No. 18-___

IN THE

# Supreme Court of the United States

MATTHEW WAYNE MINARD, Individually and in his official capacity as a Taylor Police Officer,

*Petitioner,*

v.

DEBRA LEE CRUISE-GULYAS,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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April 29, 2019

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## QUESTIONS PRESENTED

I. Did the Sixth Circuit Court of Appeals define the "clearly established" constitutional rights at issue in this qualified immunity case at too high a level of generality?

II. A Michigan police officer initiated a traffic stop of a vehicle for speeding. Exercising his discretion, the police officer issued a ticket to the driver for a lesser citation, known as a "non-moving" violation. As she was driving away from the traffic stop, the driver displayed her raised middle finger at the police officer. In response to this offensive speech, the police officer immediately initiated a second traffic stop – within 100 yards of the first traffic stop – for the purposes of amending the traffic citation to the original speeding charge.

Was it clearly established at the time of the second traffic stop that a police officer could not immediately initiate a second traffic stop, in response to a driver's offensive speech, to change his original, discretionary decision and issue a citation for the original speeding violation?

## PARTIES TO THE PROCEEDING

The petitioner is City of Taylor, Michigan police officer Matthew Wayne Minard.

Respondent is Debra Lee Cruise-Gulyas.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Matthew Wayne Minard, individually and in his official capacity as a Taylor Police Officer respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

## OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 918 F.3d 494, and included in Petitioner's Appendix (Pet. App.) at pp. 1a-7a. The unreported decision of the United States District Court for the Eastern District of Michigan, the Honorable Paul Borman, is included at Pet. App. pp. 9a-12a.

## JURISDICTION

The judgment of the Court of Appeals was entered on March 13, 2019 (Pet. App. 8a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution states, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . ."

The Fourth Amendment to the United States Constitution states, in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Fourteenth Amendment to the United States Constitution states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

## INTRODUCTION

In recent years, "this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (citations omitted). This case presents yet another instance where the Court of Appeals has defined the "clearly established" constitutional rights at issue at far too high a level of generality, improperly denying Officer Minard qualified immunity to which he is entitled under the law. Like the Court's recent cases reversing federal courts in qualified immunity cases, the Court of Appeals here ignored the particularized facts of this case, instead applying general, broad propositions of law. Qualified immunity is no immunity at all if context is ignored.

Officer Minard initiated a traffic stop of Respondent's vehicle for speeding. But instead of writing Respondent a speeding ticket, Officer Minard exercised his discretion and issued a lesser citation known as a "non-moving" violation. Driving away from the initial traffic stop, ungrateful for the reduction and Officer Minard's exercise of leniency, Respondent decided to raise her middle finger out of her window at Officer Minard. In response to Respondent's offensive speech, Officer Minard immediately pulled her over again – less than 100 yards from the first traffic stop – in order to amend the traffic citation he had just issued to the original speeding violation.

At the time Officer Minard initiated the second traffic stop for the purposes of amending the citation to the original speeding charge, it was not clearly established that his conduct violated any of Respondent's constitutional rights. It was not clearly established that Officer Minard, who had decided to exercise discretion and write Respondent a citation for a lesser

offense, could not immediately change his mind in response to Respondent's offensive speech. Officer Minard exercised discretion when he wrote Respondent a citation for a lesser violation than she committed, and he was free to change his mind. At a minimum, a reasonable police officer in Officer Minard's shoes would not have known that he lacked the authority to change his mind, let alone that the second traffic stop for purposes of amending the citation violated any "clearly established" constitutional rights.

The Court of Appeals disagreed, finding that Officer Minard's conduct as alleged violated Respondent's First, Fourth and Fourteenth Amendment rights. But the Court of Appeals' decision was the result of piecing together generalized propositions of law, which this Court has explained numerous times is impermissible. Because no case law on point alerted Officer Minard that he could not initiate the second traffic stop, whether under the First, Fourth or Fourteenth Amendment, he is entitled to qualified immunity as a matter of law. This petition should be granted and the Court of Appeals' decision should be reversed.

