

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PATRICIA MACINTOSH,) Case No. 1:21-cv-00309
)
Plaintiff,) Grand Rapids, Michigan
) Tuesday, December 7, 2021
v.) 11:00 a.m
)
GRAND TRAVERSE COUNTY)
COMMISSIONER RON CLOUS, in)
his Individual Capacity, and)
GRAND TRAVERSE COUNTY,)
)
Defendants.)
_____)

TRANSCRIPT OF HEARING ON MOTIONS TO DISMISS
BEFORE THE HON. PHILLIP J. GREEN
UNITED STATES MAGISTRATE JUDGE

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APPEARANCES (Continued):

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WITNESSES:

None

EXHIBITS:

None

1 GRAND RAPIDS, MICHIGAN, TUESDAY, DECEMBER 7, 2021, 11:00 A.M.

2 (Call to order of the Court; counsel present)

3 THE COURT: Good morning. Please be seated. Bear
4 with me while I get my technology up and running.

5 We are here in the matter of Patricia MacIntosh vs.
6 Grand Traverse County Commissioner Ron Clous and Grand Traverse
7 County, Case No. 21-cv-309. This is the date and time set for
8 a hearing on two motions, the county's motion to dismiss under
9 Rule 12(b)(6) for failure to state a claim, which was filed at
10 Docket No. 9. Plaintiff responded at Docket 23. The county
11 replied at Docket 28. Also before the Court today is Defendant
12 Ron Clous's motion to dismiss for failure to state a claim,
13 filed at Docket 15, with a brief in support at Docket 16.
14 Plaintiff responded at Docket 33, and Mr. Clous's reply was
15 filed at Docket -- excuse me -- 34.

16 Could I have appearance of counsel, please?

17 MR. RINGSMUTH: Yes, Your Honor. Blake Ringsmuth
18 appearing on behalf of Plaintiff Kelly -- or, excuse me,
19 Patricia MacIntosh.

20 THE COURT: All right. Good morning, Mr. Ringsmuth.

21 MR. RINGSMUTH: My partner.

22 MR. WUORI: Tom Wuori also on behalf of the
23 Plaintiff.

24 THE COURT: All right. Good morning, Mr. Wuori.

25 MR. GRANT: Good morning, Your Honor. Greg Grant on

1 behalf of Grand Traverse County.

2 THE COURT: All right. Good morning, Mr. Grant.

3 MR. BREGE: Good morning, Your Honor. Andrew Brege
4 on behalf of Defendant Clous.

5 THE COURT: All right. Good morning, Mr. Brege.

6 All right, gentlemen. I've read the briefs and
7 looked at the attachments. I've also done a little bit of
8 research on my own here. So I'm ready. I'm happy to hear
9 whatever you want me to address. Is there a preference as to
10 who goes first, the county or Mr. Clous?

11 MR. GRANT: Your Honor, I have spoken to Mr. Brege
12 about this and I feel that since he has the what we'll call the
13 primary defendant in this case, it probably makes logical sense
14 that he address the Court first, if that pleases the Court.

15 THE COURT: I don't care. I'm not sure what it means
16 to be a primary defendant, but I don't care who goes first.

17 And, Mr. Brege, you're very welcome.

18 MR. BREGE: Thank you. I think what's meant by that
19 is generally if the underlying constitutional claim against an
20 individual can't be established, then the claim against the
21 county fails --

22 THE COURT: Yeah.

23 MR. BREGE: -- as a matter of law.

24 THE COURT: Fair enough, fair enough. Thank you.

25 MR. BREGE: For that I think Greg's hoping to go

1 first.

2 THE COURT: Okay.

3 MR. BREGE: May it please the Court, Your Honor, I
4 will keep this brief as the Court has already expended
5 considerable time reviewing everything. If the Court has
6 questions as I go forward, please go ahead and say so. I feel
7 like I'm in roundabout --

8 THE COURT: Yeah.

9 MR. BREGE: -- with the two microphones here.

10 THE COURT: Oh, yeah. They're both -- just stand
11 kind of in the middle and they'll pick you up.

12 MR. BREGE: Okay. Well, the Court knows why we're
13 here. Plaintiff has made an allegation that her First
14 Amendment rights were violated at a public meeting that was
15 conducted over Zoom on January 20, 2021. The very short
16 version of that is Plaintiff was making a public comment,
17 following public comments by another individual, where the
18 Plaintiff's public comments piggy-backed on the comments made
19 by the prior individual in reference to the Proud Boys and a
20 number of other items.

21 THE COURT: Yeah.

22 MR. BREGE: Primarily the Proud Boy topic was most of
23 Plaintiff's topic, but in that piggy-back, because we have to
24 take this into context, the first caller, who was referenced in
25 Plaintiff's complaint and who was obviously included in the

1 very public record which is the video of this entire event,
2 made reference not just to the Proud Boys, but to a March 2020
3 meeting in which an individual was allowed to speak for about
4 twenty minutes. There were members of this Proud Boy
5 organization apparently in the crowd at that point in time, and
6 the county ultimately voted to adopt a symbolic resolution as a
7 Second Amendment sanctuary county. That is the beginning of
8 the topic that was her public comment that then led into the
9 Plaintiff's public comments.

10 The Plaintiff explicitly asked that members of the
11 board state their position on the things she was referencing;
12 the Proud Boys. She was referencing gun culture and how up
13 north they've switched from a hunting culture to a gun culture,
14 things of that nature. Mr. Clous went off screen for a few
15 seconds, grabbed an unloaded -- or at least from the video what
16 appears to be an unloaded, because it's missing its
17 stock -- gun, or missing its --

18 THE COURT: Magazine.

19 MR. BREGE: -- magazine. Sorry. Shows it on the
20 screen, sets it down. She continues with her public comment
21 until her time is up for about ten more seconds, and that's it.
22 And so Plaintiff claims that this motion --

23 THE COURT: Well, whether there was a magazine or not
24 isn't all that relevant, is it?

25 MR. BREGE: Oh, I --

1 THE COURT: I mean nobody is suggesting that through
2 a Zoom video he was going to be able to shoot anybody.

3 MR. BREGE: Well --

4 THE COURT: I don't think that's Plaintiff's claim.

5 MR. BREGE: Well, I think that it is relevant because
6 Plaintiff is saying that this motion is immature because they
7 apparently need discovery on one of the elements of a
8 retaliatory First Amendment claim, and that's whether or not,
9 one, there was an actual retaliatory action and the intent to
10 do it in response to the Plaintiff's exercise of her rights in
11 order to silence her; this intent piece. So I think that that
12 is really relevant.

13 THE COURT: Well, he's acknowledged that he brought
14 the rifle out as a result of her comment.

15 MR. BREGE: That is true, but we have to get to
16 whether or not it could ever be plausibly conceded that what he
17 was doing was threatening her. And if he is just merely
18 displaying a weapon that objectively, from looking at that
19 view, does not have its magazine, then he can't be displaying
20 it in a threatening way.

