No. 21-1608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SGT. BRIAN T. POPE,

Defendant-Appellant,

v.

CLAYTON R. HULBERT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY HULBERT, *et al*.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the District of Maryland
(Stephanie A. Gallagher, District Judge)

BRIEF OF APPELLANT

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January 24, 2022

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 21-1608 Caption: Jeff Hulbert, et al. v. Brian T. Pope, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Brian T. Pope, Sgt.
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? YES ☑ NO

2. Does party/amicus have any parent corporations? YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? YES ☑ NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ James N. Lewis Date: June 8, 2021

Counsel for: Brian T. Pope, Sgt.

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The plaintiffs-appellees, Jeff Hulbert,[1] Kevin Hulbert, and Maryland Shall Issue, Inc., brought suit against defendant-appellant Sergeant Brian T. Pope and others for alleged constitutional violations and common law torts arising from the

[1] Jeff Hulbert passed away earlier this year and his estate has substituted its appearance.

arrest of the Hulberts by Sgt. Pope, an officer of the Maryland Capitol Police. (J.A. 13-42.) The defendants, who included Colonel Michael Wilson and Sgt. Pope, moved for summary judgment on grounds that included an assertion that Sgt. Pope was entitled to qualified immunity. (J.A. 9.) On April 22, 2021, the motion was granted in part and denied in part. (J.A. 771.) Judgment was entered in favor of Col. Wilson for all the claims asserted against him. (J.A. 771.) Judgment was entered in favor of Sgt. Pope for six of the ten claims asserted against him. (J.A. 771.) Four 42 U.S.C. § 1983 claims against Sgt. Pope survived summary judgment, including three First Amendment claims (violation of right to demonstrate and right to film law enforcement officers, plus retaliation) and a Fourth Amendment claim (unconstitutional search and seizure). (J.A. 27-33, 771.)

Sgt. Pope filed a timely motion for reconsideration on May 7, 2021. (J.A. 10.) Sgt. Pope also noted this timely interlocutory appeal on May 20, 2021. (J.A. 10, 772-73.) The district court did not initially rule on the motion for reconsideration and, instead, entered an order staying the case pending resolution of this appeal. (J.A. 10-11.) This Court remanded to the district court for the limited purpose of having the district court rule on the motion for reconsideration. Doc. 25. The district court denied the motion for reconsideration on October 6, 2021. (J.A. 11, 783.) Sgt. Pope timely filed an amended notice of interlocutory

appeal on October 20, 2021, to incorporate the denial of the motion for reconsideration with this appeal. (J.A. 11, 784-85.)

The district court had jurisdiction to consider the constitutional and common law tort claims below under 28 U.S.C. §§ 1331, 1343, and 1367. This Court has jurisdiction to review the district court's collateral order under 28 U.S.C. § 1291. *See Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014) (holding that "pretrial orders denying qualified immunity generally fall within the collateral order doctrine").

ISSUES PRESENTED FOR REVIEW

1. Did the district court err by denying summary judgment based on a factual dispute that was immaterial to whether Sgt. Pope was entitled to qualified immunity?

2. Did the district court err by not considering Sgt. Pope's alternative argument that he was entitled to qualified immunity because, in addition to the infractions for which plaintiffs were arrested, there existed other, objectively reasonable grounds for the plaintiffs' arrest?

3. Did the district court err in denying Sgt. Pope's motion for summary judgment on immunity grounds when it concluded that the right to record law enforcement officers is a clearly established right under the First Amendment, despite the absence of any pertinent precedent from the Supreme Court, this Court, or the Court of Appeals of Maryland?

STATEMENT OF THE CASE

The Patriot Picket's February 5, 2018 Demonstration

Twin brothers Jeff and Kevin Hulbert created an informal group called "The Patriot Picket," which advocates for gun rights. (J.A. 284, 288-89, 737.) On February 5, 2018, the Hulbert brothers led a Patriot Picket demonstration in Annapolis, Maryland, where the State legislature was sitting, approximately one month into the legislative session. Md. Const. art. III, §§ 14, 15; (J.A. 286-87, 738). The group planned to hold the demonstration on the sidewalk at the intersection of College Avenue and Bladen Street, which is immediately adjacent to "a grassy square called Lawyers' Mall, a location frequently used for political demonstrations." (J.A. 738, *see also* J.A. 486.) Groups can obtain a permit for demonstrations in Lawyers' Mall; a permit is optional and not required, but possession of a permit will give priority to the permitted group if another, non-permitted group shows up at the same time. Code of Maryland Regulations ("COMAR") 04.05.02.02.

Sergeant Brian T. Pope is an officer with the Maryland Capitol Police ("MCP") (J.A. 737), which is "a police and security force" established by the Secretary of General Services as an agency of the Department of General Services. Md. Code Ann., State Fin. & Proc. § 4-605(a)(1) (LexisNexis 2015). On February 5, 2018, Sgt. Pope was "in his office when he received a call from dispatch alerting

him that a group was setting up a demonstration in front of Lawyers' Mall." (J.A. 738; *see also* J.A. 69, 73.) Sgt. Pope knew that permits had not been issued for any demonstrations that day, so he went to the dispatcher's office to view a live video feed of the area. (J.A. 69, 73, 738.) Sgt. Pope observed one individual, who was "later identified as Kevin Hulbert, standing on the public sidewalk in front of Lawyers' Mall with a number of signs on the ground around him." (J.A. 738-39, *see also* J.A. 81, 97.) "The dispatcher informed Sgt. Pope that more people had been standing there, but recently left the area." (J.A. 739; *see also* J.A. 77.) This was Sgt. Pope's first time working in Annapolis during the legislative session (J.A. 70) and he did not know how to respond to the situation, "so he sought guidance from his supervisor, Sgt. Donaldson." (J.A. 739; *see also* J.A. 75-76.)

Sgt. Donaldson did not order Sgt. Pope to do anything initially; instead he called the chief of the MCP, Col. Wilson, for more guidance. (J.A. 78, 739.) Sgt. Donaldson told the chief that that "the Patriot Picket was engaging in an unscheduled demonstration near Lawyers' Mall, which could potentially cause a safety issue." (J.A. 739; *see also* J.A. 217-18.) The chief advised Sgt. Donaldson that an officer should be sent to evaluate the situation "and, if necessary, to move the group to a safer location." (J.A. 739; *see also* J.A. 571.) Sgt. Donaldson then relayed this order to Sgt. Pope and told him "to let the picketers continue their

demonstration in Lawyers' Mall, even though the group did not have a permit to use the mall." (J.A. 739; *see also* J.A. 76, 78.)

Sgt. Pope's Repeated Instructions That the Demonstrators Move to Lawyers' Mall

Sgt. Pope approached Kevin Hulbert, who was still standing alone on the sidewalk in front of Lawyers' Mall with signs around him. (J.A. 85, 739.) Sgt. Pope learned from Kevin Hulbert that the rest of the group was getting something to eat. (J.A. 86, 739.) Sgt. Pope did not observe any immediate safety concerns, but he anticipated that they would arise in the near future. (J.A. 79-80, 224, 332-36, 424-25, 731-32, 746.) As a result of these safety concerns and orders from Sgt. Donaldson, Sgt. Pope "told Kevin Hulbert that because of safety concerns, even though they did not have a permit, he wanted the group to move their demonstration off the sidewalk and into Lawyers' Mall." (J.A. 739; *see also* J.A. 86.) Kevin Hulbert did not respond to the instruction, and Sgt. Pope believed Kevin Hulbert would "convey the command" to "the rest of the Patriot Picket group when they returned." (J.A. 739; *see also* J.A. 87-88.)

