

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

BRIAN T. POPE,

Defendant-Appellant

v.

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

Plaintiffs-Appellees.

Case No.: 21-1608
1:18-CV-00461-SAG

**APPELLEE’S OPPOSITION TO APPELLANT’S MOTION
TO SUSPEND BRIEFING PENDING RESOLUTION OF THE
MOTION FOR RECONSIDERATION OR, IN THE
ALTERNATIVE, FOR A 30-DAY EXTENSION**

Comes now the Appellee, and files the aforesaid opposition, stating as follows:

I. INTRODUCTION AND RELEVANT FACTS

This action was initiated on February 14, 2018 in response to Sergeant Brian T. Pope’s (“Appellant” or “Sgt. Pope”) infringement on Jeff Hulbert and Clayton Hulbert’s (“Appellees” or “the Hulberts”) first amendment rights to assembly and speech. On February 5, 2018, the Hulberts were peacefully picketing on a public sidewalk in Maryland’s capital with a small group of less than ten people during a legislative session to raise awareness about certain state laws.

Acting on orders given by the advance team of the Lt. Governor, who wanted the Lt. Governor to walk through the area without the picketers interacting with him, Sgt. Pope unconstitutionally ordered the picketers to move. When one of the Hulbert brothers remained on the public sidewalk with a sign, he was arrested, as was another of the Hulbert brothers, who was not picketing or carrying a sign, but only filming events from a reasonable distance.

On the night of February 5, 2018, when Defendant Pope arrested the Hulberts, Defendant Pope issued a single criminal citation to each Hulbert brother. In the citation, both Hulberts were charged with “willfully fail[ing] to obey a reasonable and lawful order of a law enforcement officer to which made to prevent a disturbance to the public peace.” ECF No. 84-3, Exhibit D (D. Md. February 11, 2021) at 3-4.

Under Md. Code, Crim. Law § 10-201(c)(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.” In other words, the elements of the crime charged require that the law enforcement order be made to prevent a breach of the peace. *Spry v. State*, 396 Md. 682, 692–93 (2007) (quoting *Drews v. State*, 224 Md. 186, 192 (1961)).

To issue a valid criminal citation for disorderly conduct due to a failure to obey an order of law enforcement under the circumstances present in this case,

Officer Pope would need to demonstrate: (1) that the individual's conduct was interfering with the public order or leading to a breach of the peace; and (2) that the officer directed the individual to move on in order to prevent a breach of the peace.

Prior to arriving on the scene, Officer Pope had no information that there was anything unlawful happening. *See* ECF No. 84-2, Exhibit C (D. Md. February 11, 2021). When Defendant Pope first arrived at the scene, Defendant Pope did not even see anyone walking down the sidewalk in the area, much less anyone that the Hulberts were obstructing:

Q. When you could first see the scene of this area with your own eyes in front of Lawyers' Mall, tell me what you saw.

A. I saw the one guy there with all the signs on the ground.

Q. As you approached did that scene change, or was it still one guy and signs when you first got there?

A. It was the same when I got there.

Q. And in your description of the scene, you didn't mention any other people. You didn't see anybody else as you an approached?

A. No.

Q. Nobody was walking down the sidewalk?

A. I didn't pay attention to anybody walking down the sidewalk.

Q. But you didn't see anyone that you recall?

A. Not that I recall.

Q. So when you got there, the only two people you recall on the sidewalk were yourself and Mr. Hulbert?

A. Right.

Id. at 80-81.

Defendant Pope further testified that he was not concerned with the safety of anyone in the area, and did not see any condition that looked unsafe:

Q. Now when you said that, did you feel safe at the moment?

A. Yes, I did. Safe from like danger?

Q. Safe from anything, yeah. You felt safe, didn't you, comfortable?

A. Yes.

Q. And did Mr. Hulbert look safe when you said that?

A. He looked safe.

Q. And you don't remember anybody else being there?

A. Correct.

Q. Did any condition that you could see at that time look unsafe?

A. Not that I could see.

Id. at 82-83. Pope left and returned shortly thereafter.