21 THE COURT: You're a very good lawyer, Mr. Brege. I
22 notice you're carefully using the word "display."

23 MR. BREGE: You're right. I am.

24 THE COURT: One could also use the word "brandish."

25 MR. BREGE: Well, I could use the word "brandish" if

1 I was going to concede something like that, but I would also
2 point -- Plaintiff's response, they point out that we spend too
3 much time talking about brandishing as though he needs to
4 establish this criminal element. Well, it's Plaintiff over
5 twenty times in the complaint that refers to it as brandishing.
6 It is Plaintiff in the complaint two times referring to the
7 Michigan criminal statute, MCL 750 --

8 THE COURT: How does Michigan law define
9 "brandishing"?

10 MR. BREGE: Michigan law defines "brandishing" as, to
11 get to that part of my briefing -- it is in our brief -- no,
12 the statute itself does not actually define what "brandish"
13 means. So there is a -- I believe it was an unpublished case
14 that refers to what the definition of "brandish" is, and that
15 case is *People vs. Finley*, found at 1997 Westlaw 33353296
16 (2/19/97), an unpublished case of the Michigan Court of
17 Appeals, that referred to a prior Attorney General opinion that
18 stated in the absence of any reported Michigan appellate court
19 decisions defining "brandishing," it is important to rely on
20 dictionary definitions.

21 According to the American Heritage Dictionary, Second
22 College edition, the term "brandishing" is defined as "to wave
23 or flourish menacingly as a weapon; to display ostentatiously;
24 (noun) a menacing or defined wave or flourish." This
25 definition comports with the meaning ascribed to this term by

1 courts in other jurisdictions such as the Sixth Circuit, which
2 is *United States vs. Moerman*, 233 F.3d 379 at 380, which stated
3 the court recognized that in federal sentencing guidelines
4 "brandishing a weapon" is defined to mean that the weapon is
5 pointed or waved about or displayed in a threatening manner.

6 THE COURT: Well, actually the federal law in Title
7 18 United States Code Section 924(c)(4) specifically defines
8 "brandishing," and I quote:

9 "... to display all or part of a firearm, or
10 otherwise make the presence of a firearm known to
11 another person, in order to intimidate that person,
12 regardless of whether the firearm is directly visible
13 to that person."

14 So it kind of sounds like that definition may cover what I'm
15 seeing in this video.

16 MR. BREGE: Potentially. Under the Michigan law it
17 also requires willingly and knowingly brandishing and with the
18 intent to induce fear.

19 THE COURT: Well, is there any question about
20 whether -- put aside the term "brandishing" so we don't get
21 hung up on that. Is there any question about whether he
22 willfully and intentionally went and retrieved this rifle and
23 brought it back so that people could see it on the Zoom call?
24 I don't think that's in question, is it?

25 MR. BREGE: There's no question about that. The

1 question is whether or not it's willfully and knowingly done
2 with the intent to induce fear.

3 THE COURT: Ah, yes. Okay.

4 MR. BREGE: And that's where all of these facts get
5 important, because it seems as though Plaintiff is conceding
6 through the allegations in her own complaint by only
7 referencing it as brandishing that if he doesn't do this in a
8 manner that is threatening, then all he's doing is exercising
9 his own right to display a weapon. She has to --

10 THE COURT: Right, but this is a 12(b)(6), --

11 MR. BREGE: It says --

12 THE COURT: -- so I've got to take all of her
13 allegations as true. I have to give her the benefit of every
14 reasonable inference. I know you're ready to jump back, Mr.
15 Brege, but let me just finish. And while -- I don't think the
16 Court can consider -- you know, I can't consider outside
17 evidence one way or the other, but within the complaint she is
18 saying that his conduct was such that there was a public outcry
19 over this; that even elected officials responded in a way
20 that -- indicating that this was threatening, and that at least
21 two people refused in a subsequent meeting of the commission,
22 refused to give their names, citing fear as a result of what
23 Mr. Clous did. Now, if I have to take all that as true, how
24 can I say as a matter of law that she failed to even state a
25 claim concerning whether this -- the conduct was sufficient

1 that it would cause a person of reasonable firmness to feel
2 chilled?

3 MR. BREGE: Because under 12(b)(6) and numerous
4 cases, including *NCAA vs. Bassett*, we are allowed, even at the
5 12(b)(6) stage, to look at public records, records referenced
6 in her complaint, and records attached to her complaint when
7 making this decision.

8 THE COURT: Yeah. There's stuff on both sides. I'm
9 looking at this and it's like, okay, there's some stuff that
10 helps the Plaintiff here; there's some stuff that helps you.
11 But you've got the burden at the 12(b)(6) stage of
12 demonstrating to this Court that there is no interpretation
13 here whatsoever that could support a claim.

14 MR. BREGE: It's not simply the interpretation by the
15 other person. It's the intent of the person making the
16 display, not the interpretation by the other person.

17 THE COURT: No. It's not subjective. It is
18 objective and what did he intend? Seems to me that's a factual
19 question. It's very possible, Mr. Brege, in my mind that Mr.
20 Clous brought his rifle out in order to make a statement,
21 simply, "I support gun rights" or simply to say, "I support the
22 Proud Boys." Okay? And that he had no intention of
23 intimidating Ms. MacIntosh. But it's also, seems to me,
24 entirely possibly that he had the intent as a substantial part
25 of his reason for bringing it out to send a message to Ms.

1 MacIntosh and other people with similar views.

2 MR. BREGE: Well, the funny thing about that is we
3 know his intent, because Plaintiff attached the newspaper
4 article where he states his intent, which is the same newspaper
5 article she relies on for those other facts that you talk
6 about.

7 THE COURT: That doesn't defeat a 12(b)(6) motion,
8 the fact that he's making statements that are helpful to him.
9 Yeah, I mean I get it, Mr. Brege. The Court can consider
10 things that are referenced in the complaint, but I still have
11 to give all the benefit to the Plaintiff and not to -- it would
12 be improper, in my view -- I don't see how I could grant a
13 motion to dismiss based upon some out-of-court statement that
14 the Defendant made. I mean that would last in the Sixth
15 Circuit about a nanosecond, I think.

16 MR. BREGE: Well, as long as she doesn't equally get
17 to rely on those same statements, I guess I think --

18 THE COURT: I take all that with a grain of salt. I
19 mean both sides are, it seems to me, are trying to rely on some
20 of these out-of-court statements and this other material,
21 newspaper articles. None of that carries any weight with me,
22 frankly, but this motion. Okay?

23 MR. BREGE: Fair enough.

24 THE COURT: When I look through it, I'm looking at
25 the complaint. And I went back through the complaint

1 carefully, making notes of, okay, what allegations in this
2 complaint support each of the elements that she has to prove.
3 The rest of that stuff, frankly, doesn't -- I know I can
4 consider it, but there's just -- there's stuff on both sides.
5 So I think where that usually comes into play on the 12(b)(6)
6 motion is where the materials referenced and attached are such
7 that it leaves no question about -- you know, for example, a
8 video. Let's say the video of the hearing didn't show Mr.
9 Clous bringing out any kind of a rifle. He's sitting there and
10 then -- and she's saying, well, it does, and we look at the
11 video. It's not there. Dismissed. Okay?

12 So, but in this case I'm looking at the video. I
13 looked at it a number of times. I'm not sure what his intent
14 was. I can see where it might be this, it might be that. I
15 don't get to decide what his intent was. And even if I was the
16 fact finder here, I don't know that I could decide it based on
17 what was on the video.

18 MR. BREGE: So getting to the video and whether or
19 not his intent is something the Court's going to take into
20 consideration, we need to then, I guess, look at a reasonable
21 person. Could a reasonable person interpret what he did and
22 what he displayed on there as either him making a public
23 statement, which she concedes at paragraph 31 of her complaint
24 that he's making his public statement, or is he threatening
25 her? Is he threatening her by displaying what is objectively

1 an unloaded weapon for three seconds on a Zoom call? And that
2 gets into my qualified immunity argument.

