Case No. 22-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA MACINTOSH,

Plaintiff - Appellee,

v.

GRAND TRAVERSE COUNTY COMMISSIONER RON CLOUS,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

APPELLEE'S RESPONSE TO APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to the 6th Cir. R. 26.1(a), Plaintiff is exempt from the requirement of filing a corporate affiliate/financial interest disclosure statement.

Dated: June 21, 2022

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff's counsel respectfully informs the Court that he believes oral argument is warranted because of the unique nature of the facts surrounding the legal question presented in this appeal, including the video.

STATEMENT OF THE ISSUES PRESENTED

I. Whether the District Court was correct in finding that Plaintiff had plausibly pled her claim of First Amendment retaliation in avoidance of "qualified immunity."

Plaintiff Answers: yes

Defendant Answers: no

The District Court Answers: yes

II. Whether Plaintiff's First Amendment retaliation claim is "clearly established" for purposes of a "qualified immunity" defense.

Plaintiff Answers: yes

Defendant Answers: no

The District Court Answers: yes

III. Whether "qualified immunity" is properly decided in this case through a Rule 12(b)(6) motion.

Plaintiff Answers: no

Defendant Answers: yes

The District Court Answers: no

STATEMENT OF THE CASE

Plaintiff is compelled to provide her own "Statement of the Case" as Defendant's bears little resemblance to what she actually pled. For it is the allegations in the Complaint that are the critical focus of the Court's inquiry when reviewing a Rule 12(b)(6) appeal.

Plaintiff attended a "virtual" meeting of the Grand Traverse County Board of Commissioners. While attending, Plaintiff and another citizen exercised their First Amendment rights to free speech and to petition their local government for a redress of their grievances as also provided for under Michigan law. (Complaint, RE 1, Page ID # 5.) As alleged, the atmosphere of the public meeting was tense during the "public comment" portion. Immediately prior to Plaintiff's comments another citizen criticized the Commission regarding their apparent embrace of the known hate group, the "Proud Boys." (Complaint, RE 1, Page ID # 5.) This drew a heated outburst from the Commission Chair who defended the Proud Boys, and in retaliation claimed the citizen was spreading lies and that her that her "speech" was not welcome. (Complaint, RE 1, Page ID # 5.) His rebuke of the citizen was so inappropriate that another Commissioner questioned him on the record, asking "Is it appropriate to be commenting on public comment in this manner?" (Complaint, RE 1, Page ID # 6.) As alleged, the Chair and Defendant Clous are closely aligned ideologically and on the Board, and both have publicly praised the Proud Boys.

(Complaint, RE 1, Page ID # 5, 8.) It is a reasonable inference to conclude that Defendant Clous was equally angered by the citizen's criticism of a group he, like the Commission Chair, held in favor. Defendant Clous has characterized the "Proud Boys" as "the most respected folks" and "decent guys and treated us with respect". (Complaint, RE 1, Page ID # 8.) This, after their illegal and violent role in the January 6, insurrection was well known. (Complaint, RE 1, Page ID # 3, 5-6.)

Plaintiff spoke next and specifically raised her fears about the Commission Chair cutting her off (as he did the prior citizen), his defensiveness and retaliation toward the prior caller's concerns about the "Proud Boys" and the Commission's apparent endorsement of that group's violent tendencies. This included the Proud Boys well known roll in the January 6, 2021, insurrection in Washington D.C. (Complaint, RE 1, Page ID # 6.) Because Defendant does not address Plaintiff's actual allegations regarding Defendant's conduct that make up the crux of her retaliation claim, the relevant allegations are set forth below.

> 28. As Plaintiff was closing her remarks, she asked the Commission to "please make some sort of a public statement for the community that you do not accept the behaviors" of those violent groups.
>
> 29. In response to Plaintiff's heartfelt petition to make a "public statement" disavowing such violent acts, and after his ability to fully deliberate over his actions, Defendant Clous got up and left the meeting for a few seconds.

30.Plaintiff noticed Defendant Clous leave the meeting while she was speaking and then return displaying something in front of the camera so she could see it.

31.Before Plaintiff finished her public comment asking for the Commissioners' denunciation of violence, she realized that Defendant Clous was brandishing his high-powered rifle as his "public statement" to her. (See Exhibit B, "Still" image from Video). Additionally, the video of his actions also shows Defendant Clous' menacing smirk while brandishing his weapon.

32.Defendant Clous' retaliation against Plaintiff was an escalation of the Chair-man's retaliation against the prior caller's criticism of the Commission and the Proud Boys, where the Chairman told the citizen her opinions and statements (an exercise of her right to free speech) on that topic were not welcome and that she was a liar.

33.Defendant Clous' brandishing of the deadly weapon left no doubt that neither her, nor any other, criticism of the Commissioners' support of the Proud Boys would be tolerated; a symbolic message to say "stop or else."

34.Defendant Clous' decisions and actions of brandishing a deadly weapon in retaliation to Plaintiff's public comment evidences a malicious intent if not a reckless and/or callous disregard of Plaintiff's Constitutional rights.

37.Shortly after the January 20, 2021, meeting Defendant Clous admitted that his aforementioned actions were in response to Plaintiff's public comment and defended the Proud Boys as "the

> most respected folks" that spoke at the March 4, 2020, public meeting and that "they were decent guys and treated us with respect," according to published reports. (See Exhibit C).

The Court can see that Defendant Clous mischaracterizes Plaintiff's allegations. His characterization of Plaintiff's requested "statement" to include his "comment" on a variety of issues, obviously to suit his defense, defies what Plaintiff actually pled. (Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 103.) To the contrary, as the Court can see, Plaintiff asked for Clous and the Board to denounce the "Proud Boys" violent "behaviors". (Complaint, RE 1, Page ID # 7.) There was no request for Clous' position or public statement on the Second Amendment, et al.

In direct response to Plaintiff's "request" to denounce the violent "behavior", Clous left the meeting and went and got his semi-automatic high-powered rifle. As alleged, Clous began "brandishing his high-powered rifle as his 'public statement' to her" with a "menacing smirk". (Complaint, RE 1, Page ID # 7.) The facts are clearly alleged that Clous did not just happen to have his rifle with him during the meeting as some exercise of his Second Amendment rights. He left the meeting and got his rifle in direct response to Plaintiff's speech, which he admits. (Complaint, RE 1, Page ID # 7, 8.) Nor was he just "holding" his rifle. He had it out from his body displaying it in a threatening manner; the definition of "brandishing" per

Michigan statute. (Complaint, RE 1, Page ID # 7.); M.C.L. 750.222. The District Court correctly noted that Clous' action may also constitute a violation of federal law (18 USC 924(c)(4)) for "brandishing" a gun as pled as it was done to intimidate Plaintiff. (Motion Hearing Transcript, RE 43, Page ID # 442.) Clous' threatening conduct toward Plaintiff was an escalation of the Commission Chair's prior retaliation against a citizen who also criticized the "Proud Boys" and asked him and Defendant Clous to declare they were not members of that "hate" group. (Complaint, RE 1, Page ID # 7.)

