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

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**No. 21-1608**

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**SGT BRIAN T. POPE,**

*Defendant-Appellant,*

**v.**

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

*Plaintiffs-Appellees*

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On Appeal from the
United States District Court for the District of Maryland
(The Honorable Stephanie A. Gallagher presiding)

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# BRIEF OF APPELLEES

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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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Clayton R. Hulbert, as Personal Representative of the Estate of Jeffrey Hulbert, et al.
(name of party/amicus)

who is appellee, 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/ Cary J. Hansel Date: February 23, 2022

Counsel for: Appellees, Jeff Hulbert, et al.



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## STATEMENT OF THE CASE

### Patriot Picket's Peaceful Demonstration on Lawyers' Mall

On February 5, 2018, Jeff Hulbert and Kevin Hulbert (the "Hulberts") were peacefully picketing in Maryland's capital during a legislative session as members of Patriot Picket, an informal group founded by the Hulberts to oppose infringement of Second Amendment rights. J.A. 443. The Hulberts and Patriot Picket were demonstrating on a long section of a wide public sidewalk with a group totaling a mere eight people, including the Hulberts. J.A. 95, 751. The group was not impeding or interfering with the movement of pedestrian or vehicle traffic. J.A. 85, 443. The intent of the demonstration was to bring attention to constitutional issues by displaying picket signs and answering questions from the public and passing legislators. J.A. 484.

Appellant, Sergeant Brian T. Pope ("Sgt. Pope"), had seen the Patriot Picket demonstrations before and was familiar with their Monday night picketing in the same location as the day of their arrests. J.A. 519-20. When Sgt. Pope saw the group on the night of February 5, 2018, the members of Patriot Picket were demonstrating on a public sidewalk with picket signs, in the same manner as Sgt. Pope had observed many times before. J.A. 68-263-64, 521-22. Patriot Picket demonstrates on the same sidewalk, with their signs, at the same time on almost every Monday during legislative session. J.A. 263-264. Although Sgt. Pope had

previously witnessed Patriot Picket and the Hulberts demonstrate on Monday nights in the same location, walking with picket signs on a public sidewalk, he had never issued any citations or arrested any individual connected with Patriot Picket before. J.A. 68, 522.

**Sgt. Pope's Improperly Motivated and Unconstitutional Orders**

Prior to arriving on the scene, Sgt. Pope had no information that anything unlawful was happening. JA 86-87, 122. Acting on orders given by the advance team of the Lieutenant Governor, who wanted the Lieutenant Governor to walk through the area without the picketers interacting with him, Sgt. Pope unconstitutionally ordered the Hulberts and other picketers to move from the sidewalk, a public forum, to a grassy area called Lawyer's Mall. J.A. 547-48, 621-626. This was the first and only time that Sgt. Pope had ever acted to stop a demonstration because of a complaint lodged by someone at the Governor's Mansion. *Id*. He then left and returned shortly thereafter.

An individual from the Lieutenant Governor's staff contacted the Maryland Capitol Police ("MCP") to request that Patriot Picket's demonstration be moved from the sidewalk so that Patriot Picket could not directly disseminate their message to him. J.A. 666. During deposition, the dispatcher who delivered the Lieutenant Governor's request to Sgt. Pope, Lakeisha Wesby, testified that these types of requests from elected officials were commonplace. *Id.* Additionally, she

explained that, because the MCP received these types of calls regularly, the MCP had developed a protocol that these requests be passed on to a sergeant on duty. *Id*. On the night of the Hulberts' arrests, Ms. Wesby forwarded the Lieutenant Governor's request to Sgt. Pope in accordance with this protocol. *Id.*

Ms. Wesby testified in her deposition that she explained to Sgt. Pope that, "someone had called on behalf of the Lieutenant Governor, that the Lieutenant Governor wanted to move between two buildings and did not want to interact with some protestors and was requesting that Sergeant Pope do something about it." Deposition of Lakeisha Wesby at 74-75. Pope testified that this was "the first and only time [he] had acted in connection with someone exercising their First Amendment Rights on a call from the governor's mansion." J.A. 526, 71. Pope admitted being told by Wesby that the call came from the Governor's Mansion, and that the message about the picketers was to "straighten it out" or words to that effect. J.A. 75.

Sgt. Pope interacted with the Hulberts and Patriot Picket multiple times during the evening in question, and at no point during those interactions did he observe any unsafe condition, witness any obstruction of pedestrian or vehicular traffic, or observe any other indication that Patriot Picket's lawful demonstration was in any way interfering with public order or breaching the peace. J.A. 522.

When Sgt. Pope first arrived at the scene, he did not see anyone walking down the sidewalk in the area, much less anyone that the Hulberts were obstructing. J.A. 85. In fact, the only two people on the sidewalk at the time that Sgt. Pope first approached the Patriot Picket demonstration were Kevin Hulbert and Sgt. Pope himself:

> 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.

J.A. 84-85.

When he approached the demonstration, Sgt. Pope 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.

J.A. 86-87.

The second time that Sgt. 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 pedestrians' ability to traverse 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.

J.A. 533-34.

He approached the picketers and the Hulberts to once again ask them to move to Lawyer's Mall, where it would be harder for them to be seen. J.A. 93-94. A permit is required to demonstrate on Lawyer's Mall, and Sgt. Pope was aware that Patriot Picket did not have such a permit. J.A. 76, 426. 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.

J.A. 94-96.

**Sgt. Pope's Lack of Probable Cause for the Hulberts' Arrests**

When Jeff Hulbert exercised his First Amendment right to peacefully demonstrate in a public forum and remained on the public sidewalk with a sign, he was arrested. J.A. 101. After additional police officers arrived on the scene in response to Sgt. Pope's call for backup, Kevin Hulbert, who was not picketing or carrying a sign, but only filming events from a reasonable distance, was also arrested. *Id.* Several other individuals were also filming the arrest, but Kevin Hulbert was the only person arrested for doing so. J.A. 103-04, 740.

Sgt. Pope issued a single criminal citation to each Hulbert brother. J.A. 575-576. In the citation, both Hulberts were charged with "willfully fail[ing] to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace." *Id.* Although people began to congregate and

film the police officers *after* Sgt. Pope initiated the arrests and called for backup, at no point prior to the arrests was 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.

J.A. 543-546. As Sgt. Pope clarified:

Q. …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.

J.A. 552.

Indeed, Sgt. 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.**

J.A. 554-555.

Despite that Sgt. Pope did not witness any disturbance to the peace or see the Hulberts engaging in any criminal activity, he arrested Jeff Hulbert and charged him without probable cause. J.A. 101, 540. Sgt. Pope then made the decision to arrest Kevin Hulbert and charge him with disorderly conduct for filming the arrest of Jeff Hulbert, despite that Pope was aware of the right to film police. J.A. 541-542 (agreeing that "the public has a First Amendment right to film police officers in the conduct of . . . their official duties in public"). Kevin Hulbert testified that he was 20 feet away while filming and that Pope approached him to make the arrest. J.A. 508.

