IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

BRANDON HOWARD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:15-cv-00461
	)	
JOHN HUNTER,	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)

COMES NOW the Plaintiff, Brandon Howard ("Howard"), and submits this response to Defendant John Hunter's ("Hunter") motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) (Doc. 6). Hunter's motion seeks to dismiss all of Howard's causes of action, which request relief under 42 U.S.C. § 1983 for deprivations of the Howard's rights under the Fourth (First Cause of Action), Second (Second Cause of Action) and First (Third Cause of Action) Amendment to the United States Constitution. For the reasons set forth below, Hunter's motion should be denied in its entirety.

I. STATEMENT OF FACTS

Hunter's brief in support of his motion (Doc. 7) sets forth the essential allegations of the Complaint (Doc. 1): Howard was lawfully standing on a highway overpass displaying a sign

reading "Impeach Obama" and openly had on his person a DMTS PantherArms AR-15 rifle, 7.62x39

and a .380 caliber Bersa Thunder sidearm pistol. The former was slung over his shoulder on a strap, the latter belted in a holster on his waist, and "at no point . . . did Howard draw or brandish either weapon." (Doc. 1, ¶¶ 9-11). Eventually, one officer arrived in a police cruiser, parked near where Howard was standing and observed Howard. (Doc. 1, ¶ 13). Shortly thereafter, three to five other police cars arrived at the scene; officers exited those vehicles with guns drawn and ordered Howard to drop to the ground and spread his hands above his head (Doc. 1, ¶ 15). Howard complied with the officers' command. Hunter then approached Howard and stated: "what do you think you are doing threatening people on my interstate." Howard told Hunter he was not threatening anyone but only exercising his First and Second Amendment rights. Hunter replied, "not on my overpass you're not." (Doc. 1, ¶ 16).

Hunter and other officers then handcuffed Howard, placed him in the back of a police cruiser, and transported him to the City of Hopewell Police Station. (Doc. 1, ¶ 18). On the way to the station, Hunter spoke to the local Commonwealth Attorney and told him that Howard was threatening people on the overpass with a gun. (Doc. 1, ¶ 19). Upon arriving at the station, Howard was placed in an interrogation room where he remained for an hour and a half, all the while with his hands cuffed behind his back. (Doc. 1, ¶ 21). Eventually, Howard was released.

II. ARGUMENT

A. Standard of Review

Hunter seeks dismissal of Howard's claims under Fed. R. Civ. P. 12(b)(6). It is well-established that in deciding a Rule 12(b)(6) motion, this Court must accept all well-pleaded allegations of the Complaint to be true and must view all facts in the light most favorable to the plaintiff. *Raub v. Bowen*, 960 F. Supp. 2d 602, 604 (E.D. Va. 2013). Under the Rule 12(b)(6) standard, which is decidedly deferential to plaintiffs, the Court must construe the complaints allegations in his favor, giving the plaintiff the benefit of all reasonable inferences. *Id.* at 612 (citing *T.G. Slater & Son, Inc. v. Donald P. & Patricia A. Brennan LLC*, 385 F.3d 836, 841 (4th Cir. 2004). A Rule 12(b)(6) motion to dismiss "should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief."

T.G. Slater & Son, Inc., 385 F.3d at 841.

Because Hunter's Rule 12(b)(6) motion is based on the defense of qualified immunity, it faces a "formidable hurdle." *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014), *cert. denied sub nom. Baltimore City Police Dep't v. Owens*, 135 S. Ct. 1893 (2015). A request to dismiss a claim on qualified immunity grounds is usually not successful because

> dismissal under Rule 12(b)(6) is appropriate only if a plaintiff fails to state a claim that is *plausible* on its face. . . . A claim has "facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." . . . To satisfy the standard, a plaintiff must do more than allege facts that show the "sheer possibility" of wrongdoing. . . . The plaintiff's complaint will not be dismissed as long as he provides sufficient detail about his claim to show that he has a more-than-

> conceivable chance of success on the merits. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2006).