Plaintiff was taken aback by Clous' threat of deadly violence at the exercise of her First Amendment rights. In the context of this confrontational environment, especially after being criticized for your support of the Proud Boys, it is hard to fathom how getting a high-powered rifle and brandishing it at Plaintiff would not be threatening and intimidating as alleged. (Complaint, RE 1, Page ID # 7, 8, 9.) It is a "statement" /threat, express or implied, of grievous bodily harm or death if the behavior/"speech" does not stop. (Complaint, RE 1, Page ID # 8.) Plaintiff has clearly pled a cognizable injury, both constitutionally and emotionally due to Clous' retaliation. As Plaintiff alleged, she was in fact "deterred her from exercising her First Amendment rights, including in subsequent public governmental meetings" due to his misconduct. She has lived in fear for her safety and even left her home to stay safe. Clous' actions led her to file a police report to protect herself due to the

threatening conduct. (Complaint, RE 1, Page ID # 9.) Plaintiff received threatening phone calls in the middle of the night due to Clous' actions, which is also the subject of a police report. She has been involved in therapy to try and regain a feeling of safety in her home and community.

Plaintiff has also clearly alleged that Defendant's conduct would "chill" a person of "ordinary firmness" from exercising their rights, and that she is such a person. (Complaint, RE 1, Page ID # 9, 14.) In support of that allegation, she has alleged and attached information supporting the "objective reasonableness" of her being "chilled" from exercising her rights. (Complaint, RE 1, Page ID # 9-10.) This support includes the letter demanding Clous' resignation signed by 1,500 or more people, including the Traverse City Commission Complaint (Exhibit D to Plaintiff's Complaint, RE 1-5, Page ID # 27-28.); the January 28, 2021, "special meeting" with 100 or so folks calling in, none of whose faces were shown and many of whom were afraid to give their name and/or said they felt Clous' actions were threatening (See Public Record Board of Commission Meeting Minutes from January 28, 2021 identifying "anonymous lady/gentleman" at Exhibit A and recording of the meeting (Exhibit 7 to Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 173.) at, e.g. 15:18 and 27:45; the Traverse City Record Eagle Op Ed piece ." (Exhibit E to Plaintiff's Complaint, RE 1-5, Page ID # 31) stating his actions would likely deter a citizen from the exercise of her rights.

Defendant Clous states additional "facts" that Plaintiff takes issue with. First, he argues that Clous' brandishing his weapon was only one "Zoom" box of 20 and "only lasted six to seven seconds." (Brief on Appeal of Defendant/Appellant Grand Traverse County Commissioner Ron Clous, RE 21, Page ID 15.) Neither fact is relevant: Plaintiff saw the brandished weapon and was shocked and put in fear of her safety, not because she felt he could harm her at that moment but the implied message he was sending about future harm. (Complaint, RE 1, Page ID # 9.) This understandable sentiment was shared by hundreds in the community as outlined herein and alleged in the Complaint. One citizen's comment sums up a reasonable interpretation of what Clous did. She was quoted as saying, "Ron Clous was seen to hold up a rifle to the camera, which I think is supportive of the Proud Boys and the insurrection, but also a threat. Everyone knows that if you're walking down the street and someone flashes a gun at you, it's a threat." Regarding it happening via Zoom her comments are exactly on point. "You don't have to be next to someone to make a threat. You can communicate in other ways, including over the internet." (Exhibit C to Plaintiff's Complaint, RE 1-3, Page ID # 25-26.) Indeed, for example illegal threats or intimidating messages are often communicated electronically miles from someone without the ability to carry them out immediately. See e.g. M.C.L. 750.411s (making it a crime to act threatening or intimidating over electronic medium). This is not to say that retaliatory conduct need rise to the level of a crime

by any stretch. Next Defendant Clous states that at the post-retaliation public meetings a wide variety of views were shared. A review of the transcript shows that the overwhelming majority were horrified by Clous' behavior and called for his resignation noting that elected officials should never behave that way toward a citizen's free speech rights. Finally, Clous claims that his high-powered rifle had no clip. Obviously, the gun did not need any bullets to communicate its threatening message. Moreover, Clous' lack of any statement and menacing smirk make it that much more ominous. (Complaint, RE 1, Page ID # 7.) The County Chairperson's interpretation of Clous' actions makes clear the threat to Plaintiff. In a statement to the press he interpreted Clous' brandishing the weapon as a statement of "if you are going to start trouble, don't start it here [at the County Commission meeting]." (Complaint, RE 1, Page ID # 14.) He did not mention the weapon's alleged lack of a clip. Beyond this, it is unclear how the record shows the alleged lack of clip or how Plaintiff would have known. Would it make it worse if there was a clip, or even a bullet in the chamber?

Finally, the District Court issued a thoughtful decision from the bench after a thorough review of the submissions and record. He went through the elements of the claim and carefully examined the allegations. (Motion Hearing Transcript, RE 43, Page ID # 13-15.) He also correctly observed that the defense was attempting to overly narrow what the "clearly established law" needed to be for Plaintiff to prevail.

He ultimately ruled that the focus was not on prior case law involving the display of a gun, rather it was whether the act done was in retaliation for Plaintiff's speech, relying on established case law from this Circuit. (Motion Hearing Transcript, RE 43, Page ID 451.)

SUMMARY OF THE ARGUMENTS

The District Court correctly applied the appropriate legal standard to the pleadings for a Rule 12(b)(6) motion based upon "qualified immunity." There are decades of established case law making abundantly clear that a governmental actor like Defendant may not retaliate against a citizen's exercise of her First Amendment rights. This Court has found valid retaliation claims under a wide variety of circumstances when denying "qualified immunity" defenses like this one. This is because the law is so "clearly established". As set forth *infra,* the elements of such a "retaliation" claim are equally clear. As outlined above, Plaintiff's 89 paragraph Complaint is highly detailed, especially when it comes to Defendant's actions, his intention in brandishing his AR-15 and its impact on Plaintiff and those of "ordinary firmness." All of the elements of the claim are set forth in depth. Defendant does not analyze the actual allegations, rather he just makes conclusory arguments that they do not satisfy the elements of the claim. This appears to be a different tact than his argument in the District Court. There, he acknowledged the allegations properly set forth the claim but that the allegations were "implausible" on their face.