The charges that Sgt. Pope issued the Hulberts on the night of February 5th fell under Md. Code, Crim. Law § 10-201(c)(3), which prohibits a person from "willfully fail[ing] to obey a reasonable and lawful order that a law enforcement officer makes to prevent a disturbance to the public peace." J.A. 561, 563. Pope's superior, Lt. Michael Wilson, was notified that night that arrests had been made. J.A. 578-579. The next morning, Defendant Wilson began to read media reports related to the arrests. The reports were generally critical of the arrests and critical of the Maryland Capitol Police's handling of the incident. J.A. 580.

Lt. Wilson admitted being upset about being "thrown under the bus" in the media. J.A. 573-575. Without having any more information than what was

reported by Defendant Pope and in the news media, Lt. Wilson directed Pope to add additional charges. J.A. 585-586; 232 & 597; *see also* J.A. 558.

In further violation of the Plaintiff's constitutional rights, Defendant Pope wrote additional criminal citations once he arrived on duty. J.A. 248. When Pope and other officers learned that the Hulberts were near Lawyer's Mall again on February 6, 2018, giving media interviews about the incident, Pope served the Plaintiffs with the new citations he had issued. J.A. 556-557. Two additional citations were then issued to the Hulberts under Md. Code, Crim. Law § 6-409(b) (Refusal or Failure to Leave Public Building or Grounds) and § 10-201(c)(1) (Disorderly Conduct, Disturbance of the Public Peace). J.A. 561-66.

In the follow-up report to the Hulberts' arrests, Colonel Wilson confirmed that on February 5, he and Sgt. Pope issued these new criminal charges to the Hulberts for "endangering pedestrians that were using the crosswalks." J.A. 606. He also noted that, two days later, he reviewed the charges with the State's Attorney, Wes Adams, who "advised that if there were more traffic and pedestrians crossing the crosswalks at the time of the arrest, there might have been more evidence of danger to the public," indicating a lack of evidence of any danger at all. J.A. 606-607. On February 9, 2018, the State's Attorney dismissed all charges against the Hulbert brothers after "reviewing all evidence covering the event." J.A.

443, 607. For all of the reasons demonstrated above, there was no probable cause for the second round of charges brought against the Hulberts either.

**The District Court's Decision to Deny Summary Judgment and Subsequent Denial to Reconsider**

On February 14, 2018, the Hulberts and Maryland Shall Issue, Inc. filed suit against Sgt. Pope and Lt. Michael Wilson. J.A. 13-42. On December 16, 2020 Defendants filed a motion for summary judgment. J.A. 9. The District Court's April 22, 2021 Memorandum Opinion and accompanying Order granted in part and denied in part the Defendants' motion. J.A. 771. Judgment was granted in favor of Defendant Michael Wilson on all counts, but denied as to Sgt. Pope on four of the Hulbert's Claims:

**Count I**, First Amendment Freedom of Speech – Lawful Demonstration;

**Count II**, First Amendment Freedom of Speech – Lawfully Filming Officers;

**Count III**, First Amendment Freedom of Speech – Retaliation and;

**Count IV**, Fourth Amendment – Unconstitutional Search and Seizure.

*Id.*

The District Court found that there were outstanding factual issues to be resolved by a jury. J.A. 751, 753-54, 759, 763. Sgt. Pope's own testimony raised questions regarding the lawfulness of his orders directed at the Hulberts during the Patriot Picket demonstration and whether he had probable cause to arrest the Hulberts on the day in question. J.A. 751.

At his deposition, Sgt. Pope openly admitted that neither of the Hulbert brothers created a disturbance to the public peace that warranted their arrests. J.A. 86-87, 122. He testified multiple times that "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.'" J.A. 106, 552, 751.

Additionally, Sgt. Pope was played a recording of the call that originated from the Governor's Mansion, about the presence of the Hulberts and the picketers. J.A. 547. After listening to the call, Sgt. 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 walk 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?

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?

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?

THE WITNESS: It sounds like it.

J.A. 547-549 (objections omitted).

Sgt. Pope, who had earlier admitted having been told by Wesby that the call to move the picketers came from the Governor's Mansion and that he was to "straighten it out," attempted to walk back those statements, but nevertheless admitted as follows:

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?

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.

J.A. 551.

It is important to recall that the employee who took the phone call and relayed the message to Pope testified that she in fact told him that "the Lieutenant Governor wanted to move between two buildings and did not want to interact with some protestors and was requesting that Sergeant Pope do something about it." Wesby testimony, *supra*.

The District Court declined to grant Sgt. Pope qualified immunity based on the following factual disputes:

> "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."
>
> "As 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."

J.A. 751, 753, 754, 759, 763.

On May 7, 2021, Sgt. Pope filed a Motion for Reconsideration. J.A. 10. The Motion for Reconsideration improperly attached previously *unsubmitted* video evidence. Sgt. Pope had been in possession of the video evidence since at least February 8, 2018. J.A. 440. In addition, the defense produced a viewable copy in discovery to the Plaintiffs long before moving for summary judgment.

Because the video evidence offered by Sgt. Pope in the Motion for Reconsideration was not previously unavailable and Sgt. Pope did not allege that the District Court's decision constituted clear error, the motion was eventually denied. J.A. 783. Sgt. Pope then filed the present interlocutory appeal on October 20, 2021. J.A. 784-85.

## STANDARD OF REVIEW

"A denial of summary judgment based on qualified immunity presents a narrow exception to the general rule that [an appellate court] cannot review a denial of summary judgment in an interlocutory appeal." *Halcomb v. Ravenell,* 992 F.3d 316, 319 (4th Cir. 2021). "[J]urisdiction to review orders denying a summary judgment motion based on qualified immunity is limited, however, to the review of legal issues." *Gray-Hopkins v. Prince George's County, Maryland,* 309 F.3d 224, 229 (4th Cir. 2002).

"In reviewing the District Court's denial of summary judgment based on qualified immunity, 'we accept as true the facts that the District Court concluded

may be reasonably inferred from the record when viewed in the light most favorable to the plaintiff.'" *Id.* (*quoting Waterman v. Batton*, 393 F.3d 471, 473 (4th Cir. 2005)). "To the extent that the District Court has not fully set forth the facts on which its decision is based, we assume the facts that may reasonably be inferred from the record when viewed in the light most favorable to the plaintiff." *Waterman*, 393 F.3d at 473.

"Federal Rule of Civil Procedure 52(a)(6) states that a court of appeals 'must not . . . set aside' a District Court's '[f]indings of fact' unless they are clearly erroneous.'" *Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 386 (2015).

## SUMMARY OF THE ARGUMENT

Sgt. Pope's appeal is frivolous because it asks the Court to review the District Court's denial of summary judgment as to qualified immunity and in doing so, ignores established jurisdictional boundaries. Sgt. Pope is not entitled to qualified immunity, or to an interlocutory appeal, because there are material factual disputes as to the lawfulness of his orders. Sgt. Pope claims that the Hulberts were ordered to move their demonstration from the public sidewalk due to safety concerns. However, the evidentiary record and Sgt. Pope's own testimony have created a dispute as to whether any actual, non-conjectural safety issue was served by his actions. If there was no such safety issue, Sgt. Pope's orders were unlawful,

did not serve a legitimate government interest, and thus infringed on the Hulberts' first amendment rights. The Appellee's Motion to Dismiss on these points is incorporated herein by reference.