3 THE COURT: Well, we'll get there in a minute, but I
4 want to go back to whether she's made a -- she's alleged or
5 made sufficient allegations to support the element that what
6 Mr. Clous did was sufficient to deter what is a reasonably --

7 MR. BREGE: Reasonably prudent?

8 MR. GRANT: Ordinarily firm.

9 MR. BREGE: Ordinarily --

10 THE COURT: Yeah, a person of ordinary firmness. I'm
11 not quite sure what ordinary firmness is, but I think -- I get
12 the idea that if -- in other words, it's not the kind of thing
13 that (indiscernible). That's no big deal. And again, I'm not
14 interested in relying so much on the things that are attached
15 to the complaint or -- but in her complaint herself, first of
16 all, we have to analyze this in the context in which the
17 actions were taking place. All right?

18 So what she alleges, Ms. MacIntosh alleges that the
19 speaker before her was highly critical of the Proud Boys and
20 the commission's stance with respect to the Proud Boys. But
21 you then -- and she alleges and it's substantiated on the video
22 that the chairperson -- I don't know if taking umbrage is too
23 much, but he certainly, you know, didn't like what that woman
24 had to say and felt the need to respond, even though one of the
25 other commissioners said, "Hey, I'm not sure this is

1 appropriate," and he said, "Well, they --" You know, he felt
2 pretty strongly about it. And then Ms. MacIntosh comes on and
3 she's speaking and she begins, by the way, by saying, "I'm kind
4 of --" Didn't way "afraid." "I'm not going to say some of
5 those things I was going to say about the Proud Boys, given the
6 chairperson's response to the previous speaker." But she does
7 goes on in part. I don't know what she was going to say about
8 the Proud Boys. She didn't say because she went on, I think,
9 and said what she thought of the Proud Boys and the
10 commission's actions with respect to that group, at which point
11 Mr. Clous gets up and goes and gets a rifle.

12 And I want to be careful of the language I use here,
13 because I've seen things, you know, frankly hyperbole here
14 about, you know, highly dangerous rifle. You know, all
15 firearms are dangerous if used improperly. I don't know that
16 this rifle is --

17 MR. BREGE: Or acting properly.

18 THE COURT: Well, yes. They're intended to be
19 dangerous. So, but at any rate, so he gets a rifle. I don't
20 know, frankly, what type of rifle it is, but I don't want to
21 put too much stock in what type of a rifle it is. But he makes
22 a point of getting a rifle and bringing it back while she's
23 still speaking, and she alleges that she in fact was
24 sufficiently chilled that she elected not to speak at some
25 subsequent meetings, and I think there's some indication she

1 may have spoken in some subsequent meetings, and she alleges
2 that others in the community felt the same way.

3 So again, I'm not relying upon out-of-court
4 statements. I'm simply relying upon her allegations in her
5 complaint that I have to take as true in which publicly-elected
6 officials expressed not only concern, but fear as a result of
7 this, that some commissioner members themselves felt it was
8 sufficiently serious that they proposed sanctions against Mr.
9 Clous and resolutions that were not passed.

10 So, you know, I mean with all that, how do I dismiss?

11 MR. BREGE: On qualified immunity if the Court --

12 THE COURT: Okay. Let's talk about qualified
13 immunity.

14 MR. BREGE: If the Court is -- I'm reading the tea
15 leaves that the Court is saying she's stated a First Amendment
16 claim. I still --

17 THE COURT: You are a good lawyer, Mr. Brege.

18 MR. BREGE: I still disagree --

19 THE COURT: You are a very fine -- and that's fine.

20 MR. BREGE: Obviously.

21 THE COURT: And, Mr. Brege, you're a very good lawyer
22 and I mean that sincerely, and you may be right and I'm wrong,
23 but you are reading the tea leaves correctly.

24 MR. BREGE: We're not going to --

25 THE COURT: So let's talk about qualified immunity.

1 MR. BREGE: I understand that the general proposition
2 is disfavoring qualified immunity at the twelfth and sixth
3 stage, but that doesn't mean that it's always foreclosed.

4 THE COURT: Right.

5 MR. BREGE: The Plaintiff needs to establish -- and
6 under qualified immunity it's either a specific case on all
7 fours or that the issue is beyond debate, that the prior case
8 law has put it beyond debate. And I think here, based on her
9 own allegations, that issue cannot be put beyond debate. It
10 needs to be beyond --

11 THE COURT: Here's what -- I'm sorry. You finish,
12 Mr. --

13 MR. BREGE: It needs to be beyond debate that every
14 reasonable officer or official in the position of Mr. Clous
15 would have known that what he was doing violated clearly
16 established constitutional rights.

17 THE COURT: When you say "what he was doing," what do
18 you mean by that?

19 MR. BREGE: That when he -- again, I'm not using
20 hyperbole, but the way that he held it, by holding the stock
21 and the barrel of an unloaded gun for three seconds, four
22 seconds, however long it's displayed on the video while he's in
23 his own home on a Zoom meeting while every reasonable official
24 would have known that that was a threat, that that was
25 brandishing, that that would be interpreted by somebody else as

1 retaliation in violation of clearly established rights.

2 THE COURT: Okay. Mr. Brege, I think you and I are
3 not on the same page here, and let me tell you where I'm coming
4 from so you have a chance to respond to this. I think you're
5 defining the issue too narrowly. You're saying, well, there is
6 no case specifically on point that basically says it violates
7 constitutional rights of an individual for a commissioner to
8 come out and display -- and I'm going to use "display," not
9 "brandish" -- and display a firearm.

10 I don't think that's the issue. I think the issue is
11 whether it is clearly established that a government official
12 cannot retaliate against a citizen for criticizing a government
13 official, and I'll tell you that's not my view only. It is the
14 Sixth Circuit's view. Plaintiff cited to the *Bloch* decision,
15 and I don't believe you responded to that, but I read the *Bloch*
16 decision, particularly with respect to qualified immunity. And
17 let's just nibble what that case is about.

18 So in *Bloch vs. Ribar*, or "REE-bahr" (ph.), there was
19 an alleged rape victim, the plaintiff, who criticized the
20 sheriff over the handling of the investigation. He then at a
21 press conference, I believe, made statements that were
22 embarrassing to her. She sued under Section 1983 for First
23 Amendment retaliation. The district court dismissed her claim
24 of retaliation, her First Amendment retaliation claim, on
25 qualified immunity. Went to the Sixth Circuit. The Sixth

1 Circuit reversed, and the Sixth Circuit said that the courts
2 have considered qualified immunity in the context of
3 retaliation claim focused on the retaliatory intent of the
4 defendant. And I'm going on, quoting the Sixth Circuit who in
5 turn is quoting the Tenth Circuit:

6 "The unlawful intent inherent in such a retaliatory
7 action places it beyond the scope of a police
8 officer's qualified immunity if the right retaliated
9 against was clearly established." "... the
10 proscription of retaliation for a plaintiff's
11 exercise of First Amendment rights has long been
12 established."

13 So I don't think the issue is whether there's some
14 case out there that says a county commissioner can't display a
15 firearm. What's clearly established is that a county
16 commissioner cannot take retaliatory action against a citizen
17 or a person who is exercising -- it's beyond question Ms.
18 MacIntosh had a First Amendment right to say what she said;
19 right?

20 MR. BREGE: Absolutely.

21 THE COURT: Okay. So that's clearly established.
22 The Sixth Circuit's telling me it's clearly established that a
23 county commissioner cannot take retaliatory action against her
24 for the exercise of that right.