The central issue before the Court is, when the allegations are taken in a light most favorable to Plaintiff: "should Defendant Clous have known that, in response to Plaintiff's "speech", getting his AR-15 and brandishing it to intimidate her was unconstitutional?". The allegations are plausible and the video supports Plaintiff's version of what actually happened, as the District Court concluded. Defendant's admission relative to the use of a gun in a public meeting is telling: "Defendant does not argue that displaying a gun would be proper in other contexts." Appellant's brief, p. 21. The defense then attempts to recreate the "context" where Defendant used his gun at this meeting. The problem with this is that the defense "context" defies the reality of what Plaintiff actually pled. (Complaint, RE 1, Page ID # 6-7.)

The District Court's conclusions were firmly rooted in the record and controlling law. This Court should affirm the decision so that the case may move forward.

STANDARD OF REVIEW

The defense has not set forth the full "standard of review" relating to the "qualified immunity" defense under Rule 12(b)(6). This Court has been quite clear that it is disfavored. This was recently reiterated in *Anders v Cuevas,* 984 F3d 1166 (6th Cir. 2021). There the Court admonished:

> As we have repeatedly cautioned, 'it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity. Although an officer's 'entitlement to qualified immunity is a threshold question to be resolved at the earliest point,' that point is usually summary judgment and not dismissal under Rule 12.'

(citations omitted); *Id.* at 1175.

The *Anders* court explained the rationale as being that factual development is usually necessary to decide whether the governmental actor violated established law, and not usually amenable to a review of the pleadings. *Id.*

This established, the Court is to read the "complaint in the light most favorable to the plaintiff" in determining whether it sets forth a plausible violation of a plaintiff's constitutional rights. *Cahoo v SAS Analytics, Inc.,* 912 F.3d 887, 897 (6th Cir. 2019). Furthermore, the elements of the claim (such as "adverse impact" or "intent" of the Defendant) are so often context specific, as here, and therefore not amenable to a decision on the pleadings alone. *Thaddeus-X v. Blatter,* 175 F.3d 378, 388 (6th Cir. 1999)(en banc). As such, they are not appropriate for resolution by a 12(b)(6) motion to dismiss.

ARGUMENT

I. PLAINTIFF'S CLAIM DEFEATS "QUALIFIED IMMUNITY"

This Court has long proclaimed that First Amendment rights of the citizenry are to be "jealously guarded", particularly where "political" speech is involved. *Kubala v. Smith,* 984 F.3d 1132, 1139 (6th Cir. 2021); *Thaddeus-X, supra.* Additionally, as explained *infra,* Fed. R. Civ. P. 12(b)(6) is not a favored method of raising a "qualified immunity" defense. *Anders v Cuevas,* 984 F3d 1166, 1175 (6th Cir. 2021). These principles help guide the application of the law to the facts before the Court.

Broadly speaking, the defense correctly states the concept of "qualified immunity." The two questions the Court must address in its analysis are: 1) whether the plaintiff has alleged a constitutional violation; and 2) whether that right was clearly established. *Cahoo v SAS Analytics, Inc,* 912 F.3d 887, 897 (6th Cir. 2019); *Bell v. Johnson,* 308 F.3d 594, 601 (6th Cir. 2002). Plaintiff has properly pled a constitutional violation that has long been established in our jurisprudence. The two "prongs" will each be addressed in reverse order.

A. Right to be Free from First Amendment Retaliation "Clearly Established"

Our Supreme Court has recently reiterated the long-standing principle that retaliation in response to the exercise of First Amendment rights is unconstitutional.

Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019). This Court has done the same numerous times. See e.g. *Rudd v. City of Norton Shores*, 977 F.3d 503, 512 (6th Cir. 2020). The *Rudd* court lays out how entrenched this constitutional principle is. "Today, countless decisions make clear that 'criticism of government is at the very center of the constitutionally protected area of free discussion.'" *Rudd, supra,* at 514. Another panel of this Court has explained, "it is well established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of Sec. 1983." *Barrett v. Harrington,* 130 F.3d 246, 264 (6th Cir. 1997), citing *Mt. Healthy Board of Ed. v. Doyle,* 429 U.S. 274 (1977); *Board of County Commissioners v. Umbehr,* 518 U.S. 668; 116 S. Ct. 2342, 2347 (1996). This principle is nothing if not well established.

B. Defendant Clous had "Fair Warning" that Getting a Gun in Retaliation for Plaintiff's "Speech" was Unconstitutional

As the Court has seen countless times before, the defense argues that this fact pattern is so unusual that Defendant Clous could not have possibly known his conduct was unconstitutional. However, given the clear and detailed allegations in the Complaint, the properly framed question is: whether Clous knew or should have known that getting and brandishing a high powered rifle, in retaliation for Plaintiff's protected speech, was unconstitutional. The answer to this question is clearly "yes", as Defendant Clous himself would no doubt concede. In any event this answer has

been "clearly established" for decades. This Court has explained that "the law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional and 'retaliation claims' have been asserted **in various factual scenarios.**" *Zilich v Longo,* 34 F.3d 359, 365 (6th Cir. 1994)(emphasis added). The *Zilich* case, as here, involved "retaliation" under the First Amendment.

Zilich, like other decisions of this Court (e.g. *Rudd v. City of Norton Shores*, 977 F.3d 503, 514-515 (6th Cir. 2020)), listed a number of those "various factual scenarios" where a defendant's "qualified immunity" defense was denied. The defenses were denied, not because there were specific fact patterns in prior case law that gave notice, but because the alleged conduct constituted retaliation regardless of its form. The *Zilich* opinion gave examples of the "various scenarios":

> We also agree with the findings of the district court that Zilich's First Amendment right of free speech was "clearly established" for qualified immunity purposes. The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional, and "retaliation claims" have been asserted in various factual scenarios. Meyers v. City of Cincinnati, 979 F.2d 1154 (6th Cir.1992) (firemen dismissed); Boger v. Wayne County, 950 F.2d 316 (6th Cir.1991) (county employee in Medical Examiner's Office transferred); Draud, 701 F.2d at 1170 (change in public school teacher's duties); Hildebrand v. Board of Trustees, 662 F.2d 439 (6th Cir.1981) (university professor denied tenure), cert. denied, 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 168 (1982); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969) (prisoner retaliated against for seeking access to courts). No reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political opponent with

physical threats, harassment and vandalism. Because officials "of reasonable competence could [not] disagree on this issue, immunity should [not] be recognized." Mumford v. Zieba, 4 F.3d 429, 432 (6th Cir.1993).