Finally, the right to film police officers in the conduct of their official duties in public is firmly established by consensus among the federal circuit courts. Sgt. Pope knew or should have known that he was infringing upon Kevin Hulbert's right to film when he arrested Kevin without probable cause and is not entitled to qualified immunity.

## ANALYSIS

As a preliminary matter, this Court has no jurisdiction to review denials of qualified immunity on summary judgment where said denial is based upon the existence of factual disputes. *Hicks v. Ferreyra,* 965 F.3d 302, 308–09 (4th Cir. 2020). Generally, "denials of summary judgment are interlocutory orders not subject to appellate review." *Id.* (*citing Williams v. Strickland*, 917 F.3d 763, 767 (4th Cir. 2019)). While there is an exception to the general principle "for denials of summary judgment as to qualified immunity," this exception is strictly "limited to legal questions." *Id*. This Court's "jurisdiction extends only to the denial of qualified immunity 'to the extent it turns on an issue of law.'" *Id*. (*quoting Gould v. Davis*, 165 F.3d 265, 268 (4th Cir. 1998)). Therefore, it lack(s) jurisdiction to review the District Court's order 'insofar as that order determines whether or not

the pretrial record sets forth a 'genuine' issue of fact for trial." *Gould* 165 F.3d at 268 (citing *Johnson v. Jones*, 515 U.S. 304, 319, (1995)).

## I. The District Court Properly Denied Summary Judgment Based on Material Factual Disputes.

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).

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

### A. Factual Disputes Pertaining to Whether Sgt. Pope's Actions Advanced a Legitimate Governmental Interest are Relevant to the Denial of Qualified Immunity.

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). Because issues pertaining to the government's restrictions on an individual's constitutional rights are subject to a higher level of scrutiny, the government must "make some evidentiary showing that the recited harms are 'real, not merely conjectural," and that the restriction 'alleviates these harms in a direct and material way." *Ross v. Early*, 746 F.3d 546,

556 (4th Cir. 2014) (citing *Satellite Broad. and Comm's Ass'n v. F.C.C.,* 275 F.3d 337 (4th Cir. 2001)).

Appellant argues that "none of the disputes that the court identified involves facts that are material to the issue of qualified immunity." Appellant's Br. at 12. In an attempt to dress factual disputes as questions of law, appellant challenges the District Court's findings that: (1) "there are factual disputes requiring jury resolution as to whether a legitimate government interest was served by the police action" and (2) "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. 751, 753-54; *see also* Appellant's Br. at 12-13.

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. Therefore, both of the aforementioned factual disputes are material to determining whether Sgt. Pope infringed on the Hulberts' First Amendment Rights. Appellants admit that "Sgt. Pope did not observe any immediate safety concerns, but [] anticipated that they would arise in the near future." Appellant's Br. at 6. Because the *Grace* analysis involves a factual inquiry as to whether the government's actions were narrowly tailored to serve a

significant government interest, the legitimacy and constitutionality of Sgt. Pope's actions are premised on whether an actual, immediate, and non-conjectural safety issue existed when he issued his orders to the Hulberts. The District Court acknowledged this and opined that Sgt. Pope's orders would only be legitimate "if a genuine safety concern existed." J.A. 762. If no such concern existed, then Sgt. Pope arbitrarily infringed on the Hulberts' First Amendment rights.

As the District Court astutely noted, neither of the parties dispute that the Hulberts were engaging in constitutionally protected speech when Sgt. Pope issued his orders. J.A. 746. Therefore, the only remaining question in determining the constitutionality of Sgt. Pope's actions is "whether the 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.

In its analysis, the District Court considered this Court's decision in *Ross v. Early* wherein a "plausible threat to the orderly flow of pedestrian traffic and, concomitantly, public safety" justified the government's intervention into a demonstration. 746 F.3d at 555-60; J.A. 740. In that case, there was concrete evidence that the demonstration, which was taking place in Downtown Baltimore while the Circus was in town, posed a legitimate safety risk because the protestors'

presence in the midst of the increased pedestrian and vehicle traffic due to the Circus had caused a significant safety hazard at least once. J.A. 740.

The Hulberts' case differs significantly from the circumstances in *Ross.* Defendants had argued that Sgt. Pope's actions were legitimate because pedestrians had been hit by cars at the intersection near Lawyer's Mall at least twice in the preceding year. J.A. 751. In so arguing, Defendants ignored the fact that in those instances, there were no demonstrations taking place which contributed to the pedestrians' injuries. *Id.* Therefore, unlike in *Ross,* where there was evidence that protestors had caused safety risks in a scenario where the streets were congested due to the presence of the Circus, here, there is no "clear link" between the Hulberts' conduct and the two past instances of pedestrian injuries at the intersection near Lawyer's Mall. J.A. 753.

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." J.A. 753. 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.

Without knowing whether Sgt. Pope's actions addressed any real safety issue posed by the Patriot Picket members, it is impossible to determine whether

Sgt. Pope's orders served the legitimate government interest of maintaining public safety and order. Further, as noted above, Sgt. Pope repeatedly testified that he did not see either of the Hulbert brothers creating a disturbance to the public peace that warranted their arrests. JA 86-87, 122, 751.

Appellant misguidedly relies on a single Second Circuit decision, *Kass v. City of New York*, that allowed police officers to preemptively order an individual to move to prevent a safety issue to argue that Sgt. Pope's anticipation of safety risks justified his unconstitutional orders. 864 F.3d 200 (2d Cir. 2017). This ignores the District Court's comprehensive analysis of decisions from other circuits regarding the permissibility of First Amendment restrictions and the differences in circumstances between *Kass* and the instant action. Additionally, the District Court's review of *Kass* was relevant to its analysis of the third prong of *Grace* requiring the government's restrictions on First Amendment speech to leave open ample alternative channels of communication. Appellant repeatedly conflates the facts and legal principles relevant to the second and third prongs of the *Grace* analysis throughout his brief.

In *Kass*, "there were crowds of protestors and pedestrians associated with [a] convention and the non-protest areas were limited to a two-block stretch." 864 F.3d 200, 208 (2d Cir. 2017). Contrastingly, only *eight* Patriot Picket members were occupying the public sidewalk near Lawyer's Mall on the night of February

5, 2018, and, as Sgt. Pope repeatedly testified, there was no obstruction of vehicle or pedestrian traffic. J.A. 94-95, 533-34. Therefore, *Kass* is only relevant to the instant case insofar as it pertains to whether the officers in *Kass* left open ample alternative channels by which the demonstrators could communicate their message.

Finally, Appellant points to the fact that the Patriot Picket demonstration took place in the evening to argue that Sgt. Pope's anticipation of a safety risk was legitimate. Even if this is the case, it does not settle whether there was an *actual, non-conjectural* safety risk at the time of Sgt. Pope's actions, which is crucial to the analysis of the constitutionality of those actions. Additionally, the District Court considered the fact that it was dark during the Patriot Picket demonstration and still decided that there was not enough evidence to determine whether an actual safety risk existed at that time.