## STATEMENT

Officer Minard initiated a traffic stop of Respondent's vehicle for speeding in the City of Taylor, Michigan. *Cruise-Gulyas v. Minard*, 918 F.3d 494, 496 (6th Cir. 2019). Instead of issuing Respondent a speeding ticket, however, Officer Minard "wrote her a ticket for a lesser violation, known as a non-moving violation." *Id.* at 495. As Respondent drove away from the traffic stop, she "repaid [Officer] Minard's kindness by raising her middle finger at him." *Id.* at 495. So Officer Minard "pulled [Respondent] over a second time, less than 100 yards from where the initial stop occurred, and amended the ticket to a speeding violation." *Id.*

Respondent sued Officer Minard under 42 U.S.C. § 1983. She alleged that, by stopping her a second time, Officer Minard violated her First, Fourth, and Fourteenth Amendment rights. *Id.*

Officer Minard moved for judgment on the pleadings based on qualified immunity. *Id.* The district court denied the motion, "reasoning that [Respondent] could not be stopped a second time in the absence of a new violation of the law, that she had a free speech right to make the gesture, and that the gesture did not violate any identified law." *Id.*

Officer Minard filed an interlocutory appeal raising a single issue: whether he is entitled to qualified immunity because, "even assuming he violated [Respondent's] constitutional rights, those rights were not clearly established." *Id.*

The Court of Appeals affirmed the district court's decision. The Court of Appeals held that, under the facts set forth in the complaint, Officer Minard's second traffic stop violated Respondent's "right to be free from an unreasonable seizure. . . ." *Id.* at 496. Specifically, the Court of Appeals explained that Officer Minard needed probable cause to initiate the second traffic stop and he could not rely on the initial driving infraction. *Id.*

The Court of Appeals next explained that, under the facts set forth in the complaint, Officer Minard's second traffic stop violated Respondent's free speech rights. *Id.* at 497. The Court of Appeals explained that use of the middle finger is protected speech, and a traffic stop following the use of the middle finger is unconstitutional. *Id.*

Finally, for the same reasons, the Court of Appeals allowed Respondent's Fourteenth Amendment claim to proceed. *Id.* at 498.

This timely petition followed.

## REASONS FOR GRANTING THE PETITION

The petition should be granted because the Court of Appeals and the District Court defined the "clearly established" constitutional rights at issue in this case at far too high a level of generality, contrary to this Court's well-established precedent. When defining the constitutional rights at the appropriate level of specificity, Officer Minard is entitled to qualified immunity as a matter of law. There is a dearth of case law that would have put Officer Minard on notice that the second traffic stop for the purpose of amending a citation he had just issued to the original speeding offense violated any of Respondent's constitutional rights. Officer Minard reasonably believed that, where he had discretion to issue a citation for a lesser violation, he could immediately change his mind based on Respondent's offensive speech. The Court of Appeals ignored the key contextual facts that require granting Officer Minard qualified immunity.

Time and time again, the Court has reversed Courts of Appeal – oftentimes summarily – for defining "clearly established" constitutional rights at far too high a level of generality. *See, e.g.*, *White v. Pauly*, 137 S. Ct. 548, 551 (2017); *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, n. 3 (2015); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Mullenix v. Luna*, 136 S. Ct. 305, 308–09 (2015); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Zilar v. Abbasi*, 137 S. Ct. 1843 (2017); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *Carroll v. Carman*, 135

S. Ct. 348 (2014) (per curiam); *Wood v. Moss*, 572 U.S. 744 (2014); *Plumoff v. Rickard*, 572 U.S. 765 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658, 665 (2012).

Here, by defining the constitutional rights at issue at a high level of generality and ignoring context, the Court of Appeals and District Court collapsed the two qualified immunity inquiries into one. The Court of Appeals defined the "clearly established" First, Fourth and Fourteenth Amendment rights at issue at exactly the "high level of generality" this Court has found impermissible. Specifically, the Court of Appeals explained that a traffic stop must be supported by probable cause or reasonable suspicion; otherwise the stop is an unreasonable seizure. 918 F.3d at 496–97. The Court of Appeals also found that it is clearly established that a traffic stop cannot be initiated in retaliation for the exercise of free speech. *Id.* at 497. But these formulations of law are exactly the "high level of generality" the Court has rejected time and time again. The Court has made clear that "[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined [at a high level of generality, such] as the right to be free from unreasonable searches and seizures." *Sheehan*, 135 S. Ct. at 1776.

Here, the Court of Appeals ignored the crucial facts of this case in favor of applying generalized principles of law. When proper consideration is given to the context-specific facts, there is a dearth of case law that would have put Officer Minard on notice that the second traffic stop was unconstitutional. Officer Minard unquestionably had probable cause to initiate the first traffic stop as a result of Respondent's speeding. He chose to exercise discretion and leniency, writing Respondent a citation for an offense lesser

than speeding. No clearly established case law put Officer Minard on notice that, in response to Respondent's offensive speech – a raised middle finger – he could not immediately initiate the second traffic stop for the purposes of amending the traffic citation to the original speeding charge. In order to deny Officer Minard qualified immunity, the Court of Appeals completely ignored the context of the first traffic stop, for which all agree probable cause existed to issue Respondent a speeding ticket.