Zilich, supra, at 365.

More recently this Court, in the Rudd opinion, provided other fact scenarios where the "clearly established law" on First Amendment retaliation applied:

A few examples show the kinds of actions we have found sufficiently "adverse" under the First Amendment. Cynthia Bloch could sue a sheriff for disclosing humiliating and confidential details of her rape in response to her criticism that the sheriff had not done enough to find the culprit. See Bloch , 156 F.3d at 679–80. Tom and Melanie Briner could sue the police for failing to investigate a crime in response to their criticism over how the police had investigated an earlier crime. See Briner v. City of Ontario , 370 F. App'x 682, 700–01 (6th Cir. 2010). Sue Fritz could sue a township official for encouraging her employer not to renew her contract in response to her comments at public meetings. See Fritz , 592 F.3d at 725–26. David Holzemer could sue a police officer for delaying the renewal of a permit in response to his petitioning of a city councilman. See Holzemer , 621 F.3d at 525. Kathleen Benison could sue college officials for filing a suit against her in response to her husband's sponsoring a vote of no confidence against them. See Benison v. Ross , 765 F.3d 649, 660 (6th Cir. 2014). And Frank Barrett could sue a judge for falsely telling the media that he had been "stalking" her in response to his public criticisms. See Barrett , 130 F.3d at 262.

Rudd v. City of Norton Shores, 977 F.3d at 514-515.

In all those cases, like here, the defense no doubt claimed that there was no way a "reasonable" official could know the retaliatory conduct was unconstitutional. However, the point of the cases is that "retaliation" is unconstitutional in whatever

guise it takes.[1] The appropriate focus is on whether the action taken, irrespective of its form, was done in retaliation. Given the robust case law on the topic, and multiple courts consistent direction on how to analyze it, it is beyond question that a "reasonable" governmental actor would know that Clous' conduct was unconstitutional; it had been for decades. *Barrett v. Harrington,* 130 F.3d 246, 264 (6th Cir. 1997); *Mt. Healthy Board of Ed. v. Doyle,* 429 U.S. 274 (1977).

The foregoing makes sense when the Supreme Court's direction on how "qualified immunity's" "clearly established" requirement is to be applied. Even "novel" fact patterns are still unconstitutional if the right has been sufficiently outlined. As the United States Supreme Court explained in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002):

> But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though `the very action in question has [not] previously been held unlawful,' *Anderson, supra*, at 640." *Id*., at 270-271 (citation omitted).
>
> Our opinion in Lanier thus makes clear that officials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in Lanier, we expressly rejected a requirement that previous cases be "fundamentally similar." … Accordingly, pursuant to *Lanier*, the salient question that the Court of Appeals ought to have asked is whether the state of the law in

[1] Assuming, of course it satisfies the other elements of the claim, addressed *infra.*

> 1995 gave respondents fair warning that their alleged treatment of Hope was unconstitutional.
>
> (emphasis added) See also *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005); *Bell v. Johnson*, 308 F.3d at 602.

This Court has further explained that "[a] right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right'" *Cahoo v SAS Analytics, Inc,* 912 F.3d at 898, citing *Baynes v Cleland,* 799 F.3d 600, 610 (6th Cir. 2015). Furthermore, "in order for a constitutional right to be clearly established, there need not be a case with the exact same fact pattern, or even 'fundamentally similar' or 'materially similar' facts; rather, the question is whether the defendants had 'fair warning' that their actions were unconstitutional." *Cummings v. City of Akron*, 418 F.3d 676, 687 (6th Cir. 2005)(citations omitted)(emphasis added). It is with the foregoing guidance that the Court must analyze the facts pled by Plaintiff. If, "taken in the light most favorable to [plaintiff], … the facts alleged show that the officer's conduct violated a [clearly established] constitutional right" then the motion to dismiss based upon "qualified immunity" fails. *Cahoo, supra,* at 897. Here, Clous had more than enough "fair warning" that his retaliation would be unconstitutional. *Cummings*, 418 F.3d at 687. More specifically though should he have known that leaving the meeting to get and then brandish his high-powered rifle at Plaintiff in retaliation for her "speech" because he did not like it would violate Plaintiff's First

Amendment rights? Plaintiff responds, "of course." His method of retaliation is really irrelevant and the case law has identified a multitude of unconstitutional retaliatory actions that were "clearly established", independent of the fact pattern. See e.g. *Rudd* and *Zilich, supra.* For example, surely there were no pre-existing retaliation cases involving a sheriff disclosing humiliating facts of a rape (*Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998)) or false allegations by a judge that the plaintiff had been stalking her (*Barrett v. Harrington,* 130 F.3d 246, 264 (6th Cir. 1997)). Even so, given the longstanding precedent forbidding retaliation for the exercise of First Amendment rights those "novel" fact patterns were not exempted from the "clearly established" law. As such, Defendant Clous' "qualified immunity" defense is unavailable as the District Court found.

C. Defense Case Law re "Qualified Immunity" Largely Inapplicable

The Court will note that many of the cases cited by the defense in support of their "qualified immunity" defense are not dealing with cases decided by way of Rule 12(b)(6). Rather the bulk are from cases involving Rule 56 summary judgement e.g. *Plumhoff v Rickard,* 134 S.Ct. 2012 (2014); *Pearson v Callahan*, 555 U.S. 223 (2009); *Everson v Leis*, 556 F3d 484, 494 (6th Cir. 2009), etc, the preferred standard for dealing with "qualified immunity" motions. *Anders v Cuevas,* 984 F3d at 1175. Similarly, the defense cites many cases dealing with "qualified immunity" in the "excessive force" or law enforcement context, e.g. *Saucier v Katz*, 533 US 194, 202

(2001). While those cases are applying the same standard in determining whether the constitutional right allegedly violated has been "clearly established", they are significantly different in nature than a First Amendment retaliation claim. Usually, they involve split second decisions with the officer's and public's safety in the balance. Therefore, in "excessive force" claims, this Court has emphasized that "specific cases" with similar fact patterns are "'especially important' in assessing whether the right has been "clearly established." *Bell v. City of Southfield,* Case No. 21-1516 (6th Cir. June 14, 2022). Although not as applicable as the law Plaintiff has cited, this explains the defense's primary reliance on these types of cases here; they seem to create a higher standard than is warranted. However, this more stringent requirement for prior cases with similar fact patterns is not applicable where the law has been so "clearly established" otherwise.

