

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

BRIAN T. POPE,

Defendant-Appellant

v.

Case No.: 21-1608

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

Plaintiffs-Appellees.

**APPELLEE’S REPLY TO DEFENDANTS’
OPPOSITION TO MOTION TO DISMISS**

COME NOW the plaintiffs-appellees by and through undersigned counsel and submit this reply to the Appellant’s Opposition to Appellees’ Motion to Dismiss, stating as follows:

ANALYSIS

I. Appellant’s Treatment of the Record Inherently Disputes Facts Settled by the District Court.

The government may restrict protected speech by regulations that are (1) “content-neutral,” (2) “narrowly tailored to serve a significant government interest,” and (3) “leave open ample alternative channels of communication.” *United States v. Grace*, 461 U.S. 171, 177 (1983).

Throughout his opposition to plaintiff's motion to dismiss and his brief to this court, appellant Sergeant Brian T. Pope ("Sgt. Pope") attempts to disguise factual issues as legal ones while ignoring the limits of this court's jurisdiction. Sgt. Pope's argument notes only *some* of the factual findings identified by the district court and ignores those which are adverse to his position. By employing this strategy, Sgt. Pope effectively disputes the district court's factual findings that disfavor qualified immunity. Even if this court applies the (irrelevant) standards referenced by appellant in his opposition, none of the questions presented in appellant's brief qualify for review by this court.

Appellant improperly focuses on the district court's findings that "the state has a significant interest in 'maintaining the safety, order, and accessibility of its streets and sidewalks'" and that his conversations with the dispatcher "were about potential safety concerns." Appellant's Br. at 17, 22. Regardless of any interest the state may have in maintaining the safety and order of its sidewalks and streets, the relevant question here is "whether [Sgt. Pope's] decision to move [the] demonstration off the sidewalk for safety reasons was a permissible time, place, and manner restriction, which therefore would not violate the First Amendment." J.A. 746.

Sgt. Pope's brief confuses the district court's analysis of the first and second elements of the applicable legal standard for determining whether a government

official has issued a valid time, place and manner restriction. *See Grace*, 461 U.S. at 177. The district court's recognition that Sgt. Pope's discussions with the dispatcher solely discussed potential safety concerns does not support the assertion that he properly acted to serve a legitimate government interest. Rather, it goes to the district court's analysis as to whether his actions were content-neutral.

Despite the government's low burden of proof on the "significant interest" element of the analysis, the district court found Sgt. Pope's argument unsatisfactory because he could not show that "the harm or risk of harm the restriction [sought] to address [was] 'real and not merely conjectural.'" J.A. 749-50, 753 (citing *Ross v. Early*, 746 F.3d 546, 556 (4th Cir. 2014)). The district court did acknowledge that the Hulberts and six other members of Patriot Picket were holding signs on the walkway in front of Lawyers' Mall, but it expressly declined to find that these circumstances presented a safety issue because "[t]here [was] no evidence that Jeff Hulbert and the rest of his group were actually impeding the flow of pedestrian or vehicular traffic prior to being told to move to Lawyers' Mall." J.A. 751.

Importantly, the district court's finding was supported by the fact that "Sgt. Pope repeatedly testified at his deposition that he did not see the group blocking traffic or creating any unsafe conditions and that, prior to the arrival of multiple

officers and police vehicles, people could ‘come and go freely’ and there was ‘no disturbance or disruption of the normal business in the area.’” J.A. 751-52.

Appellant repeatedly attempts to manufacture a relevant safety concern that would justify his actions by referencing the fact that two pedestrians had been hit by cars at the intersection near Lawyers’ Mall in the prior year. Appellant’s Brief at 16. Additionally, the phrasing on page 16 of appellant’s brief would suggest that the district court deemed these two prior instances of pedestrian injuries irrelevant because they “occurred during daylight hours in June.” *Id.* In reality, the district court performed an in-depth analysis of the applicable caselaw before determining that these incidents did not support a finding that a safety issue existed when Sgt. Pope issued his orders to the Hulberts and Patriot Picket. J.A. 749-54.

The district court properly made a fact-based inquiry into the circumstances of this case and compared them to the facts in *Ross* before determining that the two prior incidents where pedestrians were injured near Lawyers’ mall were irrelevant. J.A. 753 (“[U]nlike 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 Patriot Pickets’ February 5 demonstration.”)