25 MR. BREGE: What I think differentiates this case

1 from *Ribar*, in *Ribar* she goes to the newspaper. There's a
2 couple newspaper articles that are very critical and then the
3 sheriff holds this big press conference where he talks about
4 what he did, and that's all in her allegations. He talks about
5 what his staff did and then goes above and beyond into the
6 specific allegations, the highly -- what she referred to as
7 highly offensive and personal details of the rape allegation
8 that were completely unnecessary in order for him to exercise
9 his --

10 THE COURT: Was it necessary for Mr. Clous to bring a
11 firearm out?

12 MR. BREGE: She specifically asked for them to make a
13 statement and he made a statement. So this is different. She,
14 the plaintiff in *Ribar*, did not ask the sheriff to respond to
15 her criticisms.

16 THE COURT: Well, Ms. MacIntosh didn't ask Mr. Clous
17 to bring a firearm.

18 MR. BREGE: She did not, but she asked him to state
19 what his position on --

20 THE COURT: Yeah.

21 MR. BREGE: -- the Proud Boys and Second Amendment
22 rights --

23 THE COURT: But that gets us back to the other issue;
24 what was his intent. If his intent was simply to make a
25 statement about the Proud Boys, okay, maybe. But I think

1 that's a factual question at this point in my mind. So, you
2 know, going back to the Sixth Circuit, it seems to me pretty
3 clear this Court isn't to look at what the actions specifically
4 were that constitute the alleged retaliation to see if there's
5 a case prior where the courts said, no, you can't do that.
6 What's clearly established is Ms. MacIntosh had a right to
7 speak her mind, criticized the commission, and that's what she
8 was doing. No question about it. There's obviously no
9 question the commissioners weren't happy. At least some of
10 them weren't too happy with what -- or didn't agree with what
11 she had to say. And then was it clearly established that Mr.
12 Clous could not take any action to retaliate?

13 Now, I think there's a question here, a big question
14 about whether he intended to chill her speech. I think there's
15 a question here about what his intent was in terms of bringing
16 the firearm out. I just don't think I can say -- resolve that
17 in your favor at this stage of the litigation. I have
18 to -- you know, crediting her allegations, I can't do that.

19 So then in terms of qualified immunity, if I have to
20 take her allegations as true with a reasonable inference that
21 he brought that rifle out in order to somehow chill her from
22 speaking, then I don't see how he gets qualified immunity at
23 this stage. Now, the facts may develop later in the case such
24 that it is clearly established one way or the other, in which
25 case he may be entitled to qualified immunity, but I don't want

1 to give it to him now.

2 MR. BREGE: Well, as I've already indicated, I think
3 he gets there because she can't establish that every official.
4 I think that we're over broadly reading the Sixth Circuit in
5 *Bloch*. And I understand you quoted from it.

6 THE COURT: Oh, I think they're pretty clear.

7 MR. BREGE: I understand.

8 THE COURT: I don't think that's the case, Mr. Brege.

9 MR. BREGE: I think --

10 THE COURT: I think the Sixth Circuit makes it very
11 clear how the Court's supposed to look at this issue.

12 MR. BREGE: And the Sixth Circuit's opinion in both
13 *Bloch* and in the *Barrett* case pre-date numerous Supreme Court
14 opinions that make sure that it's very clear that you are not
15 supposed to take these rights in the broadest paintbrush. So I
16 would argue that --

17 THE COURT: Well, frankly, Mr. Brege, I wish Congress
18 would step in and do something about qualified immunity,
19 because it's clear as mud, you know. In my experience, and I'm
20 somewhat jaded perhaps -- and I'm saying this somewhat
21 facetiously, too, for the record -- it seems to me qualified
22 immunity is what any given judge or panel of judges think it is
23 at any given time, and that's frustrating for me and I'm sure
24 probably is for you, too, because how do we know how to apply
25 qualified immunity? Qualified immunity is very important, and

1 you're right that you -- even though you're not on as solid a
2 ground on the 12(b)(6) motion, you have every right to raise it
3 at 12(b)(6), because one of the purposes of qualified immunity
4 is not just to protect from liability, but to protect from
5 litigation, from being involved in litigation.

6 So I don't have any problem with it being raised at
7 the 12(b)(6) stage, but I'm not in a position where I can say
8 *Bloch* was wrongly decided and what they're saying, *Bloch* is not
9 the correct statement of law. That would last in the Sixth
10 Circuit even a shorter time. I mean I can't do that, Mr.
11 Brege.

12 MR. BREGE: I'm not so sure. They change things. On
13 the regular, Bronner (ph.) just changed the --

14 THE COURT: Well, I Shephardized it. There's nothing
15 that suggests that the Sixth Circuit has subsequently said you
16 shouldn't -- that there is anything wrong with this decision.

17 MR. BREGE: I understand. Getting back to the
18 complaint and the issue of qualified immunity and the every
19 reasonable officer or every reasonable --

20 THE COURT: Yeah.

21 MR. BREGE: -- official, Plaintiff concedes that not
22 every official agreed with this. That's the whole reason the
23 county is here, because the censure vote failed 3-to-3. She
24 quotes other members of the commission. I understand that she
25 quotes certain public officials as saying that they were

1 appalled by what he did. There are also others she quotes as
2 saying that he didn't do anything wrong; they didn't see
3 anything wrong or illegal about what he did.

4 THE COURT: Um-hmm.

5 MR. BREGE: To me that also gets back to that heart
6 of the qualified immunity question and then how could a
7 reasonable official know that what he was doing -- that every
8 reasonable official in this position would have known. I
9 understand the Court's position under *Bloch* --

10 THE COURT: Well, in fairness to the county and to
11 Mr. Clous, the fact that people were appalled, even if it's
12 true, doesn't mean there's a constitutional violation here.
13 What's relevant is what was Mr. Clous's intent and what was the
14 effect of his actions, given that intent, if it were to chill,
15 objectively on a person of reasonable firmness. Whether other
16 people were appalled by it, I mean I'm appalled all the time by
17 things politicians say and do, but I wouldn't suggest that any
18 of those things are constitutional violations. So again, I
19 don't know that any action by, you know, the commission
20 subsequent to or letters that were sent in or editorials, that
21 that necessarily means there's a constitutional violation here.
22 It simply means people didn't like what he did. And I suspect
23 there were a lot of people who looked at him and thought, what
24 were you thinking?

25 MR. BREGE: I don't want the Court to interpret my

1 defense of my client as me thinking that what he did --

2 THE COURT: I don't.

3 MR. BREGE: -- was a good idea.

4 THE COURT: I know you too well, Mr. Brege.

5 MR. BREGE: But that doesn't mean --

6 THE COURT: I know you too well.

7 MR. BREGE: -- that what he did was a constitutional
8 violation.

9 THE COURT: And I'm not here to judge him or to offer
10 opinions about it. It is what it is. I'm here just to decide
11 whether this case can go forward or not. His constituents can
12 decide, you know, what he did and whether he should remain in
13 office.

14 MR. BREGE: Understood. I guess the Court is well
15 aware of my position. I don't know --

16 THE COURT: Yeah.

17 MR. BREGE: -- there's a whole lot more I can add to
18 it. I think that --

19 THE COURT: Well, I appreciate your efforts, Mr.
20 Brege.

21 MR. BREGE: And I think that in this situation, given
22 the video, I think that the Court can view that video and does
23 not need to accept her claim of calling it threatening and
24 brandishing, because the Court can see the video.