Approximately one hour later, Sgt. Pope saw the group demonstrating on the sidewalk. (J.A. 89-90, 740.) Sgt. Pope approached the group and directed them to "back up their demonstration approximately fifteen feet into Lawyers' Mall." (J.A. 740; *see also* J.A. 96-97, 273-78, 347-48.) This was the second instruction given directly to Kevin Hulbert and the first given to the entire group. Initially, the group

complied with Sgt. Pope's instruction "until Jeff Hulbert spoke up and said they were not going to move anywhere." (J.A. 740; *see also* J.A. 96-97, 99-100.) At this point, "Sgt. Pope repeated his command to move to Lawyers' Mall at least two more times and warned the group that if they did not comply, he would arrest them." (J.A. 740; *see also* J.A. 97, 99.)

Arrest and Citation of Jeff and Kevin Hulbert

Sgt. Pope called for backup to effectuate an arrest of Jeff Hulbert "since he was the leader of the group who had told the others not to comply with Sgt. Pope's previous orders." (J.A. 740; *see also* J.A. 98-101.) Multiple officers responded to the call for backup. (J.A. 100-01, 740.) Several people filmed the arrest, including a passerby, a member of the media who happened to be nearby, and Kevin Hulbert. (J.A. 103-04, 740.) Sgt. Pope directed "Kevin Hulbert and two others who were also filming to back up." (J.A. 740; *see also* J.A. 103-04.) "The two other people complied, but Kevin Hulbert did not" and "Sgt. Pope then placed Kevin Hulbert under arrest." (J.A. 740; *see also* J.A. 103-04.) The Hulbert brothers were searched, placed in police vehicles, and transported "to the Annapolis city police station for processing." (J.A. 740.)

Sgt. Donaldson responded to Sgt. Pope's call for backup. (J.A. 106-07, 117-19.) Sgt. Pope traditionally prepares a statement of charges when he makes an arrest, which he intended to do here. (J.A. 107-09.) But Sgt. Donaldson ordered

Sgt. Pope to issue criminal citations instead (J.A. 106-07, 117-19, 169-72, 196), which Sgt. Pope had never done before (J.A. 108, 740-41). At the Annapolis police station, Sgt. Pope issued each Hulbert brother a citation for disobeying a lawful order under § 10-201 of the Criminal Law Article.[2] (J.A. 120-21, 420-21, 740.) Sgt. Pope wanted to write them another citation for blocking the public sidewalk, but he could not locate the pertinent regulation in COMAR. (J.A. 120-21, 127, 740-41.) Instead of making the Hulbert brothers wait while he searched COMAR, he released them, at which point they had been in custody for one hour and five minutes. (J.A. 127, 272, 740-41.)

Additional Charges Against the Hulberts, Followed by Dismissal of All Charges

After Sgt. Pope released the Hulbert brothers, he explained to Sgt. Donaldson that he could not locate the proper section of COMAR governing the citation for blocking a public sidewalk. (J.A. 126-28, 741.) "Sgt. Donaldson told Sgt. Pope that he should have issued the separate other citations, and the two discussed the steps to add the charges." (J.A. 741; *see also* J.A. 127-29.) Sgt. Donaldson also called the chief of the MCP to "inform[] him that Sgt. Pope had arrested the Hulberts and they were being issued criminal citations." (J.A. 741; *see also* J.A. 235-38.) At 9:59 p.m. on the evening of February 5, the chief sent an

[2] *See* Md. Code Ann., Crim. Law § 10-201(c)(3) (LexisNexis 2012) ("A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.").

email to other members of the MCP, informing them that two protestors had been arrested and "given criminal citations." (J.A. 741; *see also* J.A. 424-25, 731-32.) The email identified two criminal citations. (J.A. 424-25, 731-32, 741.) One was for violation of § 10-201 of the Criminal Law Article, which Sgt. Pope had issued. The other citation, however, was not for the additional charge that Sgt. Pope had intended to cite—blocking a public sidewalk—but for refusal or failure to leave a public building or grounds, which is a violation of § 6-409(b) of the Criminal Law Article.[3] (J.A. 424-25, 731-32, 741.) MCP issues a citation for violation of § 6-409(b) when demonstrators refuse to adhere to public safety measures, based on the longstanding advice of the State's Attorney's Office. (J.A. 261-62, 333, 336, 401, 760, 768.)

On February 6, 2018, the chief of the MCP "noted that it did not appear that the Hulberts were issued the citations he had specified in his email from the night before." (J.A. 742; *see also* J.A. 244-45.) The chief told Sgt. Donaldson "to reach out to the state's attorney's office to see what they needed to do to add the

[3] *See* Crim. Law § 6-409(b) ("A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during regular business hours if: (1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave: (i) has no apparent lawful business to pursue at the public building or grounds; or (ii) is acting in a manner disruptive of and disturbing to the conduct or normal business by the government unit that owns, operates, or maintains the public building or grounds; and (2) an authorized employee of the government unit asks the person to leave.").

charges." (J.A. 742; *see also* J.A. 246.) Based on conversations with the State's Attorney's Office, the chief of the MCP "told Sgt. Donaldson to tell Sgt. Pope 'to write two more criminal citations for the more appropriate charges.'" (J.A. 742; *see also* J.A. 588.) The Hulbert brothers returned to Lawyers' Mall that day to do media interviews about their arrests. (J.A. 316-17, 742.) Given the close proximity of the interviews to MCP's offices, the additional charges were served on the Hulbert brothers while they were in the area. (J.A. 742.)

The chief of the MCP "had discussions with the state's attorney's office about the incident, and on February 9, 2018, the charges against the Hulberts were dismissed." (J.A. 742; *see also* J.A. 442-46.) Five days later, the Hulbert brothers filed this lawsuit. (J.A. 13, 742.)

SUMMARY OF ARGUMENT

First, the district court erred in concluding that a factual dispute precluded the entry of summary judgment on Sgt. Pope's entitlement to qualified immunity, when the only factual dispute—whether the Patriot Picket members were in the streets and crosswalks during their demonstration—was immaterial to the qualified immunity analysis.

Second, the district court also erred by analyzing whether Sgt. Pope had probable cause to arrest based solely on the citation that he gave the Hulberts for disobeying a lawful order, when the test for determining qualified immunity is an

objective one and is satisfied where the plaintiff has committed a different offense from the one that the officer believed to be committed. Here, the undisputed facts show that other officers and an Assistant State's Attorney believed that a citation for an offense other than disobeying a lawful order was also justified under the circumstances. Because officers are protected from claims for constitutional violations for reasonable mistakes as to the legality of their actions, if other officers and a prosecutor believed that a criminal offense occurred—even if not the original offense that caused Sgt. Pope to make an arrest—then this is the kind of reasonable mistake for which Sgt. Pope is entitled to qualified immunity.