The second time that Defendant Pope saw the Hulberts and the picketers that night, he similarly did not see anyone else on the sidewalk or in the area, and the demonstration did not obstruct Defendant Pope's ability to transverse the sidewalk or obstruct any vehicular traffic:

Q. And when you were there within 20 feet of them, you don't recall seeing anybody else on the sidewalk other than the picketers; is that right?

A. That's correct.

Q. And were you able to freely go across or was anything they were doing affecting your ability to walk across at that point?

A. They couldn't affect my ability from where they were standing and where I was crossing. They were up further.

Q. And there weren't any cars stopped or, the traffic was flowing freely on the road, correct?

A. I know there was nothing stopped so yes, they could go freely.

Id. at 90-91.

Defendant Pope then approached the picketers and the Hulberts to ask them to move to a grassy area where it would be harder for them to be seen, called Lawyer's Mall. At this point, Defendant Pope still did not see anyone else on the sidewalk and was still able to traverse the sidewalk freely and without obstruction:

Q. Now as you approached them, could you see anyone else on the sidewalk besides the people with pickets?

A. I wasn't paying attention.

Q. So not that you recall?

A. Not that I recall.

Q. And you were able to approach them freely, you were able to move freely in the area?

A. Yes.

Q. And traffic was flowing freely?

A. I didn't come that way. The way I was coming from I was coming from Lawyers' Mall, so there was no traffic.

Q. But you didn't see any traffic being impeded in any way, did you?

A. No, not at that time.

...

Q. And nothing that they were doing prevented you from getting where you needed to go or exercising your duties, did it?

A. No.

Id. at 93-95.

Although people began to congregate and film the police officers *after* Defendant Pope initiated the arrests and called for backup, at no point prior to the arrests were either pedestrian or vehicular travel obstructed:

Q. So when there were eight police officers responding in front of Lawyers' Mall, the police presence caused some people to stop and pull out their cameras?

A. Probably.

Q. And that's what it [looked] liked to you?

A. Yes.

Q. And prior to the presence of a police officers, you didn't see anybody stopped or filming or anything like that?

A. No.

Q. And prior to the presence of the eight police officers, people could freely come and go as far as you saw, you didn't see anybody stopped or couldn't get by; is that right?

A. That's correct.

Q. And prior to the police officers being there, you didn't observe anybody in any unsafe condition or behavior, did you?

A. No.

...

Q. So the officers were impeding driving traffic with their lights on with their cars stopped in the intersection when they arrived; is that right?

A. I don't know if you would call it impeding, but they couldn't park on the sidewalk.

Q. And prior to the arrival of the police cars that you've already described, people could come and go freely; is that right?

A. Yes.

Id. at 114-117. As Officer Pope clarified:

Q. Now the way you've described it to me prior to these arrests -- let me put it this way. Prior to the officers' arrival, the way you described it to me, there was no disturbance or disruption of the normal business in the area by these people being there?

A. Not at that time, no.

Q. Prior to the officers being there?¹

¹ A disorderly conduct charge cannot be based on a disruption caused by police action. In *Diehl v. State*, 294 Md. 466 (1982), the Court of Appeals reversed a defendant's conviction for disorderly conduct where a police officer unlawfully ordered the defendant to get back in his car during a traffic stop and the defendant verbally protested the illegal order. The commotion caused by the police action had drawn a crowd of onlookers, but the Court of Appeals found that a disturbance had not been created where "[p]eople might have begun to stop, look and listen,

A. Correct.

Id. at 129-130.

Indeed, Defendant Pope, a trained police officer, admitted that there was no disturbance of the peace at all to support his arrest of the defendants:

Q. Did you ever observe either of the Hulberts disturbing any normal business that was going on there before the police arrived, before the group of eight officers was there?