This Court's decision in *Ross* controls, and furthermore, the District Court looked beyond both *Ross* and *Kass* in deciding that there must be a present danger before an individual's First Amendment rights may be restricted in the name of public safety. *See* J.A. 748 (reviewing *Marcavage v. Citi of Chi.,* 659 F.3d 626 (7th Cir. 2011) and others in analyzing whether Sgt. Pope's actions left open ample alternative channels for communication). Since Sgt. Pope's actions do not meet this Court's standard under *Ross,* this Court should be inclined to dismiss his appeal.

### B. Whether the Hulberts or Other Patriot Picket Members Were in the Street or Crosswalks at the Time of the Hulberts' Arrests Bears on the Constitutionality of Sgt. Pope's Actions, and Thus, his Entitlement to Qualified Immunity.

Appellant contends that the "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" "has no material bearing on whether Sgt. Pope is entitled to qualified immunity for the objectively reasonable measures he took to protect public safety." Appellant's Br. at 19-20. This flawed reasoning attempts to sidestep Sgt. Pope's own contention that, "for safety reasons, [the Maryland Capital Police] wanted to keep [the Patriot Picket members] away from the street." J.A. 79-80. As explained previously, the constitutionality of Sgt. Pope's actions hinges on whether there was an actual safety risk at the time of the Hulberts' arrests.

If, to achieve the purported safety objective, Sgt. Pope needed to keep the picketers out of the street, then the matter of whether any of the picketers were in the street causing an actual safety risk is material because it is directly relevant to the constitutionality of Sgt. Pope's actions. Without knowing whether any picketers were actually in the streets, the first element of qualified immunity--whether the defendant has violated the plaintiff's constitutional right--cannot be satisfied because it precludes the satisfaction of the *Grace* analysis. Additionally, even if picketers were indeed in the crosswalks at the time of the Hulberts' arrest, there would still be a factual dispute as to whether their presence posed an actual

safety risk that would require a jury determination. Conversely, if there were no picketers in the street posing a safety risk, then Sgt. Pope's orders were unconstitutional because they would fail entirely to serve any legitimate government interest.

Appellant's reference to the video evidence offered in his Motion for Reconsideration in the District Court is imprudent. The District Court explicitly stated that Sgt. Pope failed to exercise reasonable diligence in submitting the video evidence for consideration and could not rely on "technical difficulties" to excuse his lack of diligence since he was ultimately able to overcome those difficulties in order to submit the video with his Motion for Reconsideration. J.A. 778-79. As stated previously herein, Sgt. Pope has possessed this video evidence since February 8, 2018, and it was produced to Plaintiffs in discovery long before the District Court denied summary judgment. J.A. 440.

Appellees' counsel reviewed the video that Sgt. Pope attempted to submit with his motion for consideration. The video did not "show[] that the group regularly walked across the streets with their signs before the arrests" as Sgt. Pope had suggested. J.A. 778. Instead, the video showed that two picketers used the *crosswalks* to lawfully and safely periodically cross the street. Patriot Picket never crossed the streets in a group. Rather, the two individuals who did cross the street did so carefully and lawfully by looking out for traffic and using the crosswalks.

Pedestrians were similarly able to use the crosswalks without impediment--a factual finding that is once again supported by Sgt. Pope's deposition testimony. J.A. 543-546.

Thus, the video presents no evidence of any safety issue. Even if the video *had* shown that the picketers were in the streets, the appropriate order from Sgt. Pope would have requested the picketers to move from the street, not to move from the sidewalk to Lawyers' Mall. This situation did not involve the presence of a large crowd which blocked the sidewalk and forced pedestrians to endanger themselves by entering the street. It involved a maximum of eight individuals occupying a fifteen and one-half foot sidewalk who peacefully demonstrated in a public forum without causing an obstruction to a public walkway, and an order from the Lieutenant Governor's office to prevent them from interacting with him. It wasn't until "the police showed up to make the arrests and there were cars parked at the location . . . [that] people . . . walked into the street, off the curb, to get around the police." J.A. 752.

Furthermore, appellant's assertions that "whether members of the Patriot Picket were in the streets and crosswalks is immaterial" and that "the District Court erred when it denied qualified immunity based on that immaterial and irrelevant fact" are confounding. Appellant's Br. at 23. Sgt. Pope submitted his motion for reconsideration in the lower court specifically to allege that whatever video

evidence he submitted with that motion "show[ed] that the group regularly walked across the streets with their signs before the arrests." J.A. 778. That statement would suggest that Sgt. Pope's objective in filing his motion for reconsideration was to persuade the District Court that members of Patriot Picket were in the streets because he believed that such a showing would be dispositive in his favor. Regardless of his motivations, the District Court both declined to review the unsubmitted video evidence and found no indication that Patriot Picket members were in the streets or crosswalks during their demonstrations. As such, Sgt. Pope was unable to satisfy even the burden of proof imposed on the government by the "significant interest" element of the *Grace* analysis.

## II. Sgt. Pope is not Entitled to Qualified Immunity Because the Lawfulness of his Actions Must be Evaluated Prior to the Analysis of Probable Cause.

"[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969) (citing *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958)).

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." The elements of the crime charged

require that the law enforcement order be made to prevent a breach of the peace. In other words, to issue a valid criminal citation for disorderly conduct due to a failure to obey an order of law enforcement, an officer would need to demonstrate: (1) that the individual's conduct was interfering with the public order or leading to a breach of the peace, (2) that the officer directed the individual to move on in order to prevent a breach of the peace, and (3) that the individual failed to follow the police officer's direction.

An individual who chooses not to follow the direction of a law enforcement officer that was made arbitrarily, or for any other reason than to "promote the public order," has not engaged in disorderly conduct. *Ross v. Early*, 746 F.3d at 560 (explaining that a charge of willful failure to obey the orders of a law enforcement officer "is predicated on the law enforcement officer issuing a reasonable and lawful order, and as such, the command cannot be purely arbitrary and not calculated in any way to promote the public.").

The District Court opined that "[w]here an officer's order is unconstitutional, 'the failure to obey a lawful order statute cannot serve as the basis for probable cause.'" J.A. 759 (citing *Swagler v. Sheridan*, 837 F.Supp.2d 509, 531 (D. Md. 2011). This principle comports with the Supreme Court's decision in *Shuttlesworth*, which the District Court relied on in *Swagler*, as well as this Court's

decision in *Ross*. Therefore, again, here, whether Sgt. Pope had probable cause to arrest the Hulberts is dependent on whether Sgt. Pope's orders were lawful.

Consider *Shuttlesworth v. City of Birmingham*, wherein the Supreme Court overturned the petitioner's conviction under a statute which made it a crime to "stand, loiter, or walk upon any street or sidewalk . . . as to obstruct free passage over, on or along said street or sidewalk." 382 U.S. 87, 90 (1965). The case also involved a statute which made it "a criminal offense for any person 'to refuse or fail to comply with any lawful order, signal, or direction of a police officer.'" *Id.* at 94.