Owens, 767 F.3d at 396.

For a defendant to establish a defense of qualified immunity, he must demonstrate that (1) a plaintiff has not alleged or shown facts that make out a violation of a constitutional right, or (2) that the right at issue was not "clearly established" at the time of its alleged violation. *Id.* at 395-96. Hunter's motion relies solely on the second prong of this test, arguing that the Complaint does not show Hunter deprived Howard of any "clearly established" right. (Doc. 7, at 5). A right is "clearly established" if "'the contours of the right [are] sufficiently clear'" so that a reasonable officer would have understood, under the circumstances at hand, that his behavior violated the right. *Bailey v. Kennedy*, 349 F.3d 731, 740 (4th Cir. 2009). While the determination of whether a right is "clearly established" is made with reference to the decisional law, the non-existence of a case holding the defendant's identical conduct to be unlawful does not prevent denial of qualified immunity; qualified immunity was never intended to relieve government officials from the responsibility of applying familiar legal principles to new situations. *Wilson v. Kittoe*, 337 F.3d 392, 403 (4th Cir. 2003)

In his brief, Hunter suggests that the defense of qualified immunity should be given special solicitude in light of its purpose of protecting officers from the burdens of litigation (Doc. 7, at 4). However, the ordinary standards applied to Rule 12(b)(6) motions, such as requiring that a complaint be read and inferences drawn in favor of the plaintiff, should not be ignored or even skewed to give special substantive favor to the defense. *Wilson*, 337 F.3d at 397.

B. Fourth Amendment Claim

Howard's First Cause of Action asserts that Hunter deprived him of his right to be free of unreasonable searches and seizures under the Fourth Amendment to the United States Constitution and requests relief under 42 U.S.C. § 1983. (Doc. 1, ¶¶ 29-33). Although Hunter's brief in support of his Rule 12(b)(6) motion does not deny that the facts set forth in the Complaint indicate that Howard was "seized" for purposes of the Fourth Amendment, Hunter does repeatedly characterize the police action as a "temporary seizure" or "detention." *See*, *e.g.*, Doc. 7, at 1 fn. 1, 7). However, there is no escaping that Hunter effected a full-blown arrest of Howard. "Absent the individual's consent, transportation in handcuffs to a separate location and then to the police station for further investigation is a *de facto* arrest." *United States v. Perdue*, 427 F. Supp. 2d 671, 673 (W.D. Va. 2006), *aff'd,* 228 F. Appx. 269 (4th Cir. 2007). An involuntary transport of a handcuffed individual to a police station for questioning is an arrest for Fourth Amendment purposes. *Kaupp v. Texas*, 538 U.S. 626, 630 (2003).

In order for a custodial arrest of an individual to be legal and reasonable under the Fourth Amendment it must be supported by probable cause. *Id.*; *Wilson*, 337 F.3d at 397. Probable cause exists if, at the time of the arrest, the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense. *Smith v. Tolley*, 960 F. Supp. 977, 994 (E.D. Va. 1997). In *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992), the court explained the qualified immunity analysis employed in determining whether an officer violated "clearly established" law by arresting a person without probable cause:

> Whether probable cause exists in a particular situation therefore always turns on two factors in combination: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct. . . . Probable cause therefore could be lacking in a given case, and an arrestee's right violated, either because of an arresting officer's insufficient factual knowledge, or legal misunderstanding, or both. . . . In consequence, a court's determination whether a constitutional right not to be arrested under particular circumstances was "clearly established" requires identification both of the facts known to the arresting officer and the contours of the criminal offense asserted as the justification for arrest. The right may then be found "clearly established," hence violated, at this level of factual particularity if probable cause is lacking on either or both the factual knowledge or legal understanding components of the equation.