A. What do you mean, disturb normal business?

Q. Disturbing the conduct of any normal business.

A. No.

Q. Did you see the Hulberts disturbing the peace in any way before the eight officers were on the scene?

A. No.

Q. Now after the eight officers arrived, did you see the Hulberts disrupting normal business or disturbing the peace?

A. No.

Id. at 142-143 & 107 (emphasis supplied).

Given the foregoing, the elements of disorderly conduct were not satisfied as to either Kevin Hulbert or Jeff Hulbert. Defendant Pope had no possible

forming a crowd,” because of the police conduct, as those individuals “probably were mere curiosity seekers.” *Id.* at 472; *see also Higginbotham v. Brauer*, No. CV DKC 18-1067, 2020 WL 4569520, at *4 (D. Md. Aug. 7, 2020) (finding that summary judgment was not appropriate where plaintiff introduced evidence that “a crowd already existed, and his actions did not draw the crowd,” leading to the absence of probable cause for a disorderly conduct charge).

justification to order the Hulberts to move on from the area, as a police officer is only permitted to do so in a situation like this one when the individuals are a danger to public peace. As Defendant Pope admits that there was no obstruction of travel, no unsafe conditions, and no fear for anyone's safety, Defendant Pope did not issue the order to promote public safety.

Rather, Defendant Pope arrested Jeff Hulbert and criminally charged him without probable cause in an effort to procure compliance by the group with the unlawful order to move:

Q. So you believed that by arresting Jeff Hulbert you could stop the picketing on the sidewalk; is that right?

MR. FREDERICKSON: Objection to the form.

BY MR. HANSEL:

Q. Is that right?

A. Yes.

Q. And that was your goal?

A. Right. And they went into Lawyers' Mall after we placed those two under arrest.

Id. at 100-101.

Defendant Pope made the decision to arrest Kevin Hulbert and charge him with disorderly conduct while Kevin Hulbert was filming the arrest of Jeff Hulbert, despite the fact that Hulbert was aware of the right to film police. *Id.* at 107-108. Kevin Hulbert testified that he was 20 feet away while filming and Pope

approached him to make the arrest. ECF No. 84-1, Exhibit B (D. Md. February 11, 2021) at 29-31.

Defendant Pope did not witness any conduct from either Kevin or Jeff Hulbert that could possibly constitute disorderly conduct pursuant to Md. Code, Crim. Law § 10-201(c)(3). Thus, the original criminal citations issued against the Hulberts on the evening of February 5, 2018 were unsupported by probable cause and unconstitutional. The order to move and these citations also violated the Hulberts' First Amendment rights.

At Defendant Pope's deposition, Defendant Pope was played a recording of the call that originated from the Governor's Mansion, about the presence of the Hulberts and the picketers. After listening to the call, Defendant Pope agreed that there was no concern about public safety that justified the request, and admitted that asking picketers to move just so that the Lieutenant Governor would not have to interact with them is *not* a lawful request:

Q. You agree with me there's no mention of safety anywhere in there, right?

A. No.

Q. Okay, right, which means there's no mention of safety?

A. No.

Q. Okay, all right. So instead, what I heard was that the governor's mansion called your office and said that the lieutenant governor was about to talk to the senate building or from the senate building, and

they didn't want the protesters to interact with the lieutenant governor; do you agree with me that that's a synopsis of what we heard?

MR. FREDERICKSON: Objection to the form.

THE WITNESS: Yes.

BY MR. HANSEL:

Q. Having heard that, and with your training as a 20-plus year police officer, and given that you know people have a First Amendment right to protest, do you agree with me that preventing people from interacting with the lieutenant governor is an inappropriate reason to ask somebody that is picketing to move?

MR. FREDERICKSON: Objection.

MR. McFARLAND: Objection. Go ahead.

THE WITNESS: I guess that would be.

BY MR. HANSEL:

Q. And do you agree with me that if this call -- if this is the reason why people were asked to move, it's against their constitutional rights?

MR. FREDERICKSON: Objection.