25 THE COURT: And I think it can go either way. Yeah,

1 I've looked at the video many times, you know, and I'm not
2 going to comment because it wouldn't be appropriate on how I
3 personally feel about it, because that's not relevant and it
4 wasn't -- and I wasn't involved at the time. But I cannot say
5 that as a matter of law the video is such that no reasonable
6 person could have -- of reasonable firmness could have
7 had -- that it would not have had a chilling effect. It may be
8 the case that that ultimately is the case. I don't know, but
9 at this stage I can't dismiss the complaint. I can't say the
10 complaint is so devoid in allegations here that it can't at
11 least go forward to discovery. Thank you, Mr. Brege.

12 MR. BREGE: Thank you, Your Honor.

13 THE COURT: Mr. Grant.

14 Mr. Ringsmuth, I should give you an opportunity to
15 speak and I welcome -- I will give you the opportunity to
16 snatch defeat out of the jaws of victory.

17 MR. RINGSMUTH: That's my favorite line.

18 THE COURT: Mr. Grant.

19 MR. GRANT: Your Honor, I'll just be very quick.
20 First thing, I'd like to thank the Court for adjourning this
21 hearing two times based upon my specific request. I don't like
22 to do that.

23 THE COURT: I think it got adjourned once. I think
24 it got adjourned once for me, too.

25 MR. GRANT: Okay.

1 THE COURT: And that's one reason why I definitely
2 wanted to be ready to go today.

3 MR. GRANT: That works, too, Your Honor. Your Honor,
4 we don't think the county belongs in this case, regardless of
5 the arguments that were made by Mr. Brege, and we concur with
6 the arguments that are made by Mr. Brege because it goes to the
7 fact that there's no respondeat superior. But, Your Honor, our
8 brief is -- and our reply briefs, they're relatively short and
9 succinct. We feel like we've outlined our position in the
10 briefing in that regard. I don't really have a whole lot else
11 to add there.

12 THE COURT: Well, I have a question because I -- and
13 I think Mr. Brege included this in his arguments as well, but
14 I'm going to address this to you. You seem to be arguing that
15 Mr. Clous had a constitutional right to have a firearm, he had
16 a constitutional right under the First Amendment to express his
17 opinion, and therefore he can't be liable under Section 1983.
18 That can't be right, can it? I mean are you suggesting that as
19 long as a government official's action is otherwise lawful,
20 that it can't constitute retaliation under the First Amendment?

21 MR. GRANT: Your Honor, I think the argument really
22 that we made in that respect really went to the Plaintiff's
23 claim that the county should have done something after the fact
24 and that the fact that the county didn't censure Mr. Clous or
25 that the county didn't enter a resolution or adopt a resolution

1 saying what he did was wrong, what he did was unconstitutional,
2 by doing that what they're essentially -- what the county would
3 be saying is that Mr. Clous did something unconstitutional or
4 wrong and would thereby chill his freedom of expression under
5 the First Amendment. And if the county were to adopt a
6 resolution that says you can't do what Mr. Clous did in a
7 public meeting, now we're chilling future First Amendment free
8 expression. That, I think, goes to that.

9 THE COURT: Is that because of the -- Plaintiff seems
10 to be making an ongoing claim.

11 MR. GRANT: Correct.

12 THE COURT: Okay. I gotcha.

13 MR. GRANT: And we don't think that that's a viable
14 claim, Your Honor, at least as it goes against the county. I
15 mean the county obviously -- there's no allegation that the
16 county knew that this display of a firearm was going to happen.
17 There's no allegation of that. There's no allegation that this
18 was a pattern of conduct that had happened before at the
19 county. This was a spur-of-the-moment thing. The county's
20 under no obligation after the fact under the First Amendment to
21 then go back and censure Mr. Clous or to adopt some sort of a
22 resolution saying you can't do anything like this going
23 forward. That didn't happen and they're not required to.

24 THE COURT: Again, I don't think the issue is
25 specifically whether the county had a policy or custom of

1 tolerating commissioners displaying firearms. I think the
2 issue is whether the county had a policy or custom or practice
3 of tolerating commissioners retaliating against people who
4 express criticism, who were exercising their First Amendment
5 rights.

6 MR. GRANT: I believe they argued both, Your Honor.
7 I don't think they've alleged enough facts to support that
8 claim.

9 THE COURT: I don't think there's enough -- I think
10 there's -- in my view I don't -- and I'll hear what Mr.
11 Ringsmuth has to say. In my view I don't see sufficient
12 allegations here that the county had some sort of a policy or
13 practice specifically that encouraged or tolerated the display
14 of firearms, but maybe I'm missing something. In my mind, the
15 question is -- the more relevant question is whether the -- and
16 I don't -- I should also say I'm not aware of any specific
17 policy that's been enacted by the county that even says it's
18 okay to retaliate against people for speaking their mind. I
19 think --

20 MR. GRANT: Because there isn't one.

21 THE COURT: Yeah. Well, I certainly don't see
22 anything. So in my mind, if the case is going to go forward
23 against the county, it would be based upon the alleged
24 existence of a custom of tolerance of violating First Amendment
25 rights of people who criticized the commission, that there's a

1 custom and tolerance of commissioners retaliating against
2 individuals who exercise their right to criticize the
3 commission.

4 MR. GRANT: Understood, Your Honor. Your Honor,
5 we'll rest on our briefs.

6 THE COURT: Thank you.

7 MR. GRANT: Thank you, Your Honor.

8 THE COURT: Mr. Ringsmuth.

9 MR. RINGSMUTH: Well, I've been practicing --

10 THE COURT: Go ahead.

11 MR. RINGSMUTH: Thank you, Your Honor. I've been
12 practicing too long to not recognize my ability to snatch
13 defeat out of the jaws of victory, and so the comments I will
14 make, Your Honor, are simply to clarify a few things and to
15 support the record that the Court's reliance on the *Bloch* case
16 is well-founded, because not only for the reasons that you
17 mention on the record, the *Bloch* -- and this gets to both
18 qualified immunity and the 12(b)(6) motion -- the Sheriff
19 Ribar, "REE-bahr" (ph.), used the same defense that Mr. Clous
20 is trying to use here. He said, oh, I have a First Amendment
21 right to do this, and the court said very clearly not only
22 *Bloch*, *Barrett*, the Supreme Court from 1977 saying you can't do
23 something that would be otherwise legal if done for a
24 retaliatory purpose, and *Bloch* is very much on all fours, and I
25 agree. You take the 10,000-foot view and say the premise is

1 you can't retaliate against someone. You can't use your First
2 Amendment rights as a governmental official to --

3 THE COURT: Yeah.

4 MR. RINGSMUTH: -- justify it, so --

5 THE COURT: What is the -- is there any policy that
6 you're alleging the commission has regarding retaliation?

7 MR. RINGSMUTH: Well, now I do, yes. So let me jump
8 to that issue. We have alleged, Your Honor, that go forward
9 what the commission did is a violation of the Constitution, and
10 I went to great lengths in my brief to say we are not trying to
11 make a *Monell* case against the county for Mr. Clous's after,
12 you know, respondeat superior argument. We're not making that
13 argument.

14 What we're saying is what they did when it was
15 presented very squarely to them by way of two motions to
16 address this issue, they chose to leave it alone. They chose
17 to not state that their policy was against allowing
18 retaliation.

19 THE COURT: Well, did they have an obligation to make
20 an affirmative statement such -- like that?

21 MR. RINGSMUTH: Well --

22 THE COURT: In other words, let me change the facts
23 hypothetically. Let's say at a county commission meeting it
24 was in person and one of the commissioners got up and assaulted
25 somebody who was present because he or she didn't like what

1 that person was saying. Absent some pre-existing policy that
2 would suggest that the commission endorsed that, the fact
3 that -- let's say the commission thereafter didn't explicitly
4 condemn what that commissioner did. Does that mean now the
5 county's liable?