The Court of Appeals cobbled together general principles of law from the following cases: *Whren v. United States*, 517 U.S. 806 (1996); *United States v. Arvizu*, 534 U.S. 266 (2002); and *Rodriguez v. United States*, --- U.S. ---, 135 S. Ct. 1609 (2015). *See* 918 F.3d at 496. But the Court has repeatedly rejected this approach, reasoning that, unless clearly established law is "particularized" to the facts of each individual case, plaintiffs could "convert the rule of qualified immunity. . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 137 S. Ct. at 552 (citation omitted). That is exactly what the Court of Appeals did here. By ignoring the key contextual facts – the reason for the first stop and Officer Minard's discretionary leniency – the Court of Appeals defined the "clearly established" case law so generally as to encompass any action Officer Minard took, "converting the rule of qualified immunity into a rule of virtually unqualified liability." In other words, the Court of Appeals defined the "clearly established" case law in a vacuum, ignoring the entirety of the events leading up to the second stop. This is impermissible.

When viewing the issue presented in this case under the appropriate, particularized inquiry, Officer Minard's

actions did not violate any of Respondent's clearly established First, Fourth or Fourteenth Amendment rights. Respondent does not dispute that Officer Minard had probable cause to initiate a traffic stop of her vehicle for speeding, or that he had the authority to write her a speeding ticket. Officer Minard decided to exercise discretion, giving Respondent a break. No clearly established case law put Officer Minard on notice that, in response to Respondent's offensive speech, he could not immediately change his mind, stop Respondent's vehicle within 100 yards of the first traffic stop, and amend the traffic citation he had just issued to the original speeding offense.

Officer Minard's actions are akin to a prosecutor taking a deal off the table in response to a defendant's disrespectful behavior, or a judge changing his mind about a below-guideline sentence in response to a defendant raising his middle finger at the judge. Like the prosecutor and judge in these examples, Officer Minard exercised discretion in writing Respondent a ticket for a lower offense than the speeding she committed. And like the prosecutor and judge in the above examples, Officer Minard was entitled to change his mind based on Respondent's offensive speech. At a minimum, no clearly established case law alerted Officer Minard that he could not immediately initiate the second traffic stop in order to amend the citation to the original speeding offense.

The Court of Appeals recognized that judges have "wide latitude to consider expressive conduct during sentencing." 918 F.3d at 498 (citations omitted). But the Court of Appeals reasoned that Officer Minard's actions were not analogous to that of a sentencing judge, because the fact that the first stop had ended was a "constitutionally significant event" that pre-

cluded the second stop. *Id.* This analysis misses the point: no case law put Officer Minard on notice that, where he had just exercised leniency to a speeding driver, he could not immediately initiate the second traffic stop to amend the ticket to the original speeding offense, in response to Respondent raising her middle finger at Officer Minard. General principles of law – such as searches and seizures must be supported by probable cause or a traffic stop cannot be in retaliation for expressive conduct – do not answer the particularized inquiry in this case.

Qualified immunity is meant to protect on-the-spot decisions by police officers that are reasonably mistaken. Officer Minard's actions in this case fall squarely within the purpose of qualified immunity. While the Court of Appeals found that the first stop ending is a "constitutionally significant event," Officer Minard did not have the time to deliberate and fully appreciate that fact. Instead, he had just given a speeding driver a break, a discretionary decision, only to be thanked with a middle finger. He reasonably – even if mistakenly – believed that he could immediately initiate the second traffic stop in order to amend the citation he had just issued to the original speeding charge, for which all agree he could have issued in the first instance had he not chosen to be lenient.

## CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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April 29, 2019

# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 18-2196

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DEBRA LEE CRUISE-GULYAS,

*Plaintiff-Appellee*,

v.

MATTHEW WAYNE MINARD, individually and in his official capacity as a Taylor Police Officer,

*Defendant-Appellant*.

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Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 2:18-cv-11169—Paul D. Borman, District Judge.

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Decided and Filed: March 13, 2019

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Before: SUTTON, WHITE, and DONALD,
Circuit Judges.