The Supreme Court in *Shuttlesworth* very plainly stated: "[o]ur decisions make it clear that the mere refusal to move on after a police officer's requesting that a person standing or loitering should do so is not enough to support the offense" of obstructing a street or sidewalk. *Id.* at 91. Rather, "there must also be a showing of the accused's blocking free passage." *Id.* Here, Sgt. Pope's testimony and the District Court's factual findings preclude the possibility that he had cause to arrest the Hulberts for the offense of obstructing a public sidewalk under Md. Code 10-201(c)(1) because Sgt. Pope's testimony shows that they never obstructed the sidewalk.

Similar to the District Court's finding in this case that there is "no evidence that Jeff Hulbert and the rest of his group were actually impeding the flow of

pedestrian or vehicular traffic," the petitioners' convictions in *Shuttlesworth* were overturned because the record contained no evidence that they were obstructing the sidewalk where they were demonstrating. 382 U.S. at 94. The Court's decision turned "not on the sufficiency of the evidence, but on whether [the] conviction rest[ed] upon any evidence at all." *Id.* There is a complete lack of evidence to support the contention that Sgt. Pope had probable cause to believe that the Hulberts were engaging in *any* unlawful activity. The Hulberts, who were demonstrating on a traditional public forum and were not obstructing vehicular or pedestrian traffic, were absolutely protected by their First Amendment rights to speech and assembly at the time of their arrests.

As Sgt. Pope's own testimony demonstrated, the Hulberts were not interfering with the public order or breaching the peace, and the orders to move were made arbitrarily and unlawfully, seeking to disrupt a legal demonstration taking place on a public sidewalk. JA 86-87, 122. Since the Hulberts were not interfering with vehicular or pedestrian traffic it is impossible that Sgt. Pope's orders were constitutional because, by his own admission, there was no safety risk and thus, no legitimate government interest in interfering with the Patriot Picket demonstration. Because the orders were unconstitutional, the Hulberts were under no obligation of any kind to heed Sgt. Pope's orders, and thus cannot have been

guilty of failing to obey a lawful order, because no lawful order was issued in the first place.

*Ross* and *Shuttlesworth* are highly relevant here since these cases address the exact statute that the Hulberts were charged under and because there is a genuine issue of material fact as to the lawfulness of Sgt. Pope's orders. Additionally, Sgt. Pope, by his own testimony, knew at the time of the Hulberts' arrests that they posed no safety risk to the public because they were not obstructing either pedestrian or vehicle traffic. J.A. 94, 106, 533-34, 544, 546, 751. Therefore, considering the totality of the circumstances as articulated by Sgt. Pope himself, the orders he issued were unlawful and cannot impose an obligation to comply by statute. JA 86-87, 122.

Appellant also attempts to persuade this court that even if Sgt. Pope was mistaken about the lawfulness of his orders and the Hulberts were indeed wrongfully charged for failure to obey a lawful order, that he is still entitled to qualified immunity. In support of this argument, Appellant cites to this Court's decision in *Pegg v. Herrnberger*, 845 F.3d 112 (4th Cir. 2017) to contend that Sgt. Pope's orders were valid even if he arrested the Hulberts for one offense when they were guilty of a different offense or if he had arguable probable cause to arrest. Appellant's Br. at 24.

The Hulberts were initially arrested for failure to obey a lawful order. The secondary charges that were brought against them on February 6, 2018, involved charges of "refusal or failure to leave public building or grounds" and "disorderly conduct, disturbance of the public peace, nuisances." J.A. 336, 424, 553. Under Md. Code Crim. Law § 6-409 (b), an individual may be charged with refusal or failure to leave public building or grounds where that person (1) has no apparent lawful business to pursue at the public buildings or grounds; or (2) is acting in a manner disruptive of and disrupting to the conduct of normal business by the government unit that owns, operates, or maintains the public buildings and grounds." J.A. 732. The latter charge of disorderly conduct may be issued when a person "willfully and without lawful purpose obstruct[s] or hinder[s] the free passage of another in a public place or on a public conveyance." *Id.*

Sgt. Pope's testimony reveals that the Hulberts were not obstructing the sidewalks at all, as he testified repeatedly that "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." J.A. 94, 106, 533-34, 544, 546, 751. He also explicitly admitted that he did not see the Hulberts disturbing the conduct of any normal business or disturbing the peace in any way prior to their arrests. J.A. 121-122, 552.

Additionally, the State's Attorney's review of the available evidence, which included the surveillance footage that Sgt. Pope attempted to submit in is Motion for Reconsideration, revealed that there was a dearth of evidence to support Sgt. Pope's contentions that the Hulberts were endangering the public or creating any kind of disturbance. J.A. 606-607. Sgt. Pope had absolutely no probable cause to arrest the Hulberts or to support any of the charges that he issued to them stemming therefrom.

Appellant does not point to any evidence to challenge the District Court's factual finding that "[t]here is 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. Since the record before the trial court presented no evidence that would have justified charging the Hulberts with obstructing a public walkway, appellant's argument that Sgt. Pope made a reasonable mistake in arresting the Hulberts for the wrong charge must fail.

This case involves a question as to whether there were adequate grounds for the Hulberts' arrests. Under the facts of this case, those grounds involve the lawfulness of Sgt. Pope's order and the existence of an immediate safety issue caused by the Patriot Picket demonstration. However, even if appellant could somehow show that there were reasonable grounds for the Hulberts' arrest for

failure to obey a lawful order, the two additional charges brought against each brother the following day are not supported by any probable cause at all.

A charge under Md. Code, Crim. Law § 10-201 carries a penalty of 60 days imprisonment and a maximum fine of $500 while a charge under § 6-409 carries a penalty of 6 months' imprisonment and a maximum fine of $1,000. An individual charged under the former statute whose penalty is subsequently increased under the latter statute would undoubtedly suffer from the shock of being threatened with three times the length of imprisonment and double the financial penalty. Such is the plight of the Hulbert brothers, who sustained psychological damages due to Sgt. Pope's actions. J.A. 367. Because there are no plausible grounds for the subsequent charges, the Hulbert brothers are entitled to recovery for psychological damages stemming from the false charges brought against them regardless of whether there were grounds for the initial charge and arrest.

The question of whether Sgt. Pope had probable cause for the Hulberts' arrests is a heavily fact-based determination. As such, the facts relevant to this question are disputed by the parties and must be settled by jury decision for the aforementioned reasons.

## III. Sgt. Pope is Not Entitled to Qualified Immunity from Appellees' First Amendment Claims Because the Right to Record Was Clearly Established at the Time of the Conduct at Issue in This Case.

"[T]he lodestar for whether a right was clearly established is whether the law gave the officials fair warning that their conduct was unconstitutional." *Iko v. Shreve*, 535 F.3d 225, 238 (4th Cir. 2008); *see also Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017) ("A right is clearly established only if its contours are sufficiently clear that a reasonable official would understand that what he is doing violates that right…courts may rely on a consensus of cases of persuasive authority to determine whether a reasonable officer could not have believed that his actions were lawful."). When a public official violates a citizens' constitutional rights and could not reasonably believe that such action was lawful, the official is not protected by qualified immunity. *Booker*, 855 F.3d 533.

### A. The Law Regarding Individuals' Right to Film has Continued to Develop Since this Court's Ruling in *Szymecki*, Clearly Establishing the Right to Film.