6 MR. RINGSMUTH: Not under your scenario, Your Honor,
7 but what happened here is it was brought directly to the final
8 decision-making body, which is the county, and under the *Thomas*
9 *v. City of Chattanooga* case and many other cases, there are a
10 number of ways a county, a governmental organization, can be
11 liable. And it was our allegation and our belief that the
12 failure for them to take action to state a policy against
13 retaliation two times with it squarely before them is a
14 ratification, if you will, is an adoption, is a statement
15 that going forward that is allowable. In addition to that, the
16 county and Mr. Clous's briefing in this court has very clearly
17 stated that what he did was not unconstitutional and was
18 allowed under both the First and Second Amendment, which --

19 THE COURT: Well, weren't they talking specifically
20 about his handling of a firearm? In other words, you know,
21 couldn't the commissioners after the fact, both in their
22 comments and in their failure to adopt some sort of a
23 resolution, simply be saying, Look, we don't agree with what
24 Mr. Clous did, we don't necessarily like what Mr. Clous did,
25 but he has a Second Amendment right to possess a firearm, he

1 has a First Amendment right to express his opinion through
2 conduct as well as statements. So it seems to me that you're
3 assuming that when they fail to take action to address what Mr.
4 Clous did, that the reason that they failed to take action was
5 because they were endorsing retaliation as opposed to endorsing
6 simply his right to possess a firearm.

7 MR. RINGSMUTH: Except, Your Honor, that in this case
8 they have taken very explicitly the position that what he did
9 under the facts alleged in my complaint was constitutional, and
10 they have made that statement very clear in their briefing to
11 this Court. And what is more, that this is -- I have alleged
12 that they have adopted this policy impliedly, if not expressly,
13 in their court pleadings or their briefing; that that is a fact
14 question that we should be able to explore with the commission
15 through depositions or otherwise to say, Okay, you know, you
16 had it right before you. Commissioner Nelson, who I
17 quoted -- I don't know if I named him -- he was the one in the
18 public record, Your Honor, that said, If we don't take action
19 and say what he did was wrong, we are effectively saying it is
20 okay, and that's what this case is about.

21 THE COURT: What is okay? To possess a firearm?

22 MR. RINGSMUTH: No. To retaliate against --

23 THE COURT: Okay.

24 MR. RINGSMUTH: -- a citizen exercising their First
25 Amendment right. But we have alleged it. I believe that it's

1 very facially supported by the facts that we do know, and it is
2 something that we should be entitled to explore with the
3 commission through the discovery and certainly not at a
4 12(b)(6), because if they had never dealt with it and they just
5 moved on, that would be a different scenario. I wouldn't have
6 brought the claim. But because it was squarely in front of
7 them, exactly what happened, with people understanding that
8 there was a claim of retaliation, and they didn't take action
9 and they have said what he did is okay. And we have alleged
10 that it was unconstitutional and that's --

11 THE COURT: Do you agree with me, Mr. Ringsmuth, that
12 in order to prevail against the county it's not sufficient for
13 you to prove that the commission somehow endorsed the
14 possession of a firearm, but that it was -- the commissioners
15 were endorsing the retaliation?

16 MR. RINGSMUTH: Yes.

17 THE COURT: Okay.

18 MR. RINGSMUTH: Yes. And in this case when he didn't
19 have the weapon with him, he went up and got it, and those are
20 all facts that are in this record. And by virtue of -- well,
21 if I'm reading the tea leaves, if this Court agrees that at
22 this point there is a factual dispute about the retaliation, we
23 know what the county's position was on our complaint which
24 alleges all that, that even though Ms. MacIntosh says all these
25 things, that's not unconstitutional and they have adopted that

1 policy, not for being liable for what he did, but for their own
2 actions, and I think we should be able to explore that.

3 THE COURT: Well, let's assume for a moment that
4 Mr. -- and this is not established, but let's just assume for
5 purposes of this argument that Mr. Clous did intend to chill
6 the rights of Ms. MacIntosh and other people similarly
7 situated. It's still possible that the county commissioners
8 did what they did not to endorse that, but simply they may be
9 in error in believing that that didn't happen; in other words,
10 that what -- that they truly believe, as Mr. Brege has
11 contended, that what Mr. Clous did was not wrong, was not
12 wrongful, that he was simply displaying a firearm to express
13 his support of the Second Amendment and as expressive content.
14 Do you follow that?

15 MR. RINGSMUTH: I do.

16 THE COURT: I'm not asking this very well. In other
17 words, I don't know that the fact that the county or the
18 commissioners failed to take action in the aftermath means that
19 they endorsed retaliation.

20 MR. RINGSMUTH: And it may not, but it's certainly
21 something that I believe that we should be entitled to explore
22 through discovery because we've alleged it, and the pleadings
23 or the briefing in this court say very clearly what he did
24 isn't wrong. And as you pointed out, to my surprise they
25 didn't even deal with the whole *Bloch v. Ribar* case, so --

1 THE COURT: Yeah. But I mean in fairness to Mr.
2 Brege and Mr. Grant, they're not saying that retaliation isn't
3 wrong. They're not saying that Mr. Clous had an interest in
4 chilling Ms. MacIntosh and that wasn't wrong. What they're
5 saying is they don't believe that was the intent. They don't
6 believe that there's any indication of it; right? So the
7 commissioners could be in the same boat.

8 MR. RINGSMUTH: Oh, I didn't hear him say that. I
9 heard him say that he had the right, period. I didn't hear him
10 say that they didn't think he was retaliating, at least in the
11 briefing.

12 THE COURT: I'm pretty confident neither Mr. Brege
13 nor Mr. Grant would endorse retaliation. Yeah. Thank you,
14 though.

15 MR. RINGSMUTH: Fair enough.

16 THE COURT: I get your point.

17 MR. RINGSMUTH: Fair enough. Thank you, Your Honor.

18 THE COURT: All right.

19 MR. BREGE: Might I have one more word?

20 THE COURT: You may.

21 MR. BREGE: And it's only with regard to one portion
22 of our motion.

23 THE COURT: Yep.

24 MR. BREGE: It was also on the standing with regard
25 to the injunctive relief claim and for failure to state a

1 claim. Because Plaintiff's injunctive relief claim isn't only
2 against the county, she includes Clous in her injunctive relief
3 claim. So that I don't think was addressed during the oral
4 argument. I don't know if the Court --

5 THE COURT: Okay. Well, do you want to speak to
6 that?

7 MR. BREGE: So I would just speak to it in that
8 Plaintiff hasn't alleged that Clous is continuing to threaten
9 her, is continuing to take any actions against her. She's
10 complaining of an ongoing alleged harm she suffered from this
11 January 20th incident. There is nothing in the complaint or in
12 her briefing that would support an injunction against Defendant
13 Clous.

14 THE COURT: Well, what she alleges in paragraph 62 is
15 as follows:

16 "Given the Grand Traverse County Board of
17 Commissioners actually voting down the censure of
18 Defendant Clous, in addition to the commissioners'
19 comments stating that there was nothing wrong with
20 said brandishing, Defendant County has effectively
21 adopted a policy or practice of allowing such
22 retaliatory and threatening conduct."

23 She also alleges that that is continuing by the
24 commissioners, which would necessarily, I think, include Mr.
25 Clous, and I'm looking here in the complaint. So at least she

1 seems to be alleging -- now, whether she can prove it, I don't
2 know, but she seems to be alleging that the commissioners,
3 which include Mr. Clous, are continuing.