Under the facts as alleged by Howard, which must be construed in a light most favorable to Howard and drawing inferences in his favor, a violation of his clearly established right not to be arrested without probable cause is stated both as a matter of the facts and the law. Hunter posits a single offense which he could reasonably have believed Howard violated or was violating to justify Howard's arrest: Va. Code § 18.2-282, which prohibits pointing, holding or brandishing a firearm so as to reasonably induce fear in the mind of another. But nothing in the Complaint shows that Hunter had information that Howard's actions had "induced fear in the mind of another," an essential element of the § 18.2-282. *See Dezfuli v. Commonwealth*, 58 Va. App. 1, 707 S.E.2d 1, 5 (2011) (essential element of § 18.2.282 is that act induced fear in the mind of a victim). Indeed, the inference must be drawn that no person was put in fear, much less reasonably so, by Howard's conduct. Given the allegation of the Complaint that Howard was holding an "Impeach Obama" sign, and was not holding or handling the firearms, it certainly can be inferred that he did not induce harm in anyone.

Additionally, nothing in the Complaint shows that while on the overpass Howard "h[e]ld, point[ed] or brandish[ed]" the firearms as required for a violation of Va. Code § 18.2-282.

Instead, Howard was holding the "Impeach Obama" sign, and nothing in the Complaint indicates that Howard was in any way attempting to draw attention to the firearms. While Hunter asserts that Howard's allegation that he was not "brandishing" the firearms is a "legal conclusion," it is a quintessentially factual allegation. In order to "brandish" a firearm for purposes of § 18.2-282, one must exhibit the firearm in an ostentatious, shameless or aggressive manner. *Dezfuli*, 707 S.E.2d at 5. It would be improper on a Rule 12(b)(6) motion to infer that Howard in fact brandished or held either firearm, particularly when the allegations are specifically to the contrary.

Thus, the Complaint shows that at least two elements of the § 18.2-282 offense were lacking, preventing Hunter from having probable cause to arrest Howard for this offense. Hunter is chargeable with knowledge of the law respecting the requirements for a violation of § 18.2-282 and is not entitled to the protection of qualified immunity when he made an arrest lacking probable cause on each of the elements of the offense set forth in the statute. *See Rogers v. Stem*, 590 Fed. Appx. 201, 207 (4th Cir. 2014) (officer who arrested the plaintiff for offense but did not have facts indicating the plaintiff acted with the intent required by the statutory offense was not protected by qualified immunity).

Hunter's reliance on the decision in *Embody v. Ward*, 695 F.3d 577 (6th Cir. 2012), as establishing that the relevant law was not "clearly established" is misplaced for a number of reasons. First, *Embody* was decided on a motion for summary judgment, so there had been some factual development of what the defendant officers knew at the time they effected the seizure of the plaintiff and the court could determine whether or not the defendant officers acted with sufficient cause. The instant motion is one under Rule 12(b)(6) and there is no basis, looking

solely at the Complaint and in a light most favorable to Howard, for concluding that Hunter was reasonably mistaken in concluding that he had probable cause to arrest Howard, particularly since the Complaint affirmatively alleges Hunter did not have probable cause for the arrest. (Doc. 1, ¶ 20).

Second, the law under which the plaintiff was detained in *Embody* restricted the type of weapon that could legally be possessed (those with barrels of less than 12 inches) and the defendant officer in *Embody* had a legitimate question whether the plaintiff's firearm (which had a barrel length of 11 ½ inches) was the type of weapon that could be possessed at the park. Having a reasonable suspicion that the plaintiff was violating the law, the defendant officer in *Embody* was found to have made a valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), to investigate. By contrast, the allegations of the instant Complaint show that Hunter had no grounds for believing Howard was violating Virginia law. While Hunter would have this Court conclude that *Embody* authorizes police to effect any seizure of a person openly carrying a firearm, the case only stands for the proposition that police had reasonable suspicion under Tennessee law that a particular firearm was being illegally possessed in a state park. In this case, the relevant question is whether Howard's conduct as described in the Complaint was a violation of Virginia law such that Hunter had grounds for arresting Howard. *See Wilson*, 337 F.3d at 403 (whether officer violated clearly established law in arresting the plaintiff depended on the contours and provisions of state law). As discussed above, Hunter clearly had no basis for concluding Howard was in violation of Virginia law and so did not have grounds for arresting.