While sufficient, a Supreme Court case or controlling circuit decision on point is not necessary to "clearly establish" a right. Only a "robust consensus of cases of persuasive authority" is required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (citing *Wilson v. Layne*, 526 U.S. 603, 617 (1999). As stated in *Hope v. Pelzer*, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. 730, 741 (2002); *see also*

*Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) ("a general constitutional rule ... may apply with obvious clarity ... even though the very action in question has not previously been held unlawful").

"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.'" *Ray v. Roane*, 948 F.3d 222, 229 (4th Cir. 2020) (quoting *Booker*, 855 F.3d at 543). "The consensus of our sister circuits leaves no doubt that [the plaintiff's right] was clearly established." *Id.* at 230.

To assert that the right to film law enforcement was not clearly established at the time of the conduct at issue in this case, appellant attempts to challenge the District Court's comprehensive review of circuit court decisions on the matter. In its review, the District Court looked at seven published decisions from sister circuit courts as well as the four unpublished decisions from District Courts in the Fourth Circuit. (J.A. 754-756). Each of these cases, save one of the four unpublished decisions (*Szymecki v. Houck*, 353 Fed. App'x 852 (4th Cir. 2009)), affirmed a First Amendment right to "videotape police activities" and/or a "First Amendment right to film matters of public interest." J.A. 755.

The District Court's review of nearly every decision addressing the right to film law enforcement officials in the conduct of their duties satisfies the Supreme

Court's standard of a "robust consensus of cases of persuasive authority" to establish a given right. *Wilson*, 526 U.S. at 617. *Szymecki*, the unpublished Fourth Circuit case which Appellant primarily relies on, was decided in 2009. Contrastingly, the decisions relied on by the District Court span from 1995 to 2017, demonstrating that the right to record is not a novel issue at all, but rather one that has been discussed and analyzed for decades. The District Court adopted the correct approach to determine whether a right is clearly established in the absence of a controlling Supreme Court or Fourth Circuit decision.

The right to record law enforcement officials in the conduct of their duties is grounded in the First Amendment principle of freedom of the press. The conduct of police, especially in light of events over the past decade, is certainly a matter of public concern. Speech regarding matters of public concern is at the heart of the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 451-452 (2011) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 435 U.S. 765, 776 (1978)). Thus, it is no surprise that the First, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have all released decisions affirming the right to record police activity. *See* J.A. 754-55 (citing each decision affirming the right to record police under the First Amendment).

In addition to those cases cited to by the District Court, an additional 2011 First Circuit decision is available, which unequivocally establishes the right to film

police activity. In *Glik v. Cunniffe*, the court directly addressed the question of whether there is a "constitutionally protected right to videotape police carrying out their duties in public:"

> Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.
>
> . . .
>
> Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'"

655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 216 (1966)). In its ruling, the First Circuit applied the following sound logic: if police officers must accept "a significant amount of verbal criticism and challenge directed at" them, then they must be expected to exercise similar restraint "when they are merely the subject of videotaping that memorializes, without impairing, their work in public spaces." *Id.* at 84. In Kevin Hulbert's case, he was memorializing his brother Jeff's arrest, but was in no way interfering with Sgt. Pope's official police duties. J.A. 103, 541.

Instead of exercising the restraint expected of him as an officer of the law, Sgt. Pope arrested Kevin Hulbert when he was simply filming his brother's arrest and interfered with his First Amendment right to record police activity. J.A. 756. Despite that there were other individuals filming Jeff Hulbert's arrest, Kevin

Hulbert was singled out, and only his right to record was interfered with while the remaining individuals' rights were not similarly impaired. *Id.* The District Court explicitly stated, based on the presented facts, that Kevin Hulbert's recording did not interfere with Sgt. Pope's duties and that, therefore, there was no legitimate basis for restricting his First Amendment rights at that time:

> It is worth noting that Defendants' only justification for impeding Kevin Hulbert's right to record is that Sgt. Pope was enforcing a reasonable time, place, and manner restriction on the picketers to maintain public safety and access to the streets and sidewalks. They specifically do not distinguish Kevin Hulbert's activities from the activities of the other demonstrators and present 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. Defendants make no claim, nor is there evidence in the record, that Kevin Hulbert's filming otherwise impeded the officers' execution of their duties or their ability, for example, to safely and effectively arrest Jeff Hulbert.

J.A. 758.

Each of the aforementioned cases establishing the right to film police activity were decided prior to the conduct at issue in the instant case, giving police officers like Sgt. Pope plenty of notice as to the existence of this right. Additionally, considering the nation's recent debates regarding police activity, it is highly unlikely that Sgt. Pope, a trained police officer, was so naïve as to believe that his suppression of an individual's right to film police activity would not

constitute an abridgement of that individual's constitutional rights.[1] Since the right to record police activity was clearly established before the conduct at issue in this case and Sgt. Pope could not have reasonably believed that his actions were lawful, he is not entitled to qualified immunity.

### B. The District Court Applied the Correct Standard Under *Ray v. Roane* to determine that Individuals' Right to Film Official Police Conduct is Clearly Established.

Appellant contends that the District Court misread the standard for establishing a right in *Ray v. Roane* and wrongly relied on the consensus of other circuits regarding the right to film police activity. Appellant's Br. at 32-33. Appellees would suggest that Appellant appears to have read *Ray* in a vacuum since multiple Supreme Court decisions articulate the same standard where, in the absence of an on-point decision from a binding authority, consensus among the circuit will control. *See, e.g.*, *Ashcroft*, 563 U.S. at 742; *Wilson*, 526 U.S. at 617. Despite that this Court has yet to adopt "general constitutional principles" regarding the right to film police activity, the broad consensus among circuit courts

[1] Following the death of Eric Garner in 2014, phone camera recordings became an important tool in bringing justice to those adversely affected by unlawful police activity and set in motion a national movement to require law enforcement officers to wear body-worn cameras for accountability purposes. *See* Peter Hermann and Rachel Weiner, *Issues Over Police Shooting in Ferguson Lead Push for Officers and Body Cameras*, Washington Post, (December 2, 2014) https://www.washingtonpost.com/local/crime/issues-over-police-shooting-in-ferguson-lead-push-for-officers-and-body-cameras/2014/12/02/dedcb2d8-7a58-11e4-84d4-7c896b90abdc_story.html.

affirming that right establishes it to the extent that law enforcement officers have notice of its existence.

The argument advanced in appellant's brief would lead the reader to believe that "at least four judges within the [Fourth] circuit have disagreed with the conclusion reached by the District Court here" because they do not believe that the right to record police activity is established under the First Amendment. However, a closer look at the cited cases reveals that two of those decisions are directly in accordance with the general consensus that a right to record police activity exists, and the remaining two cases support the District Court's reasoning in its denial of qualified immunity.

In *Ray*, although this Court had already established its position that privately owned dogs are protected under the Fourth Amendment, it looked to the consensus of its sister circuits to determine whether the right was so clearly established that a violation of the right would have been "manifestly apparent" to the Defendant officer and concluded that it was. 948 F.3d at 230. Similarly, here, the District Court looked to the consensus of the Fourth Circuit's sister circuits to conclude that the right to film police activity was clearly established at the time of the Hulberts' arrests.