MR. McFARLAND: Objection. Go ahead.

THE WITNESS: It sounds like it.

ECF No. 84-2, Exhibit C (D. Md. February 11, 2021) at 125-127.

Defendant Pope further admitted that if he had known the full context of the call that was made, he would have acted differently and not even approached the Hulberts or Patriot Picket at all:

Q. Had you known at the time that this was the basis or the genesis of what happened, would you have done something differently, would you have not asked them to move had you known at the time?

MR. McFARLAND: Objection.

MR. FREDERICKSON: Objection.

THE WITNESS: Yes.

BY MR. HANSEL:

Q. What would you have done differently?

A. Based on that, that's different than what I was told. I probably would have never went out there at all.

Id. at 129.

Not surprisingly, the District Court denied Sgt. Pope's motion for summary judgment as to the claims at issue on appeal, finding that there were outstanding factual issues to be resolved by a jury. ECF No. 88 (D. Md. April 22, 2021).

Among other reasons to justify denial of the motion, the District Court found that there were factual disputes related to multiple issues:

“there are factual disputes requiring jury resolution as to whether a legitimate government interest was served by the police action.”

“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.”

“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.”

“factual disputes preclude the Court from determining, at summary judgment, whether Sgt. Pope's orders were lawful or unlawful.”

ECF No. 88 at 15, 17-18, 23 (D. Md. April 22, 2021).

On May 7, 2021, Appellant filed a Motion for Reconsideration in the District Court. *See* ECF No. 91 (D. Md. May 7, 2021). The Motion for Reconsideration attached previously *unsubmitted* video evidence which the defense had produced almost three years earlier in discovery. In other words, *the sole basis for reconsideration is a video which had been in the possession of the defense for years*, but which the defense failed to properly submit with its summary judgment motion.

In the Motion to Suspend, Appellant seeks to excuse the failure to provide the video earlier by claiming it could not “be converted to a file format that is acceptable to the District Court,” during the summary judgment stage, so he “proceeded to file the motion for summary judgment without submitting the surveillance footage as an exhibit because other video footage filmed by a member of the media was available and showed the latter part of the incident when police had arrived.” *See* ECF No. 18 at 2 (4th Cir. July 19, 2021).

Appellant claims that “[u]ltimately, the Office of the Attorney General’s Information Technology Department was able to create a file in a format that is approved by the [D]istrict [C]ourt by playing the video on the Department’s computer and recording the screen with a screen capture feature,” but offers no explanation as to why this approach was impossible at the time of summary

judgment. ECF No. 18 at 4 (4th Cir. July 19, 2021). Indeed, screen capture technology of this type has been in use by the undersigned for a decade or more.

On May 20, 2021, Appellant filed an appeal in this Court to “avoid challenges to the timeliness of the filing.” ECF No. 18 at 5 (4th Cir. July 19, 2021). The Motion to Suspend offers that “[a]fter drafting the brief of appellant, it has become clear that this Court would benefit from a ruling on the Motion for Reconsideration because it could potentially either narrow the questions to be resolved in this interlocutory appeal or eliminate the need for the appeal altogether.” *Id.* at 5-6. Similarly, in the Motion for Reconsideration, Counsel for Appellant argues that “the surveillance video resolves [the] factual dispute” regarding whether demonstrators were in the street prior to the Hulberts’ arrests. ECF No. 91 at 2 (D. Md. May 7, 2021).

However, for the reasons demonstrated below, the Court should find that (1) the Appellate briefing schedule should not be suspended because Appellant’s Motion for Reconsideration is non-meritorious and (2) that the District Court properly identified outstanding factual issues which can only be resolved through jury trial or an appellate decision, and (3) that the instant motion is nothing more than Appellant’s attempt to further delay already drawn-out proceedings and deny obstruct Appellees’ access to judicial relief.