Third, with respect to Kevin Hulbert's claims, the right to record law enforcement officers is not a clearly established First Amendment right. There is no such precedent from the Supreme Court, this Court, or the Court of Appeals of Maryland. This Court has only considered the issue once and, in an unpublished opinion, the panel declined to recognize the right. *Szymecki v. Houch*, 353 Fed. App'x 852, 853 (4th Cir. 2009). And the facts here differ materially from those out-of-circuit cases that have recognized a right to record law enforcement officers from a distance, where Kevin Hulbert was repeatedly instructed to move a short distance from where he was standing to a safer location, and he began filming only after he had disobeyed those instructions. And even if this Court were to recognize a constitutional right for the first time in *this* case, Sgt. Pope would still be entitled

to qualified immunity because the right would not have been clearly established at the time he took the actions at issue here.

ARGUMENT

I. THIS COURT REVIEWS DE NOVO THE DISTRICT COURT'S DENIAL OF QUALIFIED IMMUNITY.

"'A district court's denial of qualified immunity on summary judgment is reviewed de novo, applying the same legal standards as the district court did on summary judgment.'" *Halcomb v. Ravenell*, 992 F.3d 316, 319 (4th Cir. 2021) (quoting *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016)). The materiality of an alleged factual dispute is also a question of law that is reviewed de novo. *Johnson v. Caudill*, 475 F.3d 645, 649-50 (4th Cir. 2007).

II. THE DISTRICT COURT ERRED BY DENYING SUMMARY JUDGMENT BASED ON DISPUTES THAT DO NOT INVOLVE MATERIAL FACTS.

The district court concluded that disputes of fact precluded it from granting summary judgment on Sgt. Pope's assertion of qualified immunity, but none of the disputes that the court identified involves facts that are material to the issue of qualified immunity. The district court noted the presence of factual disputes five times in its memorandum opinion. (J.A. 751, 753-54, 759, 763.) In two instances, the court simply referred back to its earlier discussion of the factual disputes that it believed precluded summary judgment, without adding to that discussion. (*See* J.A. 759 (stating in First Amendment retaliation analysis that, "as this Court has

explained, factual disputes preclude the court from determining, at summary judgment, whether Sgt. Pope's orders were lawful or unlawful"), 763 (stating in Fourth Amendment analysis that, "[a]s discussed in the previous section, factual disputes prevent the Court from ruling as a matter of law on the lawfulness and reasonableness of Sgt. Pope's orders").)

As for the substantive discussions of the factual disputes on which the court denied summary judgment, all three come within the district court's discussion of the plaintiffs' claim that Sgt. Pope violated their First Amendment rights when he instructed them to move off the sidewalk and onto Lawyers' Mall. After concluding that Sgt. Pope's instructions were not motivated by the content of the plaintiffs' speech and left open ample alternative channels for First Amendment expression (J.A. 746-49), the court proceeded to analyze whether the government had a significant interest that would justify relocating the plaintiffs to Lawyers' Mall (J.A. 749-54). In that analysis, the district court identified three factual disputes that it believed precluded summary judgment:

- "there are factual disputes requiring jury resolution as to whether a legitimate government interest was served by the police action," (J.A. 751);

- there is a "factual dispute as to whether any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope ordering the group to move," (J.A. 753); and
- "there is a genuine issue of material fact as to whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions, or whether the police involvement caused the situation to become more disruptive and potentially hazardous," (J.A. 753-54).

As discussed below, the first and third of these disputes are not factual at all, but rather raise a question of law—whether the State has a significant governmental interest in public safety on its sidewalks and adjacent roadways. As for the second dispute, it *is* a factual dispute, but the disputed facts are immaterial to the issue of Sgt. Pope's entitlement to qualified immunity. Neither presents an obstacle to the entry of summary judgment in favor of Sgt. Pope.

A. Whether Sgt. Pope's Actions Advance a Legitimate Governmental Interest Is a Question of Law and Is Not an Obstacle to Summary Judgment on Qualified Immunity.

The district court's belief that there existed a factual dispute about "whether a legitimate government interest was served by the police action" (J.A. 751) does not preclude the entry of summary judgment in Sgt. Pope's favor. That is because the district court also concluded that "[t]here is no doubt that the state has a significant interest 'in maintaining the safety, order, and accessibility of its streets

and sidewalks.'" (J.A. 749 (citation and quotation omitted).) The alleged factual dispute appears to concern whether Sgt. Pope's orders successfully *achieved* the government's significant interest.

The district court identified this dispute despite acknowledging that cases in other circuits had concluded that actions similar to those undertaken by Sgt. Pope materially advanced the government's interests. (J.A. 749-51.) These cases included *Kass v. City of New York*, in which an individual who was not impeding pedestrian or vehicular traffic was ordered to move, refused to comply, and was arrested. 864 F.3d 200, 204 (2d Cir. 2017); (J.A. 751 (discussing *Kass*)). Despite the lack of *immediate* safety concerns, the Second Circuit rejected the notion "that to avoid liability [law enforcement] officers needed to refrain from intervening until [plaintiff] actually impeded pedestrian traffic or caused a security issue." *Id.* at 209. To the contrary, a law enforcement officer's duty necessarily involves anticipating threats to safety and guarding against them, rather than waiting until someone has already "caused a security issue." *Id.* The district court's statement that there is a factual dispute "as to whether a legitimate government interest was served by the police action" is therefore wrong as a matter of law, as by any standard moving a group of protestors from the sidewalk to the adjacent grassy area farther from the street will make the sidewalk safer and thus protect public safety.

In other respects, the district court acknowledged the safety concerns that Sgt. Pope encountered when he arrived at the scene on February 5, 2018. For example, "the parties agree[d] that the Hulbert brothers and approximately six other people were holding large signs somewhere in the middle of a fifteen- and one-half-foot walkway in front of Lawyers' Mall in downtown Annapolis." (J.A. 751.) The parties also agreed that "[i]t was dark, and the Maryland legislative session was expected to convene within a few hours." (J.A. 751.) And it was undisputed that pedestrians had previously been struck by vehicles at the intersection where Patriot Picket chose to hold its demonstration, a consideration that is among the safety reasons that were cited in Sgt. Pope's report. (J.A. 332, 336, 426, 445, 753.)

That those prior incidents "occurred during daylight hours in June, not, as here, when the Maryland Legislature was in session" (J.A. 753), does not make Sgt. Pope's concerns any less reasonable. After all, common sense suggests that the intersection would be *more*, rather than less, dangerous during the legislative session, when large numbers of legislators, staff, and lobbyists are present in the area. And common sense also suggests that the danger to pedestrians is *greater* in evening darkness than during the day. These considerations weigh in favor of immunity, not against it, as the government is "entitled to advance its interests by arguments based on appeals to common sense and logic . . . particularly where, as

here, the burden on speech is relatively small." *Ross v. Early*, 746 F.3d 546, 556 (4th Cir. 2017) (citations and quotations omitted).

In fact, the circumstances supporting immunity here are more pronounced than they were in *Ross*. As this Court held in *Ross*, the government's public safety interest was adequately demonstrated when "[t]he undisputed evidence reveals that the sidewalks surrounding the Arena suffer from severe congestion during performances of the Circus and that, at least once—in the year preceding the issuance of the Policy—the presence of protestors caused a significant safety hazard." *Id.* at 556. Here, *two* people had been struck by vehicles at the intersection within the prior *eight months*.