Appellant’s selective focus on cherry-picked factual findings would suggest that it is unnecessary for a court to determine whether Sgt. Pope’s actions served

the government's interest in keeping public streets and sidewalks safe when in fact, it is crucial to the determination of whether his actions violated the Hulbert's First Amendment rights. The constitutionality of appellant's actions simply cannot be determined without first settling the factual disputes identified by the district court, namely, the factual disputes as to whether "a legitimate government interest was served by the police action," "any real, non-conjectural safety issue was aided by Sgt. Pope's actions," and "any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope ordering the group to move." J.A. 751, 753. As is explained *infra*, the materiality of these disputes is not at issue because the substantive law determines that they are indeed material to the resolution of this matter.

II. This Court Need Not Weigh the Materiality of the Factual Disputes Herein Because *Anderson* is Instructive.

"As to materiality, the substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (U.S. 1986)

Appellant attempts to persuade this Court that he seeks a determination as to the materiality of whether (1) a legitimate government interest was served by the police action and (2) any Patriot Picket members were in the street or crosswalks at the time of the Hulberts' arrests. Both of these are heavily fact-based inquiries, and the latter is particularly important since it is the crux of appellant's repeated contention that "Sgt. Pope acted solely in an effort to protect public safety." *See*,

e.g., Grayned v. City of Rockford, 408 U.S. 104, 118-119 (emphasizing the importance of accounting for fact and circumstances particular to a case before determining whether a legitimate government interest justifies a restriction on speech); Appellant’s Br. at 22.

Firstly, it is plainly untrue that “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.” *See* Appellant’s Br. at 15. The premise of this assertion would necessarily rely on the presence of an actual threat requiring action from Sgt. Pope to neutralize it. Without such a threat, Sgt. Pope’s actions were purely arbitrary. J.A. 749 (“[T]he government must do more than ‘identify an interest that is significant in the abstract.’”) (citing *Ross*, 746 F.3d at 552).

Secondly, the factual question of whether any Patriot Picket members were in the street or crosswalks at the time of the Hulberts’ arrests is absolutely material to the determination of whether Sgt. Pope’s actions served a legitimate government interest purely because Sgt. Pope relied on this fact in the lower court to justify his actions in the name of safety. J.A. 778. Sgt. Pope cannot at once contend that his actions addressed safety issues in the intersection as well as the sidewalk by simply ignoring the district court’s finding that there is absolutely “no evidence that Jeff

Hulbert and the rest of his group were actually impeding the flow of pedestrian or vehicular traffic prior to being told to move to Lawyer's Mall." J.A. 751-52.

Sgt. Pope's testimony proves that his actions did not serve any real safety objective because he admitted "he did not see the group blocking traffic or creating any unsafe conditions." J.A. 751. Additionally, in his brief, he admits that his evidence fails to meet the standard articulated by this Court in *Ross*. Appellant's Br. at 6, 15, 22 (admitting a complete lack of "immediate" safety concerns).

Furthermore, under the standards articulated in *Anderson* and *Grace*, the applicable substantive law makes any facts relating to the presence of an actual safety concern material to this case because they will determine whether a legitimate government interest was served. Because there is an applicable standard which unambiguously determines the materiality of these facts, the Court need not waste valuable time and resources making such a determination.

III. The Facts in this Case Relating to the Probable Cause Inquiry are in Dispute.

When resolving a qualified immunity claim, a court must decide: (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right" and (2) "whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009).

Question 2 of appellant’s brief advances a convoluted argument alleging that the district court “failed to consider alternative arguments for qualified immunity.” Appellant’s Br. at 23. Appellant argues that he had “other, objectively reasonable grounds for the arrest.” Appellant’s Opp’n at 3. Appellant’s brief identifies these other grounds as “probable cause to arrest the Hulbert brothers for obstructing sidewalks.” Appellant’s Br. at 24. The district court carefully considered appellant’s argument and determined that, based on his testimony, his assertion that he had probable cause to arrest the Hulberts for obstructing the sidewalk was untenable. J.A. 753 (“Nothing in the video or testimony before the Court suggests that pedestrians’ efforts to use the sidewalk were frustrated by the group prior to the arrests.”).