D. Law "Clearly Established" that Otherwise "Proper" Act May Not Be Done in Retaliation

Contrary to the pleadings Defendant Clous attempts to characterize his actions as a sort of constitutional expression; either First Amendment or Second Amendment. The pleadings, however, tell a wholly different story. His actions were not benign expressions of support for those two Amendments. To the contrary, it was a hostile and intimidating "statement" to Plaintiff as set forth *infra*. As the District Court correctly noted, his actions could reasonably be

construed as "brandishing" of a weapon under federal law if done to intimidate. See 18 USC 924(c)(4). This is exactly what Plaintiff alleges was his intent.

While there is no doubt that governmental actors have First and Second Amendment rights, it is equally clear that those rights are not limitless. See e.g. *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (a government employee enjoys no First Amendment protection when acting/"speaking" as part of his or her official duties, even on matters of public concern). This is particularly true when it comes to retaliatory actions in response to the exercise of a citizen's rights. See e.g. *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998); *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984); *DeLoach v. Bevers*, 922 F.2d 618, 620. (10th Cir. 1990). This much the defense no doubt concedes. However, the defense ignores and then sharply departs from binding precedent in its arguments that Clous' behavior was somehow "protected" under the Constitution or otherwise. Succinctly, the Supreme Court, and this Court, have repeatedly held that "an act taken in retaliation of the exercise of a constitutionally protected right is actionable under Sec. 1983 even if the act, when taken for a different reason, would have been proper." (emphasis added). *Bloch v. Ribar,* 156 F.3d 673, 681-682 (6th Cir. 1998); *Norwell v. City of Cincinnati,* 414 U.S. 14, 16 (1973); *Matzker v. Herr,* 748 F.2d 1142, 1150 (7th Cir. 1984); *DeLoach v. Bevers*, 922

F.2d 618, 620 (10th Cir. 1990). This well accepted and binding precedent is outcome determinative and will be addressed in more detail further.

Plaintiff does not contest Defendant Clous' right to free speech or keep and bear arms. However, his mere exercise of those rights is not what Plaintiff has alleged occurred; the allegations being the sole focus at this point. He did not simply have his gun on his person. Nor did he have his weapon with him at the outset of the meeting. As alleged, he only got it in response to Plaintiff's comments he did not like about a group he speaks highly of (Proud Boys) and then used it to intimidate her. Even Clous admits that he left the meeting to get his weapon and "held up his firearm to [sic] in direct response to [Plaintiff's] request." (Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 18.) As the District Court noted, the central question is what was his intent in displaying the weapon when and as he did. (Motion Hearing Transcript, RE 43, Page ID 19, 43.) When it comes to what Plaintiff actually alleged happened, the defense has presented no case law establishing the right to threaten or intimidate another with a deadly weapon under the First, Second, or any other, Amendment. Defendant cites none in his brief either, likely because it is clear that there are limits to a governmental actor's exercise of those rights. *Bloch, supra.*

Finally, Clous attempts to graft some sort of criminal element onto Plaintiff's pleading burden when he discusses the "brandishing" allegation; this is not the law. The "adverse action" standard Plaintiff must plead discussed *infra,* does not include any criminal element. This being said, Plaintiff clearly has pled, and believes the video reasonably shows, that Clous displayed his weapon in a threatening manner as state and federal law prohibits. See M.C.L. 750.234e and 18 USC 924(c)(4) respectively. It was specifically done to get her to "shut up or else." While violation of law is not required, these laws are relevant as it makes clear that this conduct is the type that is inherently threatening/injurious and therefore likely to "chill" the exercise of one's rights.

As it relates to this Court's job, the defense largely ignores the "800 pound legal gorilla" in the room. Surprisingly, the defense fails to give any meaningful analysis or explain the relevant case law regarding the constraints placed on governmental actors' conduct/rights in this type of retaliation context. See, e.g., *Bloch v. Ribar*, 156 F.3d 673, 681-682 (6th Cir. 1998). As initially stated, supra, an otherwise proper/constitutionally protected action taken by a government actor is unconstitutional if done in retaliation for the exercise of a citizen's constitutional right. This has been the law of the land since at least 1973. *Bloch, supra,* at 681-682; *Norwell v. City of Cincinnati*, 414 U.S. 14, 16 (1973); see also *Matzker v. Herr,* 748 F.2d 1142, 1150 (7th Cir. 1984); *DeLoach v. Bevers*, 922

F.2d 618, 620 (10th Cir. 1990). The Sixth Circuit has made this even clearer since at least 1998. *Bloch, supra*. *Bloch* even involved the same ineffective defense attempted here: "the Constitution protects the defendant's conduct." Thus, even if Clous' actions would have been otherwise proper under the First or Second Amendment, he still would have violated Plaintiff's rights since it was alleged to be done in retaliation to intimidate Plaintiff.

The salient facts of *Bloch* are as follows. Plaintiff Bloch was raped and reported it to the county Sheriff Department. The rape investigation languished, and plaintiff became upset at its lack of progress. She expressed her dissatisfaction with the Sheriff and his department's investigation to two newspapers that in turn published her complaints. In response to plaintiff's exercise of her First Amendment right to criticize a governmental official, the defendant Sheriff held a press conference regarding the rape investigation and defending his actions, which the court acknowledged he had a First Amendment right to do. In it he disclosed "highly personal and extremely humiliating" details of the rape. *Bloch v. Ribar*, 156 F.3d at 676. Plaintiff in turn sued the Sheriff alleging unconstitutional retaliation for the exercise of her First Amendment rights. The "retaliation" she claimed was his publicly divulging the emotionally damaging details of the rape in response to her criticism. In defense, the Sheriff

claimed he was exercising *his* First Amendment rights by holding the press conference about the newsworthy rape and his investigation. *Id,* at 677.