The record before the district court contains other evidence that Sgt. Pope was attempting to "avert anticipated safety risks." (J.A. 746, 747 (finding that Sgt. Donaldson and the dispatcher spoke to each other and "[t]he testimony uniformly shows these conversations were about potential safety concerns . . .").) There is no evidence of any other reason for Sgt. Pope's actions and, therefore, no dispute of fact that "Sgt. Pope believed there was a potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway." (J.A. 768.)

Ultimately, whether Sgt. Pope is entitled to qualified immunity is not determined by the success or failure of his efforts to protect public safety, but by the "'objective legal reasonableness' of the action" that he took. *Anderson v.*

Creighton, 483 U.S. 635, 639 (1987). "[Q]ualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335 (1986)). Officers are protected from claims for alleged constitutional violations "for reasonable mistakes as to the legality of their action." *Merchant v. Bauer*, 677 F.3d 656, 661 (4th Cir. 2012) (quoting *Saucier v. Katz*, 457 U.S. 800, 818 (1982)). Sgt. Pope did not "knowingly violate the law" and, according to the district court, he "believed there was a potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway." (J.A. 768.) Sgt. Pope's orders were objectively reasonable efforts to protect public safety under these circumstances or, at least, were "reasonable mistakes" entitling him to qualified immunity. *Merchant*, 677 F.3d at 661.

Nor was it appropriate for the district court to deny summary judgment on the grounds that "there is a genuine issue of material fact as to whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions, or whether the police involvement caused the situation to become more disruptive and potentially hazardous." (J.A. 753-54.) The first half of this statement is substantially similar to the court's earlier articulation of the "factual dispute," which, as discussed above, does not preclude the entry of summary judgment.

The second half of this statement—"whether the police involvement caused the situation to become more disruptive and potentially hazardous" (J.A. 754)—is irrelevant and immaterial. Sgt. Pope had already instructed the group to move to Lawyers' Mall and decided to make an arrest before any other officer arrived on scene. (J.A. 740.) In fact, the other officers only showed up *because* Sgt. Pope decided to make an arrest. (J.A. 740.) Sgt. Pope was outnumbered and had to call for additional officers as a standard safety measure to ensure officer safety during an arrest. (J.A. 99, 165.)

None of the officers who responded to Sgt. Pope's call was present when Sgt. Pope told the group to move, when the group ignored Sgt. Pope, or when Sgt. Pope decided to make an arrest. And Sgt. Pope had no control over the number of officers who would respond to his call. The conduct of third-party officers who responded to a call is not relevant to the plaintiffs' claims because all the relevant facts occurred prior to their arrival. Because plaintiffs cannot bolster their claims *against Sgt. Pope* based on after-the-fact conduct of different officers, this "factual dispute" also has no bearing on Sgt. Pope's claim for qualified immunity.

B. Whether the Plaintiffs or Other Patriot Picket Members Were in the Street or Crosswalks at the Time of the Arrest Is Not Material to the Applicability of Qualified Immunity.

The only other factual dispute identified by the district court—"whether any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope

ordering the group to move" (J.A. 753)—*is* a factual dispute, but it has no material bearing on whether Sgt. Pope is entitled to qualified immunity for the objectively reasonable measures he took to protect public safety.

As discussed above, it is well established that the State and its law enforcement officers have a significant governmental interest in maintaining public safety on its sidewalks, streets, and crosswalks. That legal conclusion does not turn on whether any of the Patriot Picket members were in the street or crosswalk prior to Sgt. Pope instructing them to move onto Lawyers' Mall, as the district court believed. (J.A. 753.) And even if it did, the *un*disputed facts already establish the legitimacy of the State's public safety concerns:

- "[T]he parties agree that the Hulbert brothers and approximately six other people were holding large signs somewhere in the middle of a fifteen- and one-half-foot walkway in front of Lawyers' Mall in downtown Annapolis" (J.A. 751);
- "It was dark, and the Maryland legislative session was expected to convene within a few hours" (J.A. 751);
- This was the same intersection where pedestrians recently had been struck by vehicles under less dangerous circumstances, namely, in daytime and when the Legislature was not in session (J.A. 753); and

- Sgt. Pope was moving the group a short distance for the purpose of protecting public safety (J.A. 79-80, 217-18, 224, 332-36, 424-25, 731-32, 739, 746-47, 768).

As the district court elsewhere acknowledged, other courts have deemed these same considerations sufficient to establish qualified immunity in factually analogous circumstances. (*See* J.A. 751 (citing *Kass*, 864 F.3d at 208), for the proposition that "not allowing passersby to engage with protestors while standing in the public sidewalk 'in the heart of Manhattan, shortly before 5 p.m.' was justified").

In an effort to address the district court's concerns about the factual record, Sgt. Pope filed a motion for reconsideration for the express purpose of placing before the court the surveillance video footage that captured the kinds of safety concerns that he was trying to protect against.[4] (J.A. 10; ECF 102 at 6-7.) In responding to the motion for reconsideration, plaintiffs argued that the surveillance video was "irrelevant because the appropriateness of an arrest is measured from what the officer knew at the time of the arrest" and because "it does not show

[4] When argued in the district court below, plaintiffs-appellees pointed out one scene in the video involving a third party "who improperly crosses the street at time mark 7:24:22, causing two cars to stop and let the pedestrian pass." ECF 101 at 18. That individual may not have been affiliated with the Patriot Picket, but their conduct does highlight the same safety concerns that Sgt. Pope was trying to protect against, particularly in light of the recent pedestrian accidents at this intersection under less dangerous circumstances.

either of the brothers who were arrested in the street at all." ECF 101 at 12; *see also* ECF 101 at 11, 17 (referring to the video evidence "irrelevant"). Despite the plaintiffs' assertion that their specific movements were irrelevant, and despite having video available to document those movements, the district court denied the motion for reconsideration and denied the motion for leave to file the electronic video file in physical format as moot. (J.A. 783.) The district court erred when it relied on an immaterial fact in denying summary judgment, when the plaintiffs agreed that the issue was irrelevant and when that fact could have, and should have, been resolved by the motion for reconsideration.

It was undisputed that Sgt. Pope acted solely in an effort to protect public safety and not to impair plaintiffs' speech. Before Sgt. Pope approached the group, Sgt. Pope's supervisor spoke with the dispatcher and, as the district court found, the "testimony uniformly shows these conversations were about potential safety concerns." (J.A. 747.) "Although he recognized no apparent immediate threat to public safety, based on his discussion with dispatch and [his superior officer], Sgt. Pope believed there was a potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway" (J.A. 768) and acted in an attempt "to avert [those] anticipated safety risks" (J.A. 746). Not only is it reasonable and responsible, but it is also Sgt. Pope's job to anticipate threats to safety and guard against them. Telling the group to move from the sidewalk to the

immediately adjacent grassy area would clear the sidewalks, create distance between the demonstration and the roadway, and make the area safer.

If there is any doubt whether Sgt. Pope committed a constitutional violation on these undisputed facts, then Sgt. Pope is entitled to qualified immunity. If there is a close question of constitutional law—even with the benefit of a robust record and access to relevant appellate opinions to guide the analysis—then it would be unfair to subject a police officer to money damages for potentially making an honest mistake during real-time interactions with the public. That is the very purpose of qualified immunity. Whether members of the Patriot Picket were in the streets and crosswalks is immaterial to the analysis and the district court erred when it denied qualified immunity based on that immaterial and irrelevant fact. The record is otherwise undisputed and Sgt. Pope is entitled to qualified immunity as a matter of law.