Third, it must be stressed that *Embody* involved a limited *Terry* stop of the plaintiff who was carrying a firearm, while Hunter effected a full-blown custodial arrest of Howard. Although

the discussion above negates the idea that Hunter had reasonable suspicion that Howard was engaged in criminal activity justifying an investigatory stop, even if Hunter had such cause, the stop far exceeded the permissible limits of a *Terry* stop and deprived Howard of his Fourth Amendment rights. As the Supreme Court has ruled:

> *Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.

Florida v. Royer, 460 U.S. 491, 499 (1983). Thus, it is clearly established that a stop on "reasonable suspicion" may not be the functional equivalent of an arrest, yet the handcuffing and removal of Howard clearly constituted an arrest. *Kaupp*, 538 U.S. at 630. To the extent Hunter seeks to justify the seizure of Howard as a *Terry* stop under the reasoning of the *Embody* case, the seizure still violated the clearly established Fourth Amendment rights of Howard.

Hunter's assertion that qualified immunity protects him because of the existence of the "community caretaking" exception to the Fourth Amendment also must be rejected because it cannot be said at this stage of these proceedings that Hunter was not acting in a law enforcement capacity at the time he seized Howard. It is clearly established that for the community caretaking exception to apply, the officer actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute[.]" *Hunsberger v. Wood*, 570 F.3d 546, 553 (4th Cir. 2009) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). The allegations of the Complaint do not establish that Hunter's actions were "totally divorced" from a law enforcement activity. Indeed, the Complaint specifically alleges

that Hunter stated that he had Howard arrested because Howard was "threatening" people (Doc. 1, ¶¶ 16, 19), which can plainly be interpreted as indicating Hunter was acting in a law enforcement capacity. Whether or not this is so cannot be resolved on a Rule 12(b)(6) motion.

Moreover, Hunter's argument that the community caretaking exception applies in any case where law enforcement officers act to "protect the public" would result in the exception swallowing the rule. "Because the 'detection, investigation, or acquisition of evidence relating to the violation of a criminal statute' is ultimately aimed at discouraging crime, in some sense all law enforcement action could be described as a 'community caretaker function.'" *United States v. Davis*, 2007 WL 2301583, at *4 (W.D. Va. Aug. 9, 2007). The fact that police act to "protect the public" does not insulate their actions from the well-established strictures of the Fourth Amendment requiring police act only upon reasonable suspicion or probable cause in seizing and arresting persons. Were it otherwise, any police intrusion could be justified under the broad and vague notion of "protection of the public," and the privacy and security of citizens meant to be protected by the Fourth Amendment would be virtually eliminated. *See Commmonwealth v. Waters*, 20 Va. App. 285, 456 S.E.2d 527, 530 (1995) (the "community caretaking" exception should be cautiously and narrowly applied in order to minimize the risk that it will be abused or used as a pretext for conducting an investigatory search for criminal evidence).

Finally, the "community caretaking" exception cannot be used to justify the full-blown custodial arrest of Howard that is at issue in this case. Just as "reasonable suspicion" does not authorize police to conduct a full search of a person or subject him to a seizure tantamount to an arrest, *Royer*, 460 U.S. at 499, so too any "community caretaking" interest that Hunter had did not justify the extent of the restraint on liberty imposed on Howard, which included seizing and

handcuffing him at gunpoint, transporting him to a police station, and holding him for over an hour and a half. It is clearly established that the scope of a Fourth Amendment intrusion must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible. *Terry*, 392 U.S. at 19; *see also*, *Waters*, 456 S.E.2d at 530 (intrusion under community caretaking doctrine must be limited). Hunter's actions as set forth in the Complaint went far beyond what was reasonably necessary for preventing any perceived threat, and so clearly violated the Fourth Amendment rights of Howard.