As here, Sheriff Ribar moved to dismiss plaintiff's complaint per Fed. R. Civ. P. 12(b)(6). The district court granted the motion finding that the defendant Sheriff was entitled to qualified immunity because there "is no 'clearly established' right to exercise one's First Amendment rights without fear of embarrassing information being revealed in response by a public official exercising his/her First Amendment rights as well." (emphasis added); *Id*, at 680. The Sixth Circuit reversed. In its analysis the Circuit Court provided clear guidance on how retaliation claims involving First Amendment conduct must be reviewed. Plaintiff respectfully submits that the *Bloch* holding and analysis controls the outcome of this appeal, as explained below. First, the court pointed out that, "the right of an American citizen to criticize public officials and policies . . . is the central meaning of the First Amendment." *Id*. at 678, quoting *Glasson v. City of Louisville,* 518 F.2d 899, 904 (6th Cir. 1975). This is what the plaintiff was doing, just as the Plaintiff in the case at bar. Next, the *Bloch* court addressed the same defense that is raised in this case: the defendant Sheriff's response (speech) to the Plaintiff's criticism was protected by the First Amendment and thus not actionable because of defendant's "qualified immunity". The Sixth Circuit rejected this defense, agreeing with the plaintiff that while the Sheriff had the right to respond to the plaintiff's criticism, that right was not unlimited. *Id,* at

681. This is exactly what the defense here argues: Defendant Clous' going and getting a high-powered rifle in response to Plaintiff's exercise of her First Amendment rights is itself "speech" or the exercise of his Second Amendment right that is protected and thus not actionable. This is not the law, to the contrary. As the *Bloch* court explained:

> "We start our analysis on this aspect of the retaliation claim from the premise that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under Sec. 1983 even if the act, when taken for a different reason, would have been proper."'(emphasis added); *Id,* at 681- 682, citing *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984); *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)

So, even if the Court construes Clous' action as the exercise of his rights, it does not absolve him of liability if done in retaliation; exactly what Plaintiff has alleged. The above-quoted holding is "clearly established" and has long been the law in this Circuit and others. The application of *Bloch,* and the other cited authority, to the case at bar is compelling. Irrespective of Defendant Clous' alleged First and Second Amendment right to display a firearm in a threatening manner (which right Plaintiff does not concede exists), if he did it in retaliation for Plaintiff's exercise of her First Amendment rights, he may still be liable. *Bloch* remains the law in the Sixth Circuit, and beyond, and is cited frequently

by other courts. See e.g. *Wood v. Eubanks,* 25 F. 4th 414, 428-429 (6th Cir. 2022); *Rudd v. City of Norton Shores*, 977 F.3d 503 (6th Cir. 2020).

Equally as instructive as the foregoing is how not to frame the question of whether the right at issue is "clearly established." The District Court in *Bloch* framed it as whether there was a "clearly established right to exercise one's First Amendment rights without fear of embarrassing information being revealed in response by a public official exercising his/her First Amendment rights as well." Ultimately the District Court found there was no such right. *Bloch, supra,* at 677. The Sixth Circuit reversed concluding that the District Court's scope of plaintiff's right was too narrow. Rather than the specific action taken by the defendant (disclosing humiliating facts) the court explained that it was the intention behind the defendant's act that was the proper focus. If done for retaliation, it is actionable even if otherwise allowable. *Id,* at 682. This is the framework the District Court in the case at bar used, and is correct.

Bloch is not the only Sixth Circuit case on point either. The Court is directed to *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997). There the court found that the defendant Judge's public speech to news organizations about the plaintiff's alleged stalking and harassing her was not protected by her First Amendment rights. It found that if her accusations about his stalking/harassing were done in retaliation for plaintiff's claims that the Judge was corrupt, it was

actionable under Section 1983. *Id*. at 262-264. The *Barrett* court also noted that there is no "qualified immunity" for retaliation in response to the exercise of First Amendment rights as the right has long been "clearly established." *Id,* at 264, citing *Board of County Commissioners v Umbehr*, 518 U.S. 668 (1996) and *Mt. Healthy City Bd. of Educ. v Doyle*, 429 U.S. 274 (1977). Other circuits have held similarly as cited above. Defendant Clous' motion is not properly founded given the factual allegations pled here and the "clearly established" and binding authority guiding this Court's analysis.

E. The Facts Alleged Set Forth a Constitutional Violation

The second prong of the "qualified immunity" analysis asks whether the plaintiff's allegations set forth a constitutional violation. In its brief, Defendant Clous appears to take issue not with the actual allegations setting forth the claim, but rather with the "plausibility" of them. While the defense sets out the elements of the claim, it fails to meaningfully address Plaintiff's allegations making up each of the elements. As a review, Plaintiff must plead that: a) she engaged in protected conduct/speech; b) the defendant took "adverse action" against her (such that it would "chill" a person of ordinary firmness from exercising that right); c) in part because of her protected conduct/speech. *Rudd v. City of Norton Shores,* 977 F.3d 503, 513, 514 (6th Cir. 2020); *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir. 1998). To be clear, Plaintiff has pled all the necessary

elements in detail. The Court is directed to Complaint paragraphs 26, 28-50, 53, 55-57, 66-68, 74, 77-81 for example. (Complaint, RE 1, Page ID # 6-11, 13-15.) These allegations satisfy all the elements and are pled in a non-conclusory fashion. Each of the elements will be dealt with in turn. However, the first element of the claim, that Plaintiff engaged in "protected activity", has been conceded by Defendant.

1. "Adverse Action" is a Fact Question and the Threshold is Low

Defendant Clous primarily takes issue with whether the "adverse action" element was "plausibly pled." Essentially whether the brandishing of a deadly weapon in response to Plaintiff's speech "would likely chill a person of ordinary firmness" from continuing their First Amendment activities. To be clear, Plaintiff pled this, and that it deterred her (and would those of "ordinary firmness") First Amendment activities in addition to causing her emotional injuries. Clous does not suggest otherwise. Once pled, the Sixth Circuit has long made clear that "in most cases, the question of whether an alleged retaliatory action poses a sufficient deterrent threat to be actionable will not be amenable to resolution as a matter of law." *Bell v. Johnson,* 308 F.3d at 603, citing *Thaddeus -X v. Blatter,* 175 F.3d at 398 (6th Cir. 1999). To the contrary, it is a "question of fact." *Thaddeus-X, supra,* 175 F. 3d at 398. The *Thaddeus-X* court further explained that the inquiry of "whether activity is 'protected' or an action is 'adverse' is context-specific and

inherently dependent on factual development and analysis. *Thaddeus–X*, 175 F.3d at 388. Moreover, the Sixth Circuit has long held that the level of "chilling" of free speech a plaintiff must show is low, stating "… nothing justifies 'harassing people for exercising their constitutional rights,' **so the deterrent effect on speech 'need not be great'** to be actionable." (emphasis added); *Rudd v. City of Norton Shores,* 977 F.3d 503, 513, 514 (6th Cir. 2020); *Bloch v. Ribar,* 156 F.3d 673, 678 (6th Cir. 1998).