III. THE DISTRICT COURT ERRED WHEN IT FAILED TO CONSIDER ALTERNATIVE ARGUMENTS FOR QUALIFIED IMMUNITY.

Even if Sgt. Pope were mistaken about the lawfulness of his orders, he would still have had probable cause to arrest and thus is entitled to qualified immunity. "Probable cause is determined from the totality of the circumstances known to the officer at the time of the arrest." *Brown v. Gilmore*, 278 F.3d 362, 367 (4th Cir. 2002). "The proper focus of the inquiry is not any subjective reason for arresting [an individual], but only the objective facts surrounding the arrest."

Pegg v. Herrnberger, 845 F.3d 112, 119 (4th Cir. 2017). An officer can arrest a person subjectively believing that the individual had committed one offense when the individual had committed a completely different offense. "As the Supreme Court has previously explained, the 'subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.'" *Id.* (quoting *Devenpeck v. Alford*, 543 U.S. 146 (2004)).

"Even if probable cause to arrest is ultimately found not to have existed, an arresting officer will still be entitled to qualified immunity from a suit for damages if he can establish that there was 'arguable probable cause' to arrest." *Escalera v. Lunn*, 361 F.3d 737, 743 (2d Cir. 2004); *Orem v. Gillmore*, 813 Fed. App'x 90, 92-93 (4th Cir. 2020) (quoting and citing to the Eighth Circuit to recognize that qualified immunity applies if there is "'arguable probable cause,' which 'exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is objectively reasonable'" (citation omitted)).

The district court analyzed whether probable cause existed by focusing solely on Sgt. Pope's order that plaintiffs move from the sidewalk to Lawyers' Mall, and it denied qualified immunity based on the immaterial factual dispute discussed above. (J.A. 759, 763.) In so doing, the district court ignored the principle that an officer's subjective reason for making the arrest need not be the criminal offense charged when the known facts provide probable cause for other

charges. Here, in addition to Sgt. Pope believing in good faith that his order to move back onto Lawyer's Mall was lawful and reasonable under the circumstances, he also believed that he had probable cause to arrest the Hulbert brothers for obstructing sidewalks. (J.A. 740-41.) And other officers—with the advice of the State's Attorneys' Office—determined the next day that probable cause existed to add trespass charges under § 6-409(b) of the Criminal Law Article. (J.A. 760); *see also* COMAR 04.05.01.03.

The Maryland Capitol Police contacted an Assistant State's Attorney for advice the morning after the arrests and, with the benefit of hindsight, the prosecutor agreed that adding new charges was appropriate. (J.A. 742.) The officer who contacted the State's Attorney's Office testified that she reviewed the new charges and approved them "[w]ith the help of the state's attorney." (J.A. 402-03.) She elaborated that it was "common practice" for her to contact "the state's attorney or assistant state's attorney to get direction," and that she had spoken to an Assistant State's Attorney here because she "wanted to make sure [she] was doing it appropriately." (J.A. 404-05.) The prosecutor provided advice on several matters, including the time to serve additional charges, how to handle the previously-issued charges, and, importantly, agreed that the additional charges were "the proper charges." (J.A. 405-06.) Several other MCP officers also agreed that it was appropriate to add the new charges. (J.A. 741-42.)

The district court did not analyze whether probable cause, or arguable probable cause, existed for these other violations. That oversight is significant because, unlike the charge of failing to obey a lawful order, the charge of obstructing sidewalks has never been the subject of an appellate decision that could aid in defining the scope and contours of the violation. And in the absence of analogous precedent, principles of qualified immunity allow law enforcement officers to enforce the law as it is plainly written to the best of their abilities. Here, where Sgt. Pope's decision to issue the three charges was confirmed by several other officers and by the prosecutor's office, there is no basis on which to conclude that Sgt. Pope was acting beyond the scope of his legal authority. *See Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2012) (holding that a prosecutor's authorization of charges weighs "heavily *toward* a finding that [the officer] is immune" and it "is compelling evidence and should appropriately be taken into account in assessing the reasonableness of [an officer's] actions") (emphasis in original)).

The Supreme Court has repeatedly instructed that "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 577 U.S. at 12 (2015) (quoting *Malley*, 475 U.S. 335). Officers are protected from claims for constitutional violations "for reasonable mistakes as to the legality of their actions." *Merchant*, 677 F.3d at 661 (quoting *Saucier*, 457

U.S. at 818). There is no evidence that Sgt. Pope was "plainly incompetent" when he attempted to protect public safety by moving a demonstration a few feet farther away from a street with a recent history of pedestrian accidents. And even if Sgt. Pope is deemed to have made a mistake, the concurrence of other officers and the prosecutor's office establishes that it was a reasonable mistake that does not affect his entitlement to qualified immunity.

IV. SGT. POPE IS ENTITLED TO QUALIFIED IMMUNITY FROM THE CLAIMS ASSERTED BY KEVIN HULBERT.

Unlike his brother, who asserts a First Amendment right to lawfully assemble, Kevin Hulbert brings a claim for violation of what he asserts to be a First Amendment right to record law enforcement, which is pleaded in Count II of the complaint. (J.A. 29-30, 353.) Sgt. Pope is entitled to qualified immunity on Kevin Hulbert's claim because—in the absence of controlling precedent from the Supreme Court, this Court, or the Court of Appeals of Maryland—there is no "clearly established" right to record law enforcement within this circuit.

Even if this Court were to recognize such a right for the first time now, Sgt. Pope would still be entitled to qualified immunity because the right to record law enforcement, when defined "'at a high level of particularity," *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004), was not beyond debate in February 2018, when the events at issue unfolded. Because Sgt. Pope is entitled to qualified immunity for Kevin Hulbert's claim for violation of his alleged First Amendment

right to record law enforcement, Sgt. Pope is also entitled to qualified immunity for Kevin Hulbert's alleged claims for First Amendment retaliation and Fourth Amendment unlawful search and seizure as a matter of law.

A. Recording Law Enforcement is Not a Clearly Established Right Under the First Amendment.

To determine whether a right was clearly established at the time that the right was allegedly violated, "'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (quoting *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)). Neither the Supreme Court nor the Maryland Court of Appeals has addressed whether there is a First Amendment right to record law enforcement without the officer's consent. This Court, however, *has* addressed the issue and agreed with a district judge's conclusion that the "First Amendment right to record police activities on public property was not clearly established in this circuit." *Szymecki v. Houch*, 353 Fed. App'x 852, 853 (4th Cir. 2009).

Although unpublished opinions are not binding precedent in this circuit, *Szymecki* has served as the basis for district judges who likewise have concluded that the alleged right to record law enforcement is not clearly established within

this circuit.[5] *See, e.g.*, *J.A. v. Miranda*, No. 16-3953, 2017 WL 3840026, *6 (D. Md. Sept. 1, 2017) (Xinis, J.) (concluding that the right to record law enforcement was not clearly established in the Fourth Circuit and that, "[i]f anything, *Szymecki* underscores that this First Amendment right is *not* clearly established by expressly reaching that very conclusion in an unpublished opinion"); *Garcia v. Montgomery County*, 145 F. Supp. 3d 492, 508 (D. Md. 2015) (Chaung, J.) (reviewing this Court's holding in *Szymecki* and concluding that, as of 2015, "the Fourth Circuit has not provided police officers with fair warning that it is unconstitutional to stop someone from video recording the police in the routine public performance of their duties").