II. ANALYSIS

Appellant's Motion for Reconsideration in the District Court is without merit and does not warrant the suspension of the briefing schedule. Permitting this Motion would cause unnecessary delay of the proceedings and is not in the interest of judicial efficiency.

a. Appellant's Motion for Reconsideration is non-meritorious because it does not fall within the narrow set of grounds on which a court reconsiders its interlocutory orders or opinions.

Motions for Reconsideration under Rule 54(b) are often reviewed under the standards applicable to motions under Rules 59(e) or 60(b), since "the Fourth Circuit has not identified the precise standard for resolving such a motion." *Blanch v. Chubb & Sons, Inc.*, 124 F.Supp.3d 622, 629 (D. Md. 2015). Therefore, "[m]ost courts have adhered to a fairly narrow set of grounds on which to reconsider their interlocutory orders and opinions." *Id.* Courts only reconsider an interlocutory order when "(1) there has been an intervening change in controlling law; (2) there is additional evidence that was not previously available; or (3) the prior decision was based on clear error or would work manifest injustice." *Id.* (citing *Nana-Akua Takyiwaa Shalom v. Payless Shoesource Worldwide, Inc.*, 921 F.Supp.2d 470, 480 (D. Md 2013)); *Hill v. Braxton*, 277 F.3d 701, 708 (4th Cir. 2002). "[Motions for reconsideration] are disfavored and should be granted 'sparingly.'" *Wootten v. Commonwealth of Virginia*, 168 F.Supp.3d 890, 893 (W.D. Va. 2016)(citing

Downie v. Revco Disc. Drug Ctrs., Inc., No. 3:05-CV-00021, 2006 WL 1171960 at *1 (W.D. Va. May 1, 2006).

Under established Fourth Circuit precedent, neither Rule 54(b) nor 59(e) should be used to “rehash arguments” that the court has already considered “*or to submit evidence which should have been previously submitted.*” See *In re Pella Corp. Architect and Designer Series Windows Mktg., Sales Practices & Prods. Liabl. Litig.*, 269 F. Supp. 3d. 685, 691 (D.S.C. 2017) (emphasis added); see also, *South Carolina v. United States*, 232 F. Supp. 3d. 785, 793-94 (D.S.C. 2017) (“[A] motion to reconsider an interlocutory order should not be used to rehash arguments the court has already considered merely because the movant is displeased with the outcome.”).

Previously unavailable evidence is that which “could not have been timely submitted in the exercise of reasonable diligence.” See *Jensen v. Conrad*, 570 F.Supp. 114, 128-29 (D.S.C. 1983) (explaining that “summary judgment will generally not be altered or vacated on the basis of supplemental exhibits or affidavits filed after summary judgment is granted . . . [t]his is particularly true in a case . . . where the party seeking to amend judgment has made absolutely no showing that the additional evidence offered could not have been timely submitted.”)(citing *Clarke v. Montgomery Ward & Co.*, 298 F.2d 346 (4th Cir. 1962).

Under Federal Rule of Civil Procedure 52(a), “[f]indings of fact shall not be set aside unless clearly erroneous.” “[I]f substantial evidence was presented to support the trial court’s determination; it is not clearly erroneous and cannot be disturbed.” *Ryan v. Thurston*, 347 A.2d 834, 836 (Md. Ct. Spec. App. 1975). In other words, to meet the third circumstance under which this Court may reconsider its decision, Defendant must show that this Court’s ruling was not supported by substantial evidence.

Sgt. Pope correctly admits in his own Motion for Reconsideration that the District Court generally disfavors motions for reconsideration. ECF No. 91 at 1 (D. Md.). Further, Sgt. Pope does not specify which of the three narrow circumstances that a court reconsiders its interlocutory orders his Motion for Reconsideration falls under. Nowhere in the Motion for Reconsideration does Sgt. Pope contend that there has either been an intervening change in controlling law or that the District Court’s decision in its Memorandum Opinion was based on clear error or would work manifest injustice. The only remaining circumstance that could possibly warrant Sgt. Pope’s Motion for Reconsideration is to present additional evidence that was not previously available.