4 MR. BREGE: Mr. Clous can't act outside of -- he's a
5 single voice on the commission, so --

6 THE COURT: Well, that's true.

7 MR. BREGE: -- if there can be a policy, the policy
8 can only come from the affirmative vote of a majority of the
9 commission. He individually has no authority to enact any sort
10 of policy that can be enjoined or disjoined.

11 THE COURT: Okay, all right.

12 MR. BREGE: So that's my point on that. I understand
13 paragraph 62 makes reference to the commissioners in total, but
14 her claim is against the commissioners and Clous as an
15 individual.

16 THE COURT: Okay.

17 MR. BREGE: And so that's my --

18 THE COURT: So you're saying while the Court, if they
19 prove their case, could enjoin the commission, that the Court
20 would not be able to issue a specific injunction against Mr.
21 Clous.

22 MR. BREGE: On the policy claim, because Mr. Clous
23 can't individually enact a policy. He'd be bound by whatever
24 policy --

25 THE COURT: On the policy part. Okay.

1 MR. BREGE: Right. So my point is only on the
2 injunctive relief as to Mr. Clous. That's why --

3 THE COURT: Okay.

4 MR. BREGE: -- we included that in our arguments.

5 THE COURT: I'm going to leave that for now and it's
6 open for further motion. You may be right about that, Mr.
7 Brege, but I'm not going to shoot from the hip here and I
8 haven't thought that through carefully enough. I don't think I
9 understood your argument entirely. What you're telling me now
10 sounds like it may be right, but I'm just going to leave that
11 for now and I want to be clear that you are free to raise that
12 issue at a later point, because you may be right about that.

13 All right. The claim must be dismissed for failure
14 to state a claim on which relief can be granted unless the
15 factual allegations are enough to raise a right for relief
16 above the speculative level on the assumption that all the
17 complaint's allegations are true. *Bell Atlantic vs. Twombly*,
18 550 U.S. 544 at 545. The court need not accept as true factual
19 allegations that are clearly irrational or wholly incredible.
20 *Denton v. Hernandez*, 504 U.S. 25. As the Supreme Court has
21 held, to avoid dismissal a complaint must contain sufficient
22 factual matter accepted as true to state a claim to relief that
23 is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662.
24 This plausibility standard is not akin to a probability
25 requirement, but it asks for more than a sheer possibility that

1 a defendant has acted unlawfully if the complaint simply pleads
2 facts that are merely consistent with a defendant's liability
3 and stops short of the line between possibility and
4 plausibility. The burden to obtain relief under Rule 12(b)(6)
5 rests with the defendants. See, for example, *Directv, Inc. v.*
6 *Tyreesh*, 487 F.3d 471 at 476 (Sixth Circuit, 2007). The court
7 must construe the complaint in a light most favorable to the
8 plaintiff to accept its allegations as true; draw all
9 reasonable inferences in favor of the plaintiff. Motion to
10 dismiss should not be granted unless it appears beyond doubt
11 that the plaintiff can prove no set of facts in support of her
12 claim which would entitle her to relief. This is also from
13 *Tyreesh*. In resolving a motion to dismiss, the court may
14 consider the complaint, the exhibits and public records. I
15 don't think that's in question here.

16 As to the First Amendment claim against Mr. Clous, in
17 order to prevail on that claim she must establish three things:
18 that she engaged in constitutionally protected conduct; that an
19 adverse action was taken against her that would deter a person
20 of reasonable firmness from continuing to engage in that
21 conduct; and third, the adverse action motivated at least in
22 part by her protected conduct. I find that there's sufficient
23 allegations in the complaint to survive a 12(b)(6) motion.

24 As to the first issue, Defendant for purposes of this
25 motion doesn't contest that Ms. MacIntosh engaged in

1 constitutionally protected conduct. I also don't think there's
2 really any question about that, speaking publicly at a
3 commission meeting. I can't imagine it's not constitutionally
4 protected.

5 As to the second issue, whether adverse action was
6 taken that would deter a reasonable -- a person of reasonable
7 firmness from continuing to engage in that conduct, there are a
8 number of allegations here. I'm not going to cite to all of
9 them, but some. She alleges that Mr. Clous brandished a
10 firearm while she was still speaking (paragraph 30 and 31);
11 that she felt fearful and was deterred from speaking at
12 subsequent meetings (paragraphs 41 and 42); she alleges that
13 there was a public outcry against Mr. Clous' actions, including
14 other elected officials, and that at least some other persons
15 expressed fear of disclosing their names due to his actions.
16 These are paragraphs 43 through 45, and 47 to 48. She alleges
17 that the display -- I'm going to use the term "display," she
18 says "brandishing" -- violates Michigan law. It's not clear at
19 this point. It might, it might not. And as to adverse action,
20 was motivated at least in part by protected conduct. She
21 alleges that Mr. Clous has admitted that he displayed the
22 firearm in response to her statements. This is sufficient to
23 survive a 12(b)(6) motion.

24 As to qualified immunity, that immunity applies
25 unless two things are true. One, the Defendant violated a

1 federal constitutional right. Here there's at least sufficient
2 allegations that he did. Secondly, whether the unlawfulness of
3 the conduct was clearly established at the time. The issue
4 here in my view is not limited to whether it was clearly
5 established that a government official cannot display a firearm
6 in response to unwanted criticism from the public. The issue
7 is more properly stated as whether it was clearly established
8 that a government official may not retaliate against an
9 individual for exercising a First Amendment right to criticize
10 the public official. That right has been clearly established
11 without question in my mind, not only in the *Bloch* decision,
12 but other decisions. I don't think it's really in question
13 whether it is clearly established that a government official
14 cannot retaliate against someone for exercising their First
15 Amendment rights to criticize.

16 In the *Bloch* case, plaintiff was an alleged rape
17 victim who criticized publicly the sheriff. The sheriff then
18 made public statements regarding the investigation. And by the
19 way, the sheriff exercised his First Amendment rights in making
20 these public statements. That didn't protect him from
21 liability that he was exercising his First Amendment rights.
22 Plaintiff brought a 1983 action. The District Court dismissed
23 the retaliation claim based on qualified immunity, and the
24 Sixth Circuit reversed.

25 And I find, although this is a 1998 decision, I find

1 the analysis here is helpful and on point, and I'm not aware of
2 any case that puts this in doubt. What the Sixth Circuit in
3 *Bloch* said is,

4 "It is evident that the First Amendment right to
5 criticize public officials is well established and
6 supported by ample case law. Furthermore, it is well
7 established that a public official's retaliation
8 against an individual exercising his or her First
9 Amendment rights is a violation of Section 1983."

10 And that is a quote from *Barrett vs. Harrington*, also a Sixth
11 Circuit decision, 130 F.3d 246 at 264. The Sixth Circuit in
12 *Bloch* goes on to say:

13 "While both *Harrington* and *Ribar* . . .," or "RIH-bahr"
14 (ph.), the two defendants in those respective cases,
15 "... had the right to respond publicly to the
16 criticism lodged against them, neither are permitted
17 to do so with the intent of injuring the complainant
18 and chilling such a person from continuing to
19 exercise his or her constitutional rights."

20 The Sixth Circuit in *Bloch* goes on to say the courts
21 have considered qualified immunity in the context of a
22 retaliation claim -- I'm sorry:

23 "The courts that have considered qualified immunity
24 in the context of a retaliation claim have focused on
25 the retaliatory intent of the defendant. As the

1 Tenth Circuit said, the unlawful intent inherent in
2 such a retaliatory action places it beyond the scope
3 of a police officer's qualified immunity if the right
4 retaliated against was clearly established," as it
5 was here. "The proscription of retaliation for
6 plaintiff's exercise of First Amendment rights has
7 long been established," citing the Second Circuit.