2. Brandishing Deadly Weapon Would "Chill" Speech of the "Ordinarily Firm"

As the defense points out, only plainly "inconsequential actions" of retaliation are weeded out at the motion stage. Surely that cannot apply to the threatening display of a deadly weapon to silence a citizen's complaints. Plaintiff asks, "who would not be chilled?" To that point, the pleadings paint a relatively clear picture: 1) during a public meeting Plaintiff criticized Clous' apparent support for the "Proud Boys" and asked him to denounce theirs, and other extremist groups', violent behaviors; 2) Clous was upset with Plaintiff's "speech" and "petition", so he; 3) went and got a high-powered rifle to send Plaintiff a "message" to intimidate her to stop her criticism of him and/or the Proud Boys and/or the Board; and 4) as a direct result Plaintiff has lived in fear and been deterred from exercising her First Amendment rights.

The question presented to the Court is: do the aforementioned allegations plausibly portray a scenario that would "chill" an ordinary person from continuing to exercise their rights. Also relevant to the Court's determination is what level of proof a Plaintiff must show to satisfy that the right would likely be "chilled" by the retaliation. The defense acknowledges Plaintiff's allegation of "adverse action" by Clous causing her to be physically threatened and intimidated. However, he then he uses a criminal law standard to claim this allegation is implausible because Clous was never near her and that she could not be in "imminent fear for her person" due to the distance. (Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 110.) Clearly Plaintiff need not allege a crime was committed to satisfy her pleading burden. All this to say that the defense argument creates a fictional and erroneous standard so it can "win" the "straw man" argument. Thankfully that is not the law.

One need not be physically near someone to convey a threat of harm or dire consequences. Criminal and otherwise actionable threats or misconduct are delivered "remotely" all the time, e.g. by electronic means, letter, phone call, etc. As referenced *supra*, cyber-bullying and threats via electronic medium are crimes and both are delivered from a distance and usually have no immediacy to the threatened action. Furthermore, the standard is not "imminent fear" of one's person as the defense suggests, it is whether his threatening and intimidating brandishing of his

deadly weapon would "chill" a person of ordinary firmness. It is entirely plausible, let alone a reasonable inference, that the threat was for future harm if she continued to "speak out" against him. Its design was to intimidate her to "chill" her future speech. For instance, the threat could reasonably be interpreted to mean harm the next time Clous saw her; or "when you least expect it, expect it." Furthermore, he did not just 'hold" his weapon. He clearly displayed it at Plaintiff in a threatening manner and context. Clous' silence while brandishing the weapon was particularly ominous. If it was not a threat, he could have easily deflated the situation by explaining his harmless purpose, or used words instead of a high-powered rifle, but he chose not to. The Court must also consider the context of when his "display" happened. It occurred immediately after his ally on the Commission berated the prior citizen for raising a similar topic. The atmosphere was extremely tense, and this can be seen in Plaintiff's introductory comment to the Commission where she referenced being "cut off" and the Chair's defensiveness at the prior citizen's public comment.

Defendant next argues that because his weapon was allegedly unloaded and only appeared for six or seven seconds, it could not "chill" a person of ordinary firmness. Clous does not suggest how long his high-powered rifle needed to be brandished to "chill" such a person. Plaintiff suggests it would be however long it takes to realize someone is flashing a gun at them. Regardless, as the District Court noted after watching the meeting video many times, he felt it could be reasonably

interpreted to support Plaintiff's claim of intimidation by Clous. (Motion Hearing Transcript, RE 43, Page ID 14.) The defense actually concedes that the video could be seen as an act of intimidation in the following exchange when the District Court recited the federal law regarding "brandishing", cited *supra:*

> **Court**: So it kind of sounds like that definition [federal "brandishing" law] may cover what I'm seeing in this video.
>
> **Counsel for Clous**: Potentially. Under the Michigan law it also requires willingly and knowingly brandishing and with the intent to induce fear.
>
> (Motion Hearing Transcript, RE 43, Page ID # 442.)

Immediately after this exchange, Counsel for Clous admits that there is no question that Clous "willingly and intentionally went and retrieved this rifle and brought it back so that people could see it on the Zoom call. *Id, p. 10.* If, as defense counsel concedes, the video "potentially" shows that Clous is "brandishing" the weapon to intimidate Plaintiff, then clearly this defeats a Rule 12(b)(6) motion, if not a Rule 56 motion. In any event, evidence outside of the pleadings, such as the video of the meeting, must "utterly discredit" or "blatantly contradict" the plaintiff's pled version of events before it will negate the pleadings. *Scott v. Harris,* 550 U.S. 372, 380 (2007). For example, if the video showed there was no weapon displayed at all as the District Court explained. Obviously this is not the case here.

As for the amount of time the gun needed to be exposed, Plaintiff responds "not much." Contrary to the defense argument, intimidation by flashing a weapon can take place almost instantly. For example, road rage prosecutions for criminal brandishing happen regularly when an offended driver passes someone s/he felt cut him off while holding their pistol up to the offending driver; a matter of one or two seconds. The amount of time is irrelevant, as is whether the gun was loaded. Plaintiff had no idea whether the gun had a "clip" in it or a bullet in the chamber. It matters not to the threatening message being sent. As the defense points out, Clous could not have shot her anyway in this "virtual" public meeting. In any event, Plaintiff was fully aware of Clous' displaying the deadly weapon at her, as was the public watching the meeting.