*Sharpe v. Winterville Police Department* is distinguishable because it did not merely involve the recording of police activity, but also the real-time *broadcasting*

of the recording. 480 F.Supp.3d 689, 698 (E.D. NC 2020). Because there was a lack of consensus among the circuits regarding the right to record and simultaneously broadcast a police interaction, the plaintiff in *Sharpe* did not have a clearly established right and the defendant officer was granted qualified immunity. The *Sharp* court's decision is not persuasive here since Kevin Hulbert did not broadcast his recording of Sgt. Pope.

Contrary to Appellant's statement, the decisions in *J.A. v. Miranda* and *Garcia v. Montgomery County, Md* support a finding that the right to record police activity is clearly established. 2017 WL 3840026 at *6 (D. Md. September 1, 2017); 2013 WL 4539394 at *3 (D. Md. August 23, 2013).

In *Garcia,* the District Court recognized that, "[a]s the First Circuit recently confirmed, 'a citizen's right to film government officials, including law enforcement officers, in the discharge of their duties in a public space is a basic, vital, and well-established liberty safeguarded by the First Amendment.'" 2013 WL 4539394 at *3 (D. Md. August 23, 2013) (citing *Gilk,* 655 F.3d at 85). The court also recognized that "[g]athering information about government officials in a form that can readily be disseminated to others serves as a cardinal First Amendment interest in protecting 'the free discussion of governmental affairs.'" *Id*. (quoting *Mills*, 384 U.S. at 218).

In *J.A. v. Miranda*, the District Court acknowledged that:

> Since *Garcia*, the Fifth and Third Circuits have joined their sister Circuits in holding that 'there is a First Amendment right to record police activity in public,' albeit with appropriate time, place and manner restrictions." *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689–90 (5th Cir. 2017). In so doing, both Circuits emphasized that "[a]ccess to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, 'the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Fields*, 862 F.3d at 358 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452 (2011)). *See also Turner*, 848 F.3d at 689 ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs.") (quoting *Gilk v. Cuniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011)).

2017 WL 3840026 at *6 (D. Md. September 1, 2017). The District Court recognized that, based on the "collective wisdom of her colleague and sister Circuits," J.A.'s conduct was protected under the First Amendment and the Defendant Officers violated his right to record police activity. *Id.*

### C. The District Court's Reliance on Decisions from Other Circuits Confirms That the Right to Record Police Activity was Firmly Established Prior to the Hulberts' Arrests.

Appellant makes a futile attempt to distinguish decisions from other courts and draw attention away from part two of the two-step qualified immunity analysis. The pertinent question that these cases address is whether the right to record law enforcement was clearly established at the time of the alleged event such that a reasonable official would have understood that his conduct violated the asserted right.

The court in *ACLU v. Alvarez* affirmed individuals' right to record law enforcement in the conduct of their official duties and in the process. 679 F.3d 583 (7th Cir. 2012). The Court of Appeals for the Seventh Circuit found that "[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording." *Id*. at 596. The latter right cannot exist without the former. Additionally, the court recognized that the First Circuit's decision in *Glik* established the right to record the police and "rest[ed] its conclusion primarily on the Supreme Court's observations about the right to gather and disseminate information about government." *Id*. at 601 (citing *Mills*, 384 U.S, 218).

The heart of the Seventh Circuit's decision in *Alvarez* goes to the principle that individuals may not be held criminally liable under a wiretap statute for openly recording their interactions with police officers performing their official duties in public because "the eavesdropping statute burden[ed] speech and press rights and is subject to heightened First Amendment scrutiny." *Id*. at 600. This concurs with this Court's views on the issue. In *United States v. Duncan*, this Court agreed that federal wiretap statutes apply only to oral communications in which an individual has a reasonable expectation of privacy. 598 F.2d 839, 849-53 (4th Cir. 1979). Because the expectation of privacy is much lower in public, a wiretap statute

cannot be used to prevent individuals from filming police performing their official duties in public.

Similarly, the court in *Chestnut v. Wallace* affirmed the right to record police in the conduct of their official duties. 947 F.3d 1085 (8th Cir. 2020). Despite that *Chestnut* was decided years after the conduct at issue in this case, the court relied on the same decisions mentioned herein to determine that the right to record police activity in public was clearly established. *Id*. at 1090. Ultimately, the *Chestnut* court used a similar standard as the one in *Ray* whereby the "robust consensus of cases of persuasive authority suggests that, [] the constitution protects one who records police activity," thereby establishing the right. *Id.* at 1091.

In addressing *Gericke v. Begin,* Appellant acknowledges that the court not only held that there is a clearly established right to record law enforcement, but that a reasonable officer would have known about the clearly established right. 753 F.3d 1, 7-10 (5th Cir. 2014). However, this Court should not be inclined to distinguish *Gericke* from the instant case simply because the Fifth Circuit accepted the First Circuit's decision in *Glik* whereas this Court in *Szymecki,* did not.

Firstly, *Szymecki* is an unpublished opinion and is not binding authority here. Secondly, the Supreme Court's standard for determining whether a right is clearly established at a given time based on a consensus among the circuit courts should be given deference. Especially since this Court affirmed that standard in *Ray.*

Thus, the First Circuit's decision in *Glik*, along with the decisions from the other six circuits whose decisions are in accordance with *Glik*, should yield a result from this Court that the right to record police during the execution of their official duties has existed as an established right since at least 2011.

The availability of concurring opinions from ***seven*** separate circuits should also overcome the 5th Circuit Court of Appeals' assertion in *Turner v. Lieutenant Driver* that there is a "dearth" of persuasive authority on the right to record police activity. 848 F.3d 678 (5th Cir. 2017). Furthermore, the court in *Turner* did hold that the right to record law enforcement is clearly established, but is subject to reasonable time, place and manner restrictions. *Id.* at 697. In Sgt. Pope's case, this again raises the question of whether his orders to the Hulbert brothers were lawful.

Finally, the Third Circuit's decision in *Fields* is highly relevant here. 862 F.3d at 353. Not only did the *Fields* court decide that the right to record police was clearly established, but also, it defined a relevant contour regarding the limits of the right, stating that, "[i]f a person's recording interferes with police activity, that activity might not be protected." *Id.* at 360.

Here, the District Court explicitly decided that, based on the evidence presented and viewing it in a light most favorable to the Plaintiffs, "Kevin Hulbert's filming did not "impede[] the officers' execution of their duties or their ability, for example, to safely and effectively arrest Jeff Hulbert." (J.A. 758).

Therefore, based on the consensus of the circuit courts and the limits of the right to record police activity in *Fields,* Kevin Hulbert's activity was constitutionally protected because it did not interfere with Sgt. Pope's official duties.

Since the right to record police activity, especially in public, was clearly established at the time of the Hulberts' arrests and because Kevin Hulbert did not interfere with Sgt. Pope's official duties when he filmed his brother's arrest, Sgt Pope is not entitled to qualified immunity and this Court should decline to review this matter until the factual disputes at hand are resolved by a jury decision.

## IV. The Record Shows Uncontroverted Evidence that the Hulberts Were Neither Violating any State Ordinances nor Exercising Their Right to Film for any Nefarious Purpose.

"[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely." *Hudgens v. N.L.R.B.,* 424 U.S. 507, 515 (1976).