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COUNSEL

ON BRIEF: Mark W. Peyser, Jonathan F. Karmo, HOWARD & HOWARD ATTORNEYS PLLC, Royal Oak, Michigan, for Appellant. Hammad A. Khan, BLACKSTONE LAW, PLLC, Madison Heights, Michigan, for Appellee.

## OPINION

SUTTON, Circuit Judge. Fits of rudeness or lack of gratitude may violate the Golden Rule. But that doesn't make them illegal or for that matter punishable or for that matter grounds for a seizure.

Officer Matthew Minard pulled over Debra Cruise-Gulyas for speeding. He wrote her a ticket for a lesser violation, known as a non-moving violation. As she drove away, apparently ungrateful for the reduction, she made an all-too-familiar gesture at Minard with her hand and without four of her fingers showing. That did not make Minard happy. He pulled her over again and changed the ticket to a moving violation—a speeding offense and what counts as a more serious violation of Michigan law. Because Cruise-Gulyas did not break any law that would justify the second stop and at most was exercising her free speech rights, we affirm the district court's order denying Officer Minard's Civil Rule 12(c) motion for judgment on the pleadings.

Minard, a police officer in the city of Taylor, Michigan, stopped Cruise-Gulyas in June 2017 for speeding. But he decided to show her leniency and wrote her a ticket for a non-moving violation. As she drove away, Cruise-Gulyas repaid Minard's kindness by raising her middle finger at him. Minard pulled Cruise-Gulyas over a second time, less than 100 yards from where the initial stop occurred, and amended the ticket to a speeding violation.

Cruise-Gulyas sued Minard under § 1983, alleging that he violated her constitutional rights by pulling her over a second time and changing the original ticket to a more serious violation. She claims he unreasonably seized her in violation of the Fourth

(and Fourteenth) Amendment; retaliated against her because of her protected speech in violation of the First (and Fourteenth) Amendment; and restricted her liberty in violation of the Due Process Clause of the Fourteenth Amendment.

Minard moved for judgment on the pleadings based on qualified immunity. The district court denied the motion, reasoning that Cruise-Gulyas could not be stopped a second time in the absence of a new violation of the law, that she had a free speech right to make the gesture, and that the gesture did not violate any identified law. Minard filed an interlocutory appeal, arguing that he is entitled to qualified immunity because, even assuming he violated Cruise-Gulyas's constitutional rights, those rights were not clearly established.

Qualified immunity protects police from personal liability unless they violate a person's clearly established constitutional or statutory rights. *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). The rights asserted by Cruise-Gulyas meet that standard.

*Fourth Amendment*. Under the facts set forth in the complaint, Minard violated Cruise-Gulyas's right to be free from an unreasonable seizure by stopping her a second time.

All agree that Minard seized Cruise-Gulyas within the meaning of the Fourth Amendment when he pulled her over the second time. *Whren v. United States*, 517 U.S. 806, 809–10 (1996). To justify that stop, Minard needed probable cause that Cruise-Gulyas had committed a civil traffic violation, *id.* at 810, or reasonable suspicion that she had committed a crime, *United States v. Arvizu*, 534 U.S. 266, 273 (2002). He could not rely on the driving infraction to

satisfy that requirement. Any authority to seize her in connection with that infraction ended when the first stop concluded. *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015).

That leaves Cruise-Gulyas's gesture as a potential ground for the second stop. But the gesture did not violate any identified law. The officer indeed has not argued to the contrary. Nor does her gesture on its own create probable cause or reasonable suspicion that she violated any law. *Wilson v. Martin* explained that, where a girl extended her middle fingers at officers and walked away, her "gesture was crude, not criminal," and gave the officers "no legal basis to order [her] to stop." 549 F. App'x 309, 311 (6th Cir. 2013); *see Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) ("This ancient gesture of insult is not the basis for a *reasonable* suspicion of a traffic violation or impending criminal activity."). All in all, Officer Minard clearly lacked authority to stop Cruise-Gulyas a second time.

Minard counters that *Wilson* concerns whether officers had probable cause to arrest a girl who extended her middle fingers at them, not about whether they could stop her. But *Wilson* says that the girl's salute provided the officers "no legal basis to order [her] to stop." 549 F. App'x at 311. Minard should have known better here.