Next the defense argues that Plaintiff did not immediately react to the brandishing the way they think she should have, so Plaintiff must not have been "chilled." They characterize (without citing legal authority) Plaintiff's burden in alleging an "adverse impact" as "lofty." (Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 110.) This is hardly the case. As referenced *supra,* the Sixth Circuit has instructed that the level of deterrence "need not be great to be actionable." *Rudd v. City of Norton Shores,* 977 F.3d 503, 513-14 (6th Cir. 2020), citing *Thaddeus-X v. Blatter,* 175 F.3d 378, 397 (6th Cir. 1999)(en banc). This established, it is true that Plaintiff did continue with her statement for the last

few seconds while the impact of what just happened began to take hold. Not surprisingly, the defense does not deal with the actual pleadings explaining the impact to Plaintiff found at paragraphs 41-43, 51. (Complaint, RE 1, Page ID # 9-10.) This includes fearing for her physical safety, such that she filed a police report, among other reactions. More to the point of the "deterrence" element, Plaintiff has ceased attending or participating in County, and other, government meetings as she would have but for the retaliation. As the defense acknowledges, "self-censorship" is a "cognizable" injury for First Amendment retaliation claim purposes. *Benham v. City of Charlotte,* 635 F.3d 129, 135 (4th Cir. 2011)(citation omitted). Plaintiff alleges that this is exactly the goal intended when Clous ominously displayed his deadly weapon to Plaintiff; threaten/intimidate her into "self-censorship" to shut her up "or else". Surely this meets the "low bar" a plaintiff must meet to satisfy the "adverse action" element. Contrary to the defense's criticism of Plaintiff's ability to read her prepared statement for a few seconds more, the law requires an objective standard when analyzing the deterrence element as is clear from the "a person of ordinary firmness" requirement. In fact, the Sixth Circuit recently held in a First Amendment retaliation case that: "the adverse action need not actually chill or silence the plaintiff's First Amendment activities. Nor must the plaintiff possess an Olympian fortitude. A plaintiff need only show that the adverse action would deter a person of ordinary firmness …" *Kubala v. Smith,* 984 F.3d 1132, 1139-1140 (6th

Cir. 2021). Further, threats alone, as opposed to carrying out the threat, can satisfy the "adverse action" element. *Id, at 1140.*

3. Public Outcry Over Intimidation Proof "Ordinary Firmness" Test Met

Next, Clous argues that because at subsequent meetings scores of people spoke up about Clous' outrageous actions his prior brandishing could not have "chilled" speech. While this is not the analysis the case law requires (after the fact behavior by those not directly subject to the retaliation), it shows the per se outrageousness of it. To that point, the local paper's Op Ed piece describing Clous' behavior as "chilling" is further proof that Plaintiff's reaction is objectively reasonable. (Exhibit E to Plaintiff's Complaint, RE 1-5, Page ID # 31.) In any event, by that time Clous had been publicly chastised and was the subject of Board resolutions criticizing and censuring his conduct. Further, as alleged, many of those speaking refused to give their names or addresses exactly because they were afraid based on Clous' conduct. The Court should be aware that these people's faces could not be seen given the technology used, thus giving them even more anonymity. Clous goes on to argue that the March 4, 2020, meeting where someone was openly carrying a gun somehow bears on his conduct ten months later. Clous assumes Plaintiff was present and the record is silent on the point, however, Plaintiff did not attend the March 4, 2020. Thus, the argument is not only irrelevant, it is factually

incorrect. Beyond this, equating someone who is legally "bearing" an "arm" strapped to their leg in a non-threatening manner with the brandishing of a weapon at someone is a non sequitur and certainly not the "similar possession of a firearm" as the defense euphemistically suggests. (Brief in Support of Defendant Ron Clous' Motion to Dismiss, RE 16, Page ID # 12.)

4. Clous' Threat Caused "Chilling" of Speech

The "causation" element of a retaliation claim has repeatedly been stated as follows: was the "adverse action … motivated at least in part by the plaintiff's protected conduct." *Thaddeus-X v. Blatter, 175 F.3d* 394; *King v Zamiara,* 680 F.3d 686, 694 (6th Cir. 2012). Plaintiff has alleged that Clous' actions were "intentional" and "malicious" and in direct response to her "petition": the request that the Commission denounce the violent behavior of groups like the Proud Boys. (Complaint, RE 1, Page ID # 7-8, 11, 14.) Clous has admitted that he retrieved the weapon in response to Plaintiff's public comment. Moreover, it was the direct cause of Plaintiff's injury: both emotional and to the deterrence of the exercise of her constitutional rights. (Complaint, RE 1, Page ID # 7-8, 11, 14.) Plaintiff has alleged all the necessary elements of causation. The court in *King, supra,* also explained that a plaintiff need not have "direct evidence" of a retaliatory motive. "Circumstantial evidence" is perfectly acceptable. *King v Zamiara,* 680 F.3d at 695. Often the "temporal proximity between protected conduct and retaliatory acts as creating an

inference of retaliatory motive. *Id,* at 695-696. Here there was virtually no gap in time between Plaintiff's request and Defendant Clous' retaliation. His use of a high-powered rifle under these circumstances further establishes his retaliatory intent, and he admits he got the weapon in response to Plaintiff's "petition."

Plaintiff has alleged in detail all the elements necessary to state a First Amendment retaliation claim. The only argument the defense makes is that some of them are implausible. This is hardly the case, as the District Court found after watching the video of the meeting. The defense attempts to reframe what actually happened are appropriate for the jury as argument, but not a Rule 12(b)(6) motion that is to look to the pleadings alone.

CONCLUSION

For all the foregoing reasons, the Plaintiff asks this Court to **Affirm** the well-reasoned decision of the District Court set forth on the record at the hearing on Defendant Clous' motion to dismiss.

Dated: June 21, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(C), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation found at FRAP 32(a)(7)(B). It contains 9325 words and has been prepared in Microsoft Word, using a proportionally spaced face, Times New Roman, and a 14-point font size.

Dated: June 21, 2022

/s/ Blake K. Ringsmuth
Counsel for Plaintiff-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: June 21, 2022

/s/ Blake K. Ringsmuth
Counsel for Plaintiff-Appellee

Case No. 22-1015

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICIA MACINTOSH,

Plaintiff - Appellee,

v.

GRAND TRAVERSE COUNTY COMMISSIONER RON CLOUS,

Defendant - Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

ADDENDUM PLAINTIFF/APPELLEE'S DESIGNATION OF RECORD ON APPEAL

Pursuant to 6th Cir R 30(b), Defendant/Appellant hereby designates the following district court filings as the pertinent Record on Appeal:

DESCRIPTION OF ENTRY	DATE FILED	RECORD ENTRY NO.
Complaint w/ Exhibits	4/12/21	1, PG ID 1-32
Defendant's Motion to Dismiss w/ Exhibits	7/13/21	15-16, PG ID 90-173
Defendant's Unpublished Authority	7/13/21	17, PG ID 174-236

Defendant's Exhibits 2 and 7 Filed in Traditional Manner	7/15/21	21
Plaintiff's Corrected Response to Motion	8/25/21	33, PG ID 345-375
Defendant's Reply to Response	9/7/21	34, PG ID 380-416
Order Denying Motions to Dismiss	12/7/21	39, PG ID 421-422
Motion Hearing Transcript	12/21/21	43, PG ID 433-483
Notice of Appeal	1/4/22	44, PG ID 484-485