With respect to Howard's Fourth Amendment claim, Hunter has not overcome the "formidable hurdle" he faces in seeking Rule 12(b)(6) dismissal on the basis of qualified immunity. The Complaint sufficiently alleges a violation of clearly established law that prohibits arrests without probable cause and unreasonable seizures of the persons, and so the First Cause of Action is not subject to dismissal.

C. Second Amendment Claim

Howard's Second Cause of Action alleges that he was deprived of his rights under the Second Amendment to the U.S. Constitution, which provides that "the right of the people to keep and bear arms shall not be infringed." In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the Supreme Court established that the Second Amendment protects the right to keep and bear arms for self-defense, and soon thereafter made clear that this guarantee to bear arms is fully applicable to the States. *McDonald v. City of Chicago*, 561 U.S. 742, 749-50 (2010). Despite this binding precedent, Hunter seeks qualified immunity from Howard's Second Amendment claim by asserting that the right to bear arms *in public* is not clearly established, citing several cases which have declined to address the issue definitively because it was not necessary for

resolution of the claims in the case. *See, e.g., United States v. Masciandaro*, 638 F.3d 458 (4th Cir. 2011), and *Powell v. Tompkins*, 783 F.3d 332, 348-49 (1st Cir. 2015).

However, those courts that have addressed and decided the issue have ruled that the right to bear arms does apply outside of the home in public places. In *United States v. Weaver*, 2012 WL 727488 (S.D.W.Va. March 6, 2012), the court addressed whether the Second Amendment right extends beyond the home and found that the Supreme Court precedent requires the conclusion that it does:

> The Supreme Court itself has acknowledged a Second Amendment right to protect oneself not only from private violence, but also from public violence. *See Heller,* 554 U.S. at 594 (stating that, by the time of the founding, the right to have arms was "fundamental" and "understood to be an individual right protecting against both public and private violence."). The *Heller* Court additionally mentioned militia membership and hunting as key purposes for the existence of the right to keep and bear arms. *See id.* at 598. Confining the right to the home would unduly eliminate such purposes from the scope of the Second Amendment's guarantee.

Weaver, *supra*, at *4. The court also cited to Circuit Judge Niemeyer's opinion in *Masciandaro*, 638 F.3d at 468, which noted that *Heller* had noted reservations about the right to bear arms in "sensitive places," and reasonably pointed out that "[i]f the Second Amendment right were confined to self-defense *in the home,* the Court would not have needed to express a reservation for "sensitive places" outside of the home.

Similarly, in *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012), the court upheld a Second Amendment challenge to an Illinois' law forbidding, with few exceptions, the carrying of a firearm that was ready to use. In doing so the court ruled that the right to bear arms necessarily extends beyond the home to public places, pointing to the plain language of the Second Amendment: "The right to 'bear' as distinct from the right to 'keep' arms is unlikely to refer to

the home. To speak of 'bearing' arms within one's home would at all times have been an awkward usage. A right to bear arms thus implies a right to carry a loaded gun outside the home." *Moore*, 702 F.3d at 936. It also found that limiting the right to bear arms to the home requires a repudiation of the historical analysis undertaken by the Supreme Court in *Heller*. "*Heller* repeatedly invokes a broader Second Amendment right than the right to have a gun in one's home, as when it says that the amendment 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.' 554 U.S. at 592. Confrontations are not limited to the home." *Moore*, 702 F.3d at 935-36.

Additionally, the Ninth Circuit's decision in *Peruta v. City of San Diego*, 742 F.3d 1144, 1166 (9th Cir. 2014), *reh'g en banc granted*, 781 F.3d 1106 (9th Cir. 2015), exhaustively analyzed the text and history of the Second Amendment and concluded "that the right to bear arms includes the right to carry an operable firearm outside the home for the lawful purpose of self-defense[.]" Although rehearing has been granted in *Peruta*, the ruling has not been vacated. And in *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013), the court wrote that "[w]e do, however, recognize that the Second Amendment's individual right to bear arms *may* have some application beyond the home."