As noted above, it is well settled in the Fourth Circuit that such motions should not be used to submit evidence which should previously have been submitted. Appellant has been in possession of the surveillance video he now

attempts to submit since at least February 8, 2018. ECF No. 76-23, Exhibit U (D. Md. December 16, 2020). On that date, at 11:03 AM Mary Ellen Nardone of the State Attorney's Office requested from Rebecca Labs of the Maryland Capitol Police "all and any of the above that you may have on Kevin and Jeff Hulbert." *Id.* Ms. Labs promptly responded to Ms. Nardone's request at 12:31 PM, providing her with the video. *Id.*

It was incumbent upon counsel for Appellant to ensure that this evidence was converted to an acceptable format for the court and file for leave of court to submit a physical copy of the evidence, if necessary. Appellant clearly failed to take these steps and instead neglected to offer the surveillance video as evidence. Electronic Case Filing Policies and Procedures Manual at 16, *available at* <https://www.mdd.uscourts.gov/sites/mdd/files/CMECFProceduresManual.pdf>.

Sgt. Pope does not offer any reason as to why this video could not be submitted to evidence previously aside from the fact that "[he] did not anticipate that this would be as significant an issue during briefing of the motion for summary judgment." ECF No. 91 at 2 (D. Md. May 7, 2021). This is not an acceptable explanation as to why the video was not submitted prior to summary judgment when Appellant has been in possession of the video since February 8, 2018.

Appellant also attempts to argue that the surveillance video submission was delayed due to “ongoing technical difficulties,” yet at the same time states that these difficulties were overcome by converting the video with a simple screen capture feature. ECF No. 18 at 2, 4 (4th Cir. July 19, 2021). Had Appellant properly and diligently attempted to submit all relevant evidence at the appropriate juncture, prior to summary judgment, he would have undoubtedly been able to overcome the cited technical difficulties in the same manner.

Appellant’s Motion for Reconsideration will fail not only because the surveillance video evidence that should have been previously submitted, but because the District Court’s findings of fact cannot be set aside unless it meets the clearly erroneous standard. Appellant claims that the District Court’s ruling on the Motion for Reconsideration will “narrow the questions to be resolved in this interlocutory appeal or eliminate the need for the appeal altogether.” ECF No. 18 at 6 (4th Cir. July 19, 2021). However, in so arguing, Appellant neglects to mention that the outstanding issues from summary judgment were identified after review of evidence before the court, including “other video footage filmed by a member of the media [which] was available and showed the latter part of the incident when police had arrived.” *See* ECF No. 18 at 2 (4th Cir. July 19, 2021). Therefore, the District Court’s decision cannot and should not be set aside because the Court had

video evidence of the incident when issuing its summary judgment decision and properly based its decision on substantial evidence.

b. The surveillance video that Appellant belatedly submitted is irrelevant.

“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)(emphasis added). A charge of willful failure to obey a reasonable and lawful order of a law enforcement officer under Md. Crim. Law §10-201 “requires a public disturbance.” *Higgin Botham v. Brauer*, 2020 WL 4569520, at *5 (D. Md. August 7, 2020).

In its Memorandum Opinion, the District Court denied summary judgment on the matter of whether Sgt. Pope’s actions on the day of the incident properly served a significant government interest and ultimately concluded 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.” ECF No. 88 at 17-18 (D. Md. April 22, 2021). Instead of offering previously unavailable evidence to support the conclusion that there was a real, non-conjectural safety issue at the time that Sgt. Pope issued the unconstitutional orders, Appellant has chosen to hone in on the matter of whether any demonstrators were in the street or crosswalks prior to Sgt. Pope’s orders to move. ECF No. 91 at 2. Though the

District Court did identify this as a factual dispute, the video neither supports (1) the contention that there were demonstrators in the street or crosswalks prior to Sgt. Pope's orders, nor (2) clarifies whether there was an actual safety issue at the time that Sgt. Pope issued those orders.