Two recent decisions demonstrate that the right to record law enforcement was still considered uncertain at this time when Sgt. Pope took the actions at issue in this case. In *Maliki v. City of Parkersburg*, No. 19-cv-00520, 2020 WL 4929025 (S.D. W.Va. June 29, 2020), the court reviewed *Szymecki*, and the lack of contrary authority from the Supreme Court, this Court, and West Virginia Supreme Court of Appeals, and concluded that "[t]he state of the law, at least according to these three courts whose opinions govern this case, did not change between [*Szymecki*] and June 2, 2018," *id.* at *4. Because "recording the police is not First

[5] *Szymecki* has also been cited by other federal appellate courts. *See*, *e.g.*, *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 n.29 (5th Cir. 2017); *Mocek v. City of Albuquerque*, 813 F.3d 912, 930 (10th Cir. 2015).

Amendment 'protected speech,' it cannot serve as the basis for a First Amendment retaliation claim like the one Plaintiff seeks to bring here." *Id.* And in *Sharpe v. Winterville Police Dep't*, 480 F. Supp. 3d 689, 607 (E.D.N.C. 2020) , the district court also reviewed *Szymecki* to find that the right to record law enforcement was not clearly established in this circuit. Although neither decision constitutes binding precedent, they reflect an ongoing debate among the district courts as to whether a right to record law enforcement exists and, if so, what its contours might be. *Contra Dyer v. Smith*, No. 3:19-cv-921, 2021 WL 694811, at *8 (E.D. Va. Feb. 23, 2021) (Gibney, J.) ("Although neither the Supreme Court nor the Fourth Circuit has recognized a right to record government officials performing their duties, both the general constitutional rule and a consensus of cases clearly establish this right.").

The uncertainty among district judges about whether a right to record law enforcement is clearly established in this circuit is particularly pronounced in this case, because Kevin Hulbert was not acting as a bystander recording a third party's law enforcement encounter, as is typically the circumstance in which courts have addressed the potential right to record law enforcement. *See, e.g.*, *Miranda*, 2017 WL 3840026, at *1 (plaintiff was filming the arrest of another person from the living room in his own home); *Garcia*, 145 F.Supp.3d at 499-501 (a photojournalist was filming an arrest occurring across the street from a distance of

thirty-five feet); *Fields v. City of Phila.*, 862 F.3d 353, 356 (3rd Cir. 2017) (one plaintiff was recording the arrest of a third party without interfering and another plaintiff took photos of police breaking up a house party from a public sidewalk); *Turner v. Lieutenant Driver*, 848 F.3d 678, 683-84 (5th Cir. 2017) (plaintiff filmed a police station from the public sidewalk across the street from the station). Instead, Kevin Hulbert only began filming *after* he had disobeyed Sgt. Pope's repeated instructions to move for safety reasons. The district court in *Sharpe* explained that such facts would further complicate the question because "the Fourth Circuit has not held in a published opinion that an individual's right under the First Amendment to record a traffic stop is clearly established, *much less* held that an individual has a right to record and real-time broadcast a traffic stop *from within the stopped car*." *Sharpe*, 480 F. Supp. 3d at 698 (emphasis added). As a result, the asserted right to record law enforcement was not clearly established at the time of Kevin Hulbert's arrest, and even less clear was whether such a right would extend to his situation, where he was the subject of the law enforcement encounter. Indeed, two other people were filming, complied when Sgt. Pope told them to move, and were not arrested. That fact demonstrates that Kevin Hulbert was arrested not for filming a police encounter, but for refusing to adhere to reasonably crafted safety measures. (J.A. 740; *see also* J.A. 103-04.) These considerations further underscore Sgt. Pope's entitlement to qualified immunity.

B. The District Court Erroneously Relied on *Ray v. Roane* in Denying Qualified Immunity.

Szymecki is this circuit's most recent decision addressing the subject, and there the Court affirmed a district court's conclusion that the "asserted First Amendment right to record police activities on public property was not clearly established in this circuit." 353 Fed. App'x at 853. The district court was nevertheless persuaded to deny qualified immunity based on *Ray v. Roane*, 948 F.3d 222 (4th Cir. 2020), in which this Court stated that, "[i]n the absence of 'directly-on-point, binding authority,' courts may also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'" *Id.* at 229 (quoting *Booker v. South Carolina Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017)); (J.A. 756-58). That reliance, however, was based on a misreading of *Ray*.

1. *Ray* Does Not Authorize the Use of Out-of-Circuit Precedent When, as Here, There Is a Fourth Circuit Decision that Resolves the Issue.

This Court in *Ray* denied qualified immunity for Fourth Amendment claims arising out of an officer's fatal shooting of a dog when "it was in [plaintiff's] yard, tethered, and incapable of reaching or harming [the officer]." 948 F.3d at 225. The Court did not, however, base its conclusion on the "consensus of persuasive authority" in other circuits, as the district court believed. Instead, *Ray* was firmly grounded in this Court's own precedents, and the Court used the "consensus of

persuasive authority" from other circuits only to confirm its conclusion. *Id.* at 229-30. It was able to do because, under its own precedents, "it [wa]s well-settled that privately owned dogs are 'effects' under the Fourth Amendment, and that the shooting and killing of such a dog constitutes a 'seizure,'" such that the only question to be answered was whether shooting Ms. Ray's dog "was reasonable under the circumstances alleged in the complaint." *Ray*, 948 F.3d at 227 (citing *Altman v. City of High Point, N.C.*, 330 F.3d 194, 203-05 (4th Cir. 2003)). *Ray* acknowledged that, notwithstanding *Altman*'s longstanding guidance, the Court had previously "never had the occasion to hold that it is unreasonable for a police officer to shoot a privately owned animal when it does not pose an immediate threat to the officer or others." *Id.* at 229. Still, *Ray* concluded that the asserted right followed from *Altman* clearly enough that it was objectively and "'manifestly apparent' to a reasonable officer[.]" *Id.* at 230.

No such analogous Fourth Circuit precedent supports the denial of qualified immunity here. This Court has adopted no "general constitutional principles" that would make a right to film law enforcement "'manifestly apparent'" even to a reasonable officer, when at least four judges within the circuit have disagreed with the conclusion reached by the district court here. *Sharpe*, 480 F. Supp. 3d at 698; *Maliki*, 2020 WL 4929025 at *4; *Miranda*, 2017 WL 3840026 at *6; *Garcia*, 145 F. Supp. 3d at 508. And what one finds in this circuit's most recent encounter with

the question of a First Amendment right to film law enforcement is an unwillingness to recognize such a right *at all*, even at the level of general constitutional principles. *Szymecki*, 353 Fed. App'x at 853 (affirming the district court's conclusion that a clearly established "First Amendment right to record police activities on public property" did not exist). Whatever value a "consensus of persuasive authority" from other circuits might have "[i]n the absence of 'directly-on-point, binding authority,'" *Ray*, 948 F.3d at 229, it does not apply when *Szymecki* had already declined to recognize a clearly established right to film law enforcement. That is because, "'if a right is recognized in some other circuit, but not in this one, an official will ordinarily retain the immunity defense.'" *Id.*

2. The District Court Relied on Decisions from Other Circuits That Are Factually and Legally Different From this Case.

Even if it were appropriate to rely on out-of-circuit authority to override this Court's conclusion in *Szymecki*, several decisions on which the district court relied (J.A. 754-55) involved circumstances markedly different from this case. In *Fields v. City of Philadelphia*, 862 F.3d 353 (3rd Cir. 2017), the Third Circuit concluded that defendant officers were entitled to qualified immunity from First Amendment claims for retaliation and a Fourth Amendment claim for unreasonable search and seizure. The facts involved two recordings: (1) one by a civilian who took a photo of the police breaking up a house party, and (2) one by a person who attempted to

record the arrest of a third party at a protest and was prevented from doing so when she was forced against a wall by a police officer. *Id.* at 356. Both arrestees were at least fifteen feet from the police activities and were not otherwise interfering with those activities. *Id.* Although the Third Circuit recognized a clearly established right to record police, it also explained that it had hitherto "never held that such a right exists, only that it might." *Id.* at 361. Accordingly, *Fields* ultimately held that existing law did not give "fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected" and concluded that the officers were entitled to qualified immunity. *Id.* at 362.