Thus, the cases which have decided whether the Second Amendment right to bear arms extends beyond the home have declared that it does, noting that the conclusion is nearly inescapable in light of the ruling in *Heller*, the text of the Second Amendment, and the history of the right to bear arms. In light of this precedent, Hunter's claim that the law is not "clearly established" in this area because certain courts have declined to specifically address the issue must be rejected. A right is "clearly established" if its contours are sufficiently clear, *Bailey*, 349

F.3d at 740, the non-existence of a case from the Fourth Circuit is no basis for finding otherwise. *Wilson*, 337 F.3d at 403. Hunter's request for dismissal of the Second Cause of Action must be rejected because the law establishing a Second Amendment right to bear arms in public was sufficiently clear at the time of the events set forth in the Complaint.

D. First Amendment Claim

The Third Cause of Action set forth in the Complaint alleges that Hunter deprived Howard of his right to freedom of speech guaranteed by the First Amendment (Doc. 1, ¶¶ 39-43). In seeking dismissal of this claim, Hunter argues that the Complaint fails to allege what it was Howard was protesting (Doc. 7, at 10). Yet Hunter acknowledges that the Complaint alleges Howard was holding and displaying to passersby an "Impeach Obama" sign, which manifestly alleges that Howard was speaking out against the current President and his administration. Even if the sign did not set forth with particularity those policies or actions of the Obama administration Howard was protesting, he was certainly exercising his First Amendment right to freedom of speech at the time he was accosted by Hunter and the other officers. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) (a particularized or "narrow, succinctly articulable message is not a condition of constitutional protection" of expression under the First Amendment) and *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (burning of a United States flag constitutes protected speech).

Hunter's further argument that the Complaint does not allege that he seized and arrested Howard because of this constitutionally-protected expression is simply belied by the plain allegations of the Complaint. It is alleged that "[t]he actions of [Howard] as alleged herein were an effort to deprive Howard of the right to engage in protected Speech under the First

Amendment to the U.S. Constitution," and this allegation is reiterated in the subsequent paragraph (Doc. 1, ¶¶ 40-41). That Hunter was seeking to prevent Howard's expression is further supported by the allegation in ¶ 16 of the Complaint that when Howard told Hunter he was merely exercising his First Amendment rights, Hunter responded "not on my overpass you're not." (Doc. 1, ¶ 16). Hunter contends that he was actually acting to protect public safety in seizing Howard, but whether he was seeking to suppress or not is a question of fact that cannot be resolved on a Rule 12(b)(6) motion. Thus, in *Tobey v. Jones*, 706 F.3d 379, 391-92 (4th Cir. 2013), the court ruled that the First Amendment claim of an airline passenger who was arrested after he bared his chest to display the text of the Fourth Amendment while in a security screening line was not subject to dismissal under Rule 12(b)(6) despite the defendants' claims that they sought the arrest of the plaintiff because of safety concerns and that they were protected by qualified immunity. Whether the plaintiff was targeted for some reason other than his expression could not be decided at the Rule 12(b)(6) stage. *Id.* at 392. And qualified immunity did not support dismissal of the complaint in *Tobey* because "given well-established precedent, we know that it is *unreasonable* to effect an arrest without probable cause for displaying a silent, nondisruptive message of protest[.]" *Id.* (emphasis in original).

The instant Complaint alleges all the required elements for a First Amendment claim: (1) that Howard engaged in constitutionally protected non-violent protest; (2) that he was seized as a result of the protest; and (3) the temporal proximity of his peaceful protest and his arrest, unsupported by probable cause, shows Hunter engaged in impermissible retaliation. *Tobey*, 706 F.3d at 387. Because it is clearly established that such conduct violates the First Amendment,

Hunter's request to dismiss the Third Cause of Action on qualified immunity grounds must be denied.

III. CONCLUSION

For the reasons set forth above, the Plaintiff respectfully requests that the Defendant's Rule 12(b)(6) motion to dismiss the Complaint be denied in its entirety.

Respectfully submitted,

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CERTIFICATE

I hereby certify that on the 23rd day of September, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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