Counsel for Appellee have reviewed the surveillance video in question. The video does *not* “[show] that the group regularly walked across the streets with their signs before the arrests.” *Id.* Instead, the video shows that one or two demonstrators used the crosswalks to lawfully and safely periodically cross the street. At no point does the video show that the demonstrators created a safety issue that called for police involvement.

On the contrary, the video shows that the demonstrators never crossed the streets in a group and that each time one of the demonstrators did cross the street, they did so carefully and lawfully by looking out for traffic and using the crosswalks.

The video also shows that pedestrians were able to regularly use the crosswalks without impediment, which is also a factual finding supported by Sgt. Pope's own deposition testimony. ECF No. 88 at 15. (D. Md. April 22, 2021).

The most substantial safety risk shown in the video is posed by a pedestrian – not associated with the picketers – who improperly crosses the street at time mark 7:24:22, causing two cars to stop and let the pedestrian pass.²

At no point in the video do any of the demonstrators improperly enter the street prior to Pope's unlawful orders. After police arrive and after the orders, one individual who was filming the arrests steps into the street without obstructing traffic.

Critically, neither of the Hulbert brothers ever crossed the street or entered the crosswalk or roadway at any time in the video, and it was not one of the Hulbert brothers who briefly stepped into the street after the orders were given and police were on the scene. The video depicts the Hulberts arriving at the scene and staying on the Lawyer's Mall side of the street where the picketing primarily took place.

Orders given to the Hulberts must be justified *by the actions of the Hulberts* in order for the order to them to be lawful. Nothing the Hulberts did justified an order to them to move. The fact that two other individuals lawfully crossed the

²The video also shows approximately five police vehicles arriving at the scene to arrest two people. At only one point in the video, after the arrival of the police vehicles, is one demonstrator seen standing in the street next to a police vehicle to gain a vantage point for filming the arrests. It is likely that, as the District Court suggested, "the police involvement caused the situation to become more disruptive and potentially hazardous." ECF No. 88 at 17-18 (D. Md. April 22, 2021).

street at various points in the surveillance video does not justify *the Hulberts'* arrests.

Moreover, even if it was the Hulberts who crossed the street safely in the crosswalk, doing so is perfectly lawful and does not provide grounds to order one to move.

In addition, the order to move was *not* to stay out of the crosswalk, but instead to leave a public sidewalk. Such an order is not justified by the conduct alleged. In other words, even if the persons crossing the street had cause a problem (they did not), the relevant order would have been not to cross the street. Having someone leave a public sidewalk because they earlier crossed a street is simply illogical and, therefore, an unlawful order.

Finally, there is nothing disorderly shown on the video (*and the defense does not even contend otherwise*). Even if the Hulberts were the ones crossing the street (*they were not*); even if the crossing was unlawful (*it was not*); even if ordering them off of a public sidewalk was rationally related to crossing the street (*it was not*), there was still no disturbance of the peace – as Officer Pope himself has admitted.

The Hulberts were initially arrested under a charge of “willfully [failing] to obey a reasonable and lawful order of a law enforcement officer to . . . prevent a disturbance of the public peace.” Since a charge of willful failure to obey a

reasonable and lawful order of a law enforcement officer under Md. Crim. Law §10-201 requires a public disturbance and an officer generally determines probable cause from the totality of the circumstances known to the officer at the time of arrest, Sgt. Pope is required to articulate the public disturbance that the Hulberts were causing at the time of their arrests.

According to Sgt. Pope's deposition, "he did not see the group blocking traffic or creating any unsafe conditions and that, prior to the arrival of multiple police officers and police vehicles, people could 'come and go freely' and there was 'no disturbance or disruption of the normal business in the area.'" ECF No. 88 at 15 (D. Md. April 22, 2021) (citing ECF 84-2 at 80-83 (D. Md. February 11, 2021)); *see also* ECF 76-1 at 31 (D. Md. December 16, 2020) (acknowledging that "Sgt. Pope did not observe the presence of any immediate safety hazards.").