Minard adds that no case put him on notice about this fact pattern—that a second stop after a first stop supported by probable cause violated Cruise-Gulyas's Fourth Amendment rights. Defined at that specific level of generality, he says, the case law did not clearly prohibit the stop. But Minard misses a point. In making his argument, he fails to acknowledge that the second stop was distinct from the first stop, *not* a continuation of it. At this stage, we must accept

Cruise-Gulyas's allegations—that Minard stopped her twice—as true. In that light, case law clearly requires independent justification for the second stop. *See Rodriguez*, 135 S. Ct. at 1614. No matter how he slices it, Cruise-Gulyas's crude gesture could not provide that new justification. *See Wilson*, 549 F. App'x at 311. While these cases are not factually identical, they establish clear, specific principles that answer the questions this case asks. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589–90 (2018). At this stage, Cruise-Gulyas's allegations survive Minard's motion for judgment on the pleadings based on qualified immunity.

*First Amendment*. Cruise-Gulyas also alleges that Minard violated her free speech rights by stopping her the second time in retaliation for her expressive, if vulgar, gesture. To succeed, she must show that (1) she engaged in protected conduct, (2) Minard took an adverse action against her that would deter an ordinary person from continuing to engage in that conduct, and (3) her protected conduct motivated Minard at least in part. *Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

Precedent clearly establishes the first and second elements. Any reasonable officer would know that a citizen who raises her middle finger engages in speech protected by the First Amendment. *Sandul v. Larion*, 119 F.3d 1250, 1255 (6th Cir. 1997) (gesturing with the middle finger is protected speech); *see Cohen v. California*, 403 U.S. 15, 19, 26 (1971).

An officer who seizes a person for Fourth Amendment purposes without proper justification and issues her a more severe ticket clearly commits an adverse action that would deter her from repeating that conduct in the future. The Constitution suggests as much by

prohibiting unreasonable searches and seizures. U.S. Const. amend. IV. And we said as much in *Center for Bio-Ethical Reform, Inc. v. City of Springboro*, holding that it is clearly established that "police action to seize a . . . person" is adverse given that "the Founders endeavored scrupulously to protect" an individual's "liberty of movement" in the Fourth Amendment. 477 F.3d 807, 822, 824 (6th Cir. 2007). In view of the reality that something "as trivial as failing to hold a birthday party for a public employee" amounts to retaliation if done because the employee exercised his speech rights, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 n.8 (1990) (quotation omitted), an unwarranted police stop, a far greater intrusion on liberty, must satisfy the test too.

Cruise-Gulyas also meets the third element, a fact-intensive question in this instance. She alleged in the complaint that Minard stopped her because she made a crude gesture. That counts as a cognizable, and clear, violation of her speech rights.

In his reply brief, Minard analogizes his case to a prosecutor who might reasonably think he could take a plea deal off the table if a defendant behaved offensively or a judge who might reasonably think that she could increase a defendant's sentence if the defendant raised his middle finger at her right after she read her sentence from the bench. Judges, it is true, have wide latitude to consider expressive conduct during sentencing. *See* 18 U.S.C. § 3661; *United States v. White Twin*, 682 F.3d 773, 778–79 (8th Cir. 2012). But we need not wade through those complicated questions now because these facts differ materially. As alleged, the first stop had ended, a constitutionally significant event, before the officer initiated the second, unjustified stop. The Supreme Court has said that any

justification for the first stop ceases when that stop ends. *Rodriguez*, 135 S. Ct. at 1614. These facts more closely resemble a prosecutor who tries to revoke a defendant's deal a few days after everyone has agreed to it or a judge who hauls the defendant back into court a week or two after imposing a sentence based on the defendant's after-the-fact speech. Those examples seem more problematic and more in keeping with today's decision. Minard, in short, clearly had no proper basis for seizing Cruise-Gulyas a second time.

*Fourteenth Amendment*. Cruise-Gulyas also brought a substantive due process claim under the Fourteenth Amendment. The district court allowed the claim to proceed, offering no independent analysis of it. We do not reach that claim here because Minard offered no analysis of it distinct from his discussion of the First and Fourth Amendment claims in his brief on appeal. He has therefore forfeited any argument that we treat the due process claim differently from those claims at this stage in the litigation. *See Babick v. Berghuis*, 620 F.3d 571, 577 (6th Cir. 2010).

We affirm.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed: March 13, 2019]

---

No. 18-2196

---

DEBRA LEE CRUISE-GULYAS,

*Plaintiff-Appellee*,

v.

MATTHEW WAYNE MINARD, individually and in his official capacity as a Taylor Police Officer,

*Defendant-Appellant*.

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Before: SUTTON, WHITE, and DONALD, Circuit Judges.