Importantly for the present case, the Third Circuit declined to define the limits of that right, instead stating that it "is not absolute," and it is "'subject to time, place, and manner restrictions.'" *Id.* at 360. The court also made clear that "not . . . all recording is protected or desirable" and specifically noted that, "[i]f a person's recording interferes with police activity, that activity might not be protected." *Id.* *Fields*, then, is not authority for the proposition that Sgt. Pope's actions *here* implicate a clearly established right.

Similarly, in *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), the Fifth Circuit held that an officer was entitled to qualified immunity for claims brought by a plaintiff who, while video-recording a police station, was detained for

failing to provide identification to an officer. *Id.* at 683-84. The panel majority noted that other circuits have held that the First Amendment protects the right to record police,[6] but it also stated that "[w]e cannot say, however, that 'existing precedent . . . placed the . . . constitutional question *beyond debate*.'" *Id.* at 687 (emphasis in original) (internal citation omitted). *Turner* concluded that the right to record law enforcement is clearly established subject to reasonable time, place, and manner restrictions, *see id.* at 687-88, but it also held that, "[i]n light of the absence of controlling authority and the dearth of persuasive authority, there was no clearly established First Amendment right to record the police at the time of [plaintiff's] activities." *Id.* at 687. As a result, the officers were entitled to qualified immunity. *Id.*

In *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), a person who recorded from thirty feet away an officer's traffic stop of her friend's car was later arrested and charged with offenses that included illegal wiretapping. *Id.* at 2-3. The court denied qualified immunity in large part due to specific precedent within the First Circuit. *Id.* at 7-10. Before *Gericke* was decided, the First Circuit had already recognized a right to record police. *Id.* at 7 (citing *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011)). The court held that a reasonable officer would have known that

[6] Judge Edith Clement dissented "from the majority's dicta purporting to clearly establish a First Amendment right to film the police." *Id.* at 696 (Clement, J., dissenting).

there is a clearly established right to record law enforcement, including during a traffic stop. That distinguishes *Gericke* from this case, where the only circuit-level guidance—*Szymecki*—expressly *declined* to recognize the right.

In *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2011), the ACLU sought a preliminary injunction to prevent "prosecutors from enforcing [a new] eavesdropping statute against people who openly record police officers performing their official duties in public." *Id.* at 586. The statute made it a felony to record the audio of a conversation unless everyone involved gave consent. *Id.* at 587-88. The Seventh Circuit, in a 2-1 decision, concluded that "the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny." *Id.* at 600. The court stated that the law was "likely unconstitutional," *see id.* at 608, but given the nature of the case, it never decided whether the right to record police is clearly established or whether an officer would be entitled to qualified immunity. In sidestepping that issue, the court noted that different judges had resolved that issue differently: "This case does not, of course, raise a question of qualified immunity; we do not need to take sides in the circuit split in order to decide this case." *Id.* at 601 n.10.

In *Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020), an officer arrested someone who was watching another officer perform traffic stops. *Id.* at 1087. The appeal concerned only "denial of qualified immunity to a police officer

who stopped, frisked, and handcuffed a person who had been watching another police officer perform traffic stops." *Id.* It was a Fourth Amendment case, not a First Amendment case. *Id.* at 1088. In a 2-1 decision issued two years *after* Sgt. Pope's actions here, the Eighth Circuit held that "no reasonable officer could conclude that a citizen's passive observation of a police-citizen interaction from a distance was criminal." *Id.* at 1090. The Eighth Circuit did not decide the ultimate issue of whether the officer was entitled to qualified immunity, because that determination involved a "factual dispute" that was not within the appellate court's jurisdiction on interlocutory appeal, *see id.* at 1089, but the dissenting judge nonetheless concluded that the officer "is entitled to qualified immunity," *id.* at 1099 (Gruender, J., dissenting).

In reaching its decision in *Chestnut*, the Eighth Circuit majority looked at cases where the ability to record police was found to be a constitutional right and held that "[t]his robust consensus of cases of persuasive authority suggests that, if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary prerequisite to recording." *Id.* at 1090. The dissenting judge acknowledged the line of cases establishing the right to record police, but maintained that "the fact that a certain right exists does not mean it is without limits, nor does it necessarily indicate that it is obvious how the right applies to a certain set of facts." *Id.* at 1096 (Gruender, J., dissenting). The

dissenting judge believed that *Chestnut* involved distinguishing facts—the person followed the officer from stop to stop, the officer considered this suspicious, and they were in a neighborhood where police recently faced violent attacks—which meant that "a reasonable officer could believe it would not violate clearly established law to conduct an investigative stop." *Id.* at 1096-97 (Gruender, J., dissenting).

These cases are factually and legally different from this case, and none establishes that the right to record police is clearly established within *this* circuit, much less under the specific circumstances of this case. Even if there were a clearly established right to record law enforcement peacefully from a distance, these cases would not place a reasonable officer on notice that it would violate clearly established law to arrest someone who had disobeyed multiple orders to move a few feet for safety reasons and then took out a cell phone to record the officer.

That conclusion is underscored by the fact that some of the out-of-circuit cases cited by the district court here contained dissents. As the Supreme Court has recognized, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 608 (1999). If this Court were to conclude that there is a First Amendment right to record law enforcement—and that the right

protects people who are being ordered to move for safety reasons and choose to record the officer only after receiving and disobeying multiple orders—then Sgt. Pope should still be granted qualified immunity. If the right exists, it was not clearly established in February 2018 to fit the particular facts of this case such that a reasonable officer in Sgt. Pope's shoes would have known that his actions violated a clearly established right.[7]

C. Even if This Court Were to Conclude That Recording Law Enforcement Generally is a Clearly Established Constitutional Right, Sgt. Pope Would Still Be Entitled to Qualified Immunity in This Case of First Impression.