8 And the *Bloch* decision goes on to say:

9 "In addition, the Ninth Circuit articulated the
10 principle that government officials in general and
11 police officers in particular may not exercise their
12 authority for personal motives, particularly in
13 response to real or perceived slights to their
14 dignity. Surely anyone who takes an oath of office
15 knows or should know that much."

16 So I find that at this stage I cannot dismiss on the
17 basis of qualified immunity. As the facts develop, we'll see.
18 Again, it's not been established that, yet anyway, that Mr.
19 Clous intended to chill anybody's rights, and it's not been
20 established, yet at least, that a person of reasonable firmness
21 would have been chilled by those actions. But that survives
22 the 12(b)(6) motion, so the qualified immunity will not
23 preclude the case from going forward against Mr. Clous.

24 As for the claims against the county, Ms. MacIntosh
25 must establish that there's some sort of a policy or custom,

1 then connect that policy or custom to the county and establish
2 that her injury was due to the execution of that policy or
3 custom. Plaintiff can show an illegal policy or custom if the
4 official with the final decision-making authority ratified the
5 illegal actions or if there's an existence of a custom or
6 tolerance or acquiescence of constitutional violations. Here
7 there are sufficient allegations to survive a 12(b)(6) motion.

8 Now, whether she can prove this ultimately or not is
9 another question, but she alleges that the chairperson of the
10 commission had chastised a previous speaker and made clear that
11 her opinions regarding the Proud Boys were not welcome
12 (paragraph 22). She alleges that the chairperson laughed at
13 the display of the firearm, and that's frankly not in question
14 because the video shows that. She alleges that subsequent
15 efforts at resolution and censure were defeated; that the
16 chairperson made public comments to the effect that Mr. Clous
17 did nothing wrong; that county representatives and
18 commissioners have stated that Defendant Clous's conduct did
19 not violate any county rules. Now, that alone is not going to
20 establish a policy. But then she also alleges that given the
21 Grand Traverse County Board of Commissioners actually voting
22 down the censure of Defendant Clous, in addition to the
23 commissioners' comments that there's nothing wrong with such
24 brandishing, the county has effectively adopted a policy and a
25 practice of allowing such retaliatory or threatening conduct.

1 Again, whether all this can be proved is another matter, but is
2 sufficient to survive a 12(b)(6) motion.

3 Therefore, both motions to dismiss, each by the
4 county and Mr. Clous, are denied. The case will go forward and
5 we'll see what happens after some discovery.

6 Mr. Ringsmuth, is there anything further that we need
7 to take up at this time?

8 MR. RINGSMUTH: Nothing more, Your Honor.

9 THE COURT: All right. Mr. Brege, anything from your
10 perspective?

11 MR. BREGE: No, Your Honor.

12 THE COURT: All right. Mr. Grant?

13 MR. GRANT: No, Your Honor.

14 THE COURT: All right. And again, I want to clarify
15 I've not addressed the issue of the injunctive relief claim
16 against Mr. Clous.

17 MR. BREGE: Understood. Given that there was a
18 denial of qualified immunity, I have to take up the
19 consideration of interlocutory appeal.

20 THE COURT: Okay.

21 MR. BREGE: I assume that our next step will be a
22 Rule 16 conference.

23 THE COURT: Yes.

24 MR. BREGE: And then I believe I have thirty days. I
25 assume --

1 THE COURT: Sit down, Mr. Brege. Thank you.

2 MR. BREGE: I assume that there will be an order
3 issued consistent with today's ruling.

4 THE COURT: Yeah. Thank you, Mr. Brege. I hadn't
5 thought about that. The next step normally would be a Rule 16
6 conference. Obviously Mr. Clous has a right to consider
7 whether he wants to bring the interlocutory appeal. If he
8 chooses to bring the interlocutory appeal, my inclination would
9 be to stay the case. It may be necessary. I'm not even sure
10 if it's up to me to stay the case or the interlocutory appeal
11 automatically stays the case. It probably doesn't
12 automatically because we've got the county, but my inclination
13 would be to stay the case. I don't know that we even need a
14 Rule 16 conference if Mr. Clous is going to pursue that, but
15 I'm open to it.

16 MR. BREGE: Well, I'm saying I believe my time limit
17 would be thirty days from whenever the order is entered. So if
18 we do set the Rule 16, maybe set it beyond that thirty-day
19 period so that we'll know if --

20 THE COURT: Okay.

21 MR. BREGE: -- it's filed or not. I can't make that
22 decision right now.

23 THE COURT: No, I understand that.

24 MR. BREGE: Oh.

25 THE COURT: I understand.

1 MR. BREGE: But just that way we're not bumping out
2 another date too soon if it does get filed. So mid-January
3 would probably be a safe time.

4 THE COURT: Okay. Mr. Ringsmuth, any objection to
5 that?

6 MR. RINGSMUTH: No.

7 THE COURT: All right. Well, let's look at some
8 dates, then. So thirty days takes us at least to January 7th.
9 How about -- why don't we -- I've got the 25th of January and
10 the 26th open.

11 MR. BREGE: I believe I can do the 25th.

12 THE COURT: The 25th?

13 MR. BREGE: I'm waiting for my phone to wake back up.

14 THE COURT: Okay.

15 MR. GRANT: I have a conflict on the 25th. Depending
16 on when, I could do it earlier in the day.

17 THE COURT: Well, I'm wide open on the 25th.

18 MR. GRANT: I'm open any time on the 25th.

19 MR. BREGE: I am too, Your Honor.

20 THE COURT: Okay. When are you available on the
21 25th, Mr. --

22 MR. RINGSMUTH: This will not take more than thirty
23 minutes, I assume?

24 THE COURT: The Rule 16?

25 MR. RINGSMUTH: Yeah.

1 THE COURT: Well, I wouldn't think, but --

2 MR. RINGSMUTH: Okay.

3 THE COURT: -- you never know.

4 MR. RINGSMUTH: I would say any time before noon.

5 THE COURT: Okay. Well, why don't we say ten
6 o'clock.

7 MR. RINGSMUTH: All right. Sounds fine. Would that
8 be in person or would we do it by videoconference?

9 THE COURT: I leave it to you. Yeah, Rule 16's
10 certainly can be done by video as far as I'm concerned. Is
11 that your preference?

12 MR. RINGSMUTH: I think it would be.

13 THE COURT: All right. We'll go ahead and set it
14 by --

15 MR. RINGSMUTH: In January? That way we don't have
16 to dig through --

17 MR. GRANT: That's a safe bet. It's a safe --

18 THE COURT: Then maybe I can be at home, too. I've
19 got my virtual background. So, yeah, ten o'clock on the 25th,
20 and it will be by video. So you guys will get a link.

21 All right. Thank you, Mr. Brege for reminding me of
22 that.

23 MR. BREGE: Thank you, Your Honor.

24 THE COURT: Anything else?

25 MR. BREGE: Nothing else.

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THE COURT: Okay. Thank you all.

MR. RINGSMUTH: Thank you, Your Honor.

MR. BREGE: Thank you, Your Honor.

MR. GRANT: Thank you, Your Honor.

(Proceedings adjourned at 12:05 p.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript,
to the best of my ability, from the electronic sound recording
of the proceedings in the above entitled matter.

Date: December 21, 2021



Karen L. Banks, CER 3592