The question of whether Sgt. Pope had probable cause for the Hulberts’ arrests is also a heavily fact-based determination. *See, e.g. United States v. Radcliffe*, 757 Fed. App’x. 250, 252 (4th Cir. 2018) (“Whether the officer has probable cause is a fact-based inquiry.”) (citing *United States v. Humphries*, 372 F.3d 653, 657 (4th Cir. 2004)). The facts relevant to this question are disputed by the parties and must be settled by jury decision for the aforementioned reasons.

Additionally, appellant’s argument ignores the most glaring factual dispute, the materiality of which, again, is determined by the standards in *Anderson* and *Pearson*—that of the constitutionality of his orders. Individuals’ First Amendment

right to peacefully protest is indisputably established. Therefore, unless this Court can make a factual determination as to the constitutionality of Sgt. Pope's orders, the district court properly denied qualified immunity pending resolution of the facts since the first component of the standard for qualified immunity pertains to whether the facts show a violation of an established constitutional right. *Pearson*, 555 U.S. at 232. Without assessing the constitutionality, and thereby, the lawfulness, of Sgt. Pope's actions, probable cause for the Hulberts' arrests simply cannot exist since they were charged with disobeying a lawful order. J.A. 740 (citing Md. Code. Crim. Law § 10-201).

IV. Even if the District Court had not Found that the First Amendment Right to Film is Clearly Established, Sgt. Pope Would Nevertheless be Subject to Trial.

Appellant uses the third question presented in his brief to express his dissatisfaction with the district court's application of this Court's standard for determining whether a constitutional right is clearly established. *Ray v. Roane*, 948 F.3d 222, 229 (4th Cir. 2020) ("In 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.") (internal quotations and citations omitted).

The district court referenced decisions from seven other circuits before concluding that the First Amendment right to film police in the conduct of their

official duties is firmly established. J.A. 757. Sgt. Pope misguidedly relies on this Court's decision in *Szymecki v. Houck* to argue that the right is not firmly established in the Fourth Circuit. 353 Fed. App'x 852 (4th Cir. 2009). This argument ignores the standard articulated in *Ray* as well as the fact that "since *Szymecki*, five more circuits addressing this issue have agreed the First Amendment includes a right to record police interaction." *Id.*

The Hulberts' complaint alleged constitutional violations under the First and Fourth Amendments. Even if the district court had concluded that there is no First Amendment right to film police in the conduct of their official duties, Sgt. Pope would still be forced to stand trial for Kevin Hulbert's false arrest claim because he was not committing a crime when he was arrested. Kevin Hulbert was simply standing nearby, filming his brother's arrest without interfering with Sgt. Pope's ability to perform his duties. Additionally, only one of the Hulbert brothers, Kevin, was filming when he was arrested. Jeff Hulbert's First and Fourth Amendment claims have nothing to do with whether the right to film police was firmly established at the time of his arrest and as a result, trial is necessary as to those claims since relevant factual disputes are present.

Furthermore, the district court found that Sgt. Pope could not have had any legitimate reason for arresting Kevin Hulbert while he was filming because he "[did] not distinguish Kevin Hulbert's activities from the activities of the other

demonstrators and present[ed] no evidence that his filming created some different or greater threat to public safety and pedestrian traffic than picketers like Jeff Hulbert who were holding signs,” and there was no “evidence in the record [] that Kevin Hulbert’s filming otherwise impeded the officers’ execution of their duties or their ability . . . to safely and effectively arrest Jeff Hulbert.” J.A. 758, fn 5.

Finally, appellant’s reliance on *Chase v. Grant*, No. 99-7484, 2000 WL 630953 (4th Cir. May 16, 2000) to assert that this Court has jurisdiction to settle factual disputes following a denial of summary judgment on a qualified immunity defense is both woefully misguided and contradictory to this Court’s clearly articulated standard. *See Iko v. Shreve*, 535 F.3d 225, 234 (4th Cir. 2008) (“[W]e lack jurisdiction to re-weigh the evidence in the record to determine whether material factual disputes preclude summary disposition.”); *see also* Appellant’s Opp’n at 4.

The first sentence of appellant’s explanation of *Chase* correctly observes that the court remanded the case to the district court because the district court had failed to identify which facts were in dispute and explain how those disputed facts were relevant to its analysis of the defendant’s claim of qualified immunity. Appellant’s Br. at 4. The district court’s opinion in this case does not have the same deficiencies. Additionally, unlike the district court’s decision in *Chase*,