As discussed above, district judges in this circuit have been asked several times in the years since *Szymecki* whether there was a First Amendment right to record the activities of law enforcement and many of them have concluded that there is not. Thus, even if this Court were to conclude *now* that the right to record

[7] To the extent that the district court relied on Sgt. Pope's own statements to find a clearly established right (J.A. 757-58), that reliance constitutes legal error, because an officer's "subjective beliefs" about the legality of his conduct "are irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *see also Wilson v. Kittoe*, 337 F.3d 392, 402 (4th Cir. 2003) (the inquiry into whether "[a] right is 'clearly established'" is "an objective one, dependent not on the subjective beliefs of the particular officer at the scene"); *Frasier v. Evans*, 992 F.3d 1003, 1016, 1019 (10th Cir. 2021) (holding that "it is therefore 'irrelevant' whether each officer defendant actually believed—or even in some sense knew—that his conduct violated . . . the First Amendment"). And even if Sgt. Pope's statements were relevant, he made those statements in response to questioning about a general right to record law enforcement, not a specific right to record under the circumstances of this case—a distinction that, as discussed in text, several courts have highlighted.

law enforcement is clearly established under the circumstances of this case, Sgt. Pope would still be entitled to qualified immunity in this case of first impression.

For the law to be clearly established, it cannot "be defined 'at a high level of generality'"; rather, it must "be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). Adherence to this principle takes on critical importance here because, unlike many of the cases that have considered whether the right exists for a peacefully-filming bystander, such a right was certainly not clearly established given the facts and circumstances of Kevin Hulbert's arrest, where he recorded law enforcement officers during his own encounter with them. In fact, one district court within this circuit recently granted qualified immunity in a case where, like Kevin Hulbert's, the plaintiff's recording went beyond recording as a bystander. Citing *Szymecki*, the Eastern District of North Carolina held in 2020 that qualified immunity applied when plaintiff's activity "not only involves the right of a passenger in a stopped vehicle during a traffic stop to record police, but also to real-time broadcast such a recording during a traffic stop." *Sharpe*, 480 F. Supp. 3d at 697. Given that courts within this circuit have held *after* the events of February 2018 that even a generally applicable right to record law enforcement would not defeat qualified immunity under the circumstances present here, Sgt. Pope is entitled to qualified immunity even if the

Court were to announce now, for the first time, a constitutional right to record law enforcement.[8]

[8] Because Kevin Hulbert does not have a viable First Amendment claim for the alleged right to record law enforcement, his remaining claims—for First Amendment retaliation and Fourth Amendment seizure—also fail as a matter of law. If recording law enforcement after being ordered to move a short distance for safety reasons "is not First Amendment 'protected speech,' it cannot serve as the basis for a First Amendment retaliation claim." *Maliki*, 2020 WL 4929025, at *4. The same is true for Kevin Hulbert's Fourth Amendment claim, which the district court said hinges entirely on whether he was engaging in clearly established First Amendment activity when arrested. (J.A. 763 (denying summary judgment based solely on factual disputes that prevented the court from ruling on the "lawfulness and reasonableness of Sgt. Pope's orders" under the First Amendment). As discussed above in text, Sgt. Pope's orders were lawful and reasonable, but at a minimum, in the absence of constitutionally protected activity, Sgt. Pope's orders in such circumstances amounted to "reasonable mistakes" for which officers are entitled to qualified immunity.

CONCLUSION

The judgment of the United States District Court for the District of Maryland should be reversed and the case remanded with instructions to dismiss the remaining claims against Defendant-Appellant Sgt. Brian T. Pope.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

The defendant-appellant respectfully requests that the Court hear oral argument in this appeal. The defendant-appellant submits that oral argument would aid the Court in disposition of this appeal, which raises questions of qualified immunity, including a question of first impression for this Court.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 10,247 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Fourteen point, Times New Roman.

/s/ James N. Lewis

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James N. Lewis

TEXT OF PERTINENT PROVISIONS

United States Code, Title 28

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1291(c) and (d) and 1295 of this title.

§ 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

§ 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress

providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

(b) For purposes of this section--

(1) the District of Columbia shall be considered to be a State; and

(2) any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 25 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Annotated Code of Maryland, Criminal Law Article (LexisNexis 2012)

§ 6-409. Refusal or failure to leave public building or grounds

* * *

Prohibited--During regular business hours

(b) A person may not refuse or fail to leave a public building or grounds, or a specific part of a public building or grounds, during regular business hours if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave:

(i) has no apparent lawful business to pursue at the public building or grounds; or

(ii) is acting in a manner disruptive of and disturbing to the conduct of normal business by the government unit that owns, operates, or maintains the public building or grounds; and

(2) an authorized employee of the government unit asks the person to leave.

§ 10-201. Disturbing the public peace and disorderly conduct

Definitions

(a) (1) In this section the following words have the meanings indicated.

(2) (i) "Public conveyance" means a conveyance to which the public or a portion of the public has access to and a right to use for transportation.

(ii) "Public conveyance" includes an airplane, vessel, bus, railway car, school vehicle, and subway car.

(3) (i) "Public place" means a place to which the public or a portion of the public has access and a right to resort for business, dwelling, entertainment, or other lawful purpose.

(ii) "Public place" includes:

1. a restaurant, shop, shopping center, store, tavern, or other place of business;

2. a public building;

3. a public parking lot;

4. a public street, sidewalk, or right-of-way;

5. a public park or other public grounds;

6. the common areas of a building containing four or more separate dwelling units, including a corridor, elevator, lobby, and stairwell;

7. a hotel or motel;

8. a place used for public resort or amusement, including an amusement park, golf course, race track, sports arena, swimming pool, and theater;

9. an institution of elementary, secondary, or higher education;

10. a place of public worship;

11. a place or building used for entering or exiting a public conveyance, including an airport terminal, bus station, dock, railway station, subway station, and wharf; and

12. the parking areas, sidewalks, and other grounds and structures that are part of a public place.

Construction of section

(b) For purposes of a prosecution under this section, a public conveyance or a public place need not be devoted solely to public use.

Prohibited

(c) (1) A person may not willfully and without lawful purpose obstruct or hinder the free passage of another in a public place or on a public conveyance.

(2) A person may not willfully act in a disorderly manner that disturbs the public peace.

(3) A person may not willfully fail to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace.

(4) A person who enters the land or premises of another, whether an owner or lessee, or a beach adjacent to residential riparian property, may not willfully:

(i) disturb the peace of persons on the land, premises, or beach by making an unreasonably loud noise; or

(ii) act in a disorderly manner.

(5) A person from any location may not, by making an unreasonably loud noise, willfully disturb the peace of another:

(i) on the other's land or premises;

(ii) in a public place; or

(iii) on a public conveyance.

(6) In Worcester County, a person may not build a bonfire or allow a bonfire to burn on a beach or other property between 1 a.m. and 5 a.m.

Penalty

(d) A person who violates this section is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 60 days or a fine not exceeding $500 or both.

Annotated Code of Maryland, State Finance & Procurement Article (LexisNexis 2015)

§ 4-605. Police and security force; transfers, powers

In general

(a) (1) In accordance with the provisions of the State Personnel and Pensions Article, the Secretary may establish a police and security force, known as the Maryland Capitol Police of the Department of General Services, to protect people and property on or about improvements, grounds, and multiservice centers under the jurisdiction of the Department, and in the surrounding areas of the buildings and grounds in the State as described in § 4-601 of this subtitle.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SGT. BRIAN T. POPE,	*	
Defendant-Appellant,	*	
v.	*	No. 21-1608
CLAYTON R. HULBERT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY HULBERT, *et al.*,	*	
Plaintiffs-Appellees.	*	

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CERTIFICATE OF SERVICE

I certify that, on this 24th day of January, 2022, the Brief of Appellant and Joint Appendix was filed electronically and served on counsel of record, all of whom are registered CM/ECF users:

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