the undisputed facts show that Trooper Riggen engaged in unlawful viewpoint discrimination. *See* Pl.'s Mot. Summ. J. 50–53; *see also* Pl.'s Opp'n Summ. J. 32–38. When the government targets speech because that speech is critical of the government or because some may find it offensive, that constitutes unlawful viewpoint

discrimination. *See* Pl.'s Mot. Summ. J. 51 (citing *Matal v. Tam*, 582 U.S. 218, 223, 243 (2017); *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 771 (2d Cir. 1999)). The undisputed material facts demonstrate that Riggen targeted Bombard's speech on both of these unlawful bases—because he believed Bombard's speech was offensive and because he believed it criticized the government.[6] *See, e.g.*, Defs.'s Resp. Pl.'s SUMF ¶ 11 (Riggen's deposition testimony about perceiving Bombard's speech as criticism of him as a police officer or of the "government at large"); *id.* ¶ 33 (Riggen's deposition admission that he believed that a middle finger directed at Riggen was not an "appropriate" way for Bombard to express himself); *id.* ¶ 36 (Riggen's deposition testimony that, after mistakenly perceiving a middle-finger gesture, he stopped Bombard to "enforce society's mores").

Defendants' opposition fails to address these arguments. *See* Defs.' Opp'n Summ. J. 8–9. In fact, their brief does not discuss any law concerning viewpoint discrimination and they do not dispute the facts showing that Riggen engaged in viewpoint discrimination. Instead, Defendants cite a single inapposite case—an

[6] Of the various facts that Bombard relies on in the viewpoint discrimination section of his motion, Defendants agree that all of them are undisputed except one. *Compare* Pl.'s Mot. Summ. J. 50–53 (citing Pl.'s SUMF ¶¶ 9–11, 33–37, 50, 52, 63, 169–72), *with* Defs.' Resp. Pl.'s SUMF ¶¶ 9–11, 33–37, 50, 52, 63, 169–72. Defendants purport to dispute paragraph 63 of Bombard's statement of facts, but that paragraph merely relays verbatim quotes from Bombard and Riggen that are audible in the cruiser video. *See* Pl.'s Reply to Defs.' Resp. to Pl.'s SUMF ¶ 63 ("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.' Ex. 7 [Cruiser Video 4:40–49]; Ex. 3 [Riggen Dep. Tr. 155:11–156:16].."). Defendants cannot manufacture a dispute by asserting that Riggen did not say something when the recording not only shows he said it but Riggen admitted doing so in his deposition.

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

Defendants also fail to counter Bombard's points regarding the many additional ways that Trooper Riggen, in addition to stopping and arresting Bombard, engaged in viewpoint-discriminatory acts and chilled Bombard's speech. *See* Pl.'s Mot. Summ. J. 52–53; Pl.'s Opp'n Summ. J. 34–35. The U.S. and Vermont Constitutions protect speakers from public officials who seek to intimidate them into silence—exactly what Trooper Riggen did to Bombard. Because Riggen acted to chill Bombard's viewpoint and the law clearly established that doing so violated the First Amendment and Article 13, this Court should grant summary judgment for Bombard on his viewpoint discrimination claim.

CONCLUSION

For the foregoing reasons, this Court should grant Bombard's motion for summary judgment on all counts and deny the Defendants' cross motion.

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Respectfully submitted,

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[7] Judge Maley, in resolving Bombard's motion to suppress, cited *McDermott* in a discussion of the fruits-of-the-poisonous-tree doctrine. Ex. 11 [Decision on Defendant's Motion to Suppress and Dismiss at 6, Docket No. 241-2-18 (Vt. Sup. Ct. Aug. 31, 2018)]. The court's use of the case played no role in adjudicated whether Riggen violated Bombard's First Amendment rights, let alone adjudicated a claim of viewpoint discrimination.

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