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On Appeal from the United States District Court for the Eastern District of Michigan at Detroit

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JUDGMENT

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

**APPENDIX C**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Filed: September 24, 2018]

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Case No. 18-11169

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DEBRA LEE CRUISE-GULYAS, an

*Plaintiff*,

v.

MATTHEW WAYNE MINARD, individually and in his official capacity as a Taylor Police Officer,

*Defendant*.

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Paul D. Borman
United States District Judge

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OPINION AND ORDER
DENYING DEFENDANT'S MOTION TO DISMISS

Plaintiff's amended complaint based upon 42 U.S.C. § 1983 alleges that Defendant violated her constitutional rights under the First, Fourth, and Fourteenth Amendments to the Constitution.

Plaintiff contends that Defendant Minard, while acting as a Taylor Police Officer, violated her rights on June 1, 2017, by seizing her and her vehicle, without probable cause or even reasonable suspicion. Specifically, Plaintiff states that after Defendant completed a traffic stop for speeding and issued her a ticket for impeding traffic, as she pulled away she "flipped him

the bird" (raised her middle finger) whereupon he stopped/seized her a second time for no legitimate reason thereby violating her constitutional rights.

Plaintiff claims are:

1. Count One - First Amendment Retaliation 42 U.S.C. § 1983

2. Count Two - Fourth Amendment (42 U.S.C. § 1983; Unlawful Detention and Seizure)

3. Count Three - Substantive Due Process (42 U.S.C. § 1983; Fundamental Liberty)

On June 19, 2018, Defendant filed a Motion for Judgment on the Pleadings Pursuant to Fed. R. Civ. P. 12(c) (ECF #10). On July 3, 2018, Plaintiff filed a Response (ECF #12). On July 11, 2018, Defendant filed a Reply (ECF #13). On September 21, 2018, the Court held oral argument.

The evidence before the Court included a state court record that established that Plaintiff had received and paid a ticket for impeding traffic. That ticket was written by Defendant Minard after the initial stop for speeding. While Defendant could have, at that time, issued a ticket for speeding, he did not. It was only after the initial stop had been completed, and Plaintiff drove off and "flipped the bird" that Defendant stopped her a second time without any legal justification.

The Court noted on this record that precedential case law, dating back years before this offense clearly established that "flipping the bird" to a police officer is protected as freedom of speech under the First Amendment and also clearly established Fourth Amendment precedent protects Plaintiff from being stopped and seized by police without probable cause or even reasonable suspicion.

The following cases inform this decision:

*Whren v. United States*, 116 S. Ct. 1769, 1772 (1996). Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" [under the Fourth Amendment].

*Swartz v. Insogna*, 704 F.3d 105, 110 (2d Cir. 2013) "This ancient gesture of insult [giving him the finger] is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity." (emphasis in original)

*Wilson v. Martin*, 549 Fed. Appx. 309 (6th Cir. 2013) "T.W.'s gesture (raising middle finger toward an adult male police officer) . . . was crude, not criminal; and the officers were patently without probable cause to arrest her for it. . . . Hence the district court was correct to deny qualified immunity . . . ."

*Greene v. Barber*, 310 F.3d 889, 896-97 (6th Cir. 2002). "Mr. Greene's characterization of Lt. Barber as an "asshole" was not egregious enough to trigger application of the "fighting words" doctrine. [W]as Greene's right not to be arrested for insulting a police officer "clearly established" in March of 1997? *Mount Healthy v. Doyle*, 97 S.Ct. 568 (1977) . . . held that where constitutionally protected speech is 'a motivating factor' in governmental action adverse to the plaintiff, the adverse action is unconstitutional . . . ."

*Sandul v. Larion*, 119 F.3d 1250, 1254-55 (6th Cir. 1997). It is well-established that "absent

> a more particularized and compelling reason for its actions, a State may not, consistently with the First and Fourteenth Amendments make the simple public display . . . of a four-letter expletive a criminal offense. *Cohen v. California*, 403 U.S. 15, 26 (1971). In *Cohen*, the words of individual expression were also f—k you . . . . First Amendment protection is very expansive."

Finally, at the September 21, 2018 hearing, Defendant's counsel conceded: "No doubt the gesture helped – it probably was the foundation for the change of his [Defendant's] mind" [to implement a second stop] . . . "can't argue around that, your Honor."

For the reasons stated on the record, and in this Opinion, the Court DENIES Defendant's Motion to Dismiss, and Orders the parties to commence facilitation before Magistrate Judge Elizabeth Stafford.

DATED: Sept. 24, 2018

/s/ Paul D. Borman
Paul D. Borman
United States District Judge