Appellant's own testimony therefore unequivocally establishes that there was no public disturbance at the time of the Hulberts' arrests based on his assessment of the totality of the circumstances.

The surveillance video submitted in conjunction with the Motion for Reconsideration similarly supports the absence of a public disturbance at the time of Appellees' arrests.

Further, the District Court has recognized the ultimate irrelevance of the question of whether someone crossed the street:

Nothing in the video or testimony before the Court suggests pedestrians' efforts to use the sidewalk were frustrated by the group prior to the arrests. Still, Defendants argue that even though the demonstration was not immediately unsafe, an emerging threat to safety justified Sgt. Pope's actions. Specifically, Defendants argue that because "[p]edestrians had been hit by cars at this intersection within the prior year, safety issues were reasonably anticipated in the area." ECF 76-1 at 33 (citation omitted). They also note that there have been dozens of unrelated complaints to the police about cars not stopping for pedestrians. ECF 176-7 at 109. However, unlike in *Ross*, where there was a clear link between a past incident with a circus protestor and the plaintiff's conduct, there is no evidence that the circumstances surrounding these vehicle accidents or complaints had anything in common with the Patriot Picket's February 5 demonstration. There is nothing suggesting the safety threats had occurred in conjunction with any kind of First Amendment activity, and the accidents appear to have occurred during daylight hours in June, not, as here, when the Maryland Legislature was in session. *See* ECF 76-20 (reporting that pedestrians "were struck by passing vehicles on June 6, 2017 at 3:08 pm and June 21, 2017 at 6:48 pm").

See ECF No. 88 at 17 (D. Md. April 22, 2021).

Finally, even setting aside the irrelevancy of the issue of whether anyone stepped into the street, the Motion to Reconsider is doomed to failure because there are other factual disputes. These include, "whether a legitimate government interest was served by the police action;" and "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." ECF No. 88 at 15, 17-18 (D. Md. April 22, 2021).

c. Appellant does not cite adequate cause to suspend briefing or to extend it by 30 days.

Appellant contends that his appellate brief is fully drafted, but that the briefing should nonetheless be suspended since a Motion for Reconsideration is pending in the District Court. ECF No. 18 at 5-6 (4th Cir. July 19, 2021). Since Appellant's brief is prepared, the schedule should move forward promptly because the surveillance video offered does not properly dispose of the outstanding factual issues identified in the District Court's summary judgment ruling. This matter has endured for years, to the extent that one of the original Plaintiffs has died and is now represented by his estate. The instant Motion to Suspend serves no purpose other than to delay proceedings further, frustrating Appellees' access to relief for the constitutional harms caused in this case.

On various occasions throughout litigation, counsel for Appellant has caused unnecessary delay. On July 10, 2019, the plaintiff served written discovery to include document requests. After extensive attempts to obtain compliance, on October 28, 2019, Appellees filed a motion to compel discovery. Even after the motion to compel was filed and the Court ordered production, Appellants were still submitting discovery documents as late as July 2, 2020 – *over a year after the requests were made* – at which time Appellees were provided with part five of a five-part document production and a 39-page privilege log claiming privilege for many of the requested discovery documents. In light of the instant Motion to

Suspend and Appellant's previous attempts to delay or prevent discovery, Appellees request that the court recognize these actions as Appellant's continued effort to further delay proceedings.

III. CONCLUSION

Since Appellants brief is prepared, the Motion for Reconsideration will fail in the District Court, and this Motion to Suspend Briefing is an attempt to further delay proceedings, Appellees respectfully request that this Court deny Appellants' Motion to Suspend Briefing.

Respectfully Submitted,

Hansel Law, P.C.

/s/ Cary Hansel

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of August, 2021, the foregoing motion was filed with the Court's CM/ECF system which shall effect service on all parties so entitled.

/s/ Cary Hansel

Cary J. Hansel