"For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'" *McCullen v. Coakley,* 573 U.S. 464, 486 (2014) (citing *Ward v. Rock Against Racism,* 481 U.S. 781, 799 (1989)). "[T]he government . . . 'may not regulate expression in such a manner that a substantial

portion of the burden on speech does not serve to advance its goals.'" *Id.* (citing *Ward*, 481 U.S. at 799).

### A. Statutes Construed to Limit the Traditional Public Forum Status of Sidewalks are Presumptively Impermissible.

The National Police Association's (NPA) *amicus* brief relies heavily on the contention that the Hulbert brothers were engaged in unlawful activity at the time of their arrest and that therefore, their actions were not protected by the First Amendment. Br. of Amicus at 17. The NPA points to COMAR §§ 04.05.01.01, 04.05.01.03(A)(5)(b), 04.05.01.07, and 04.05.02.01 to support their argument that "Lawyers' Mall and the surrounding areas are subject to" the State of Maryland's regulations governing the accessibility of state property. *Id.* at 4-5. A mere cursory review of these COMAR provisions and relevant caselaw makes clear that sidewalks are afforded heightened protections from such regulations since they are "among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property." *Grace* 461 at 179.

The NPA's statements that the sidewalks around Lawyers' Mall are "highly regulated patches of land" "subject to a complex, and heretofore constitutional set of regulations" are simply wrong. Br. of Amicus at 18. Firstly, COMAR 04.05.01.07 is irrelevant to this case as it pertains to monetary solicitations, which

is not at issue here. Setting aside the fact that the Hulberts were not charged under any of the COMAR provisions cited by the NPA, making the references thereto irrelevant, they are also irrelevant because they simply do not apply to the facts in this case. COMAR 04.05.01 lays out general regulations that apply to state buildings and grounds under the jurisdiction of the Maryland Department of General Services. Sidewalks, being public property, generally do not fall within the jurisdiction of such state departments for the purposes of the First Amendment, and similarly are not included in COMAR's definition of "property." *See* COMAR 04.05.01.01 (defining "property" as "State public buildings, improvements, grounds, and multiservice centers under the jurisdiction of the Department of General Services.")

In *Grace*, the Supreme Court struck down a statute limiting First Amendment activity insofar as it applied to sidewalks adjacent to state property because it "could not be justified as a reasonable place restriction." 461 U.S. at 181. The NPA attempts to distinguish *Grace* from the instant case by claiming that the case is about the display of banners on public sidewalks outside of the United States Supreme Court Building as opposed to the Hulberts' picketing on a sidewalk. Br. of Amicus at 11 n.8. This argument arises from an egregious misreading of *Grace*. The Supreme Court explicitly made a distinction between the Court grounds and the surrounding sidewalks, opining:

> In *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 133 (1981), we stated that "Congress ... may not by its own *ipse dixit* destroy the "public forum" status of streets and parks which have historically been public forums...." **The inclusion of the public sidewalks within the scope of § 13k's prohibition, however, results in the destruction of public forum status that is at least presumptively impermissible.** Traditional public forum property occupies a special position in terms of First Amendment protection and will not lose its historically recognized character for the reason that it abuts government property that has been dedicated to a use other than as a forum for public expression. **Nor may the government transform the character of the property by the expedient of including it within the statutory definition of what might be considered a non-public forum parcel of property.** The public sidewalks forming the perimeter of the Supreme Court grounds, in our view, are public forums and should be treated as such for First Amendment purposes.

461 U.S. at 181 (emphasis added).

The Supreme Court's distinction between public sidewalks and state grounds in *Grace* coupled with the absence of the word "sidewalks" from COMAR 04.05.01.01 indicates that the other regulations cited to by the NPA do not apply to the sidewalks in front of Lawyers' Mall where Patriot Picket was demonstrating. Similarly, two cases cited to by the NPA support the same proposition. In *Adderly v. State of Fla.*, protesters were blocking vehicular traffic on a driveway to a jail entrance which was not normally used by the public and were convicted for trespassing. 385 U.S. 39 (1966). The Supreme Court again drew a distinction between public and state-owned property and concluded that the protesters' actions were not protected by the

First Amendment because the sheriff who asked them to leave "objected only to their presence on that part of the jail grounds reserved for jail uses" and "[t]here [was] no evidence at all that on any other occasion had similarly large groups of the public been permitted to gather on this portion of the jail grounds for any purpose." *Id*. at 47.

The Supreme Court also distinguished the facts in *Adderly* from those in *Edwards v. South Carolina* where a group of protesters were arrested for marching peacefully on sidewalks adjacent to state grounds. 372 U.S. 229 (1963). The demonstration in *Edwards* took place on "state capitol grounds [which] are [traditionally] open to the public," and the demonstrators "went in through a public driveway." *Adderly,* 385 U.S. at 41. Because the demonstrators in *Edwards* occupied traditionally public forums as opposed to the non-public driveway occupied by the demonstrators in *Adderly*, the Supreme Court overturned the petitioners' convictions in *Edwards* because their activities took place in spaces protected by the First Amendment.

Appellees must now again refer to Sgt. Pope's testimony that the Hulberts were not obstructing the streets or sidewalks at any point during their picketing and the District Court's finding that there was 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 Lawyers' Mall." J.A. 94, 106, 533-34, 544,

546, 751-52. *Shuttlesworth* made clear that, without "a showing of the accused's blocking free passage," an individual engaging in activities protected by the First Amendment simply has not acted unlawfully. 382 U.S. at 91. The Hulberts were not engaging in unlawful activity at the time of their arrests.

For the foregoing reasons, the NPA's reliance on *NAACP v. Claiborne Hardware* misses the mark by a wide margin. 458 U.S. 886 (1982). Even ignoring the fact that *Claiborne Hardware* dealt primarily with violent conduct, the Hulberts' activity was completely lawful. Furthermore, in all of the proceedings to take place in this Court and the District Court, not **once** has Sgt. Pope, the state, or any of the prior defendants **ever** alleged that the Hulberts engaged in violent activity. Any arguments addressing the fact that the First Amendment does not protect violent activity are moot, redundant, and irrelevant.

### B. The Hulberts' Activity in This Case is Entirely Unrelated to the Concept of "First Amendment Audits."

The NPA indirectly accuses the Hulberts of conducting a "First Amendment audit" on the night that Sgt. Pope arrested them. In doing so, they concede that "the underlying conduct itself—recording law enforcement—is a First Amendment-protected activity in many federal circuits" and acknowledge that such audits are "not inherently unlawful." Br. of Amicus at 6. The NPA contends that "video-sharing platforms incentivize 'auditors' to harass law enforcement to produce increasingly dramatic video footage, which in turn garners views on websites like

YouTube, which translates to money." *Id.* Such a statement reveals that the authors of the *amicus* brief harbor a fundamental misunderstanding of how creators of YouTube videos receive revenue from their content.

To gain revenue from a YouTube video, creators must monetize their content. To do so, they must apply for the YouTube Partner Program ("YPP") and meet minimum eligibility requirements which include having more than 4,000 valid public watch hours in the 12 months prior to applying to YPP and more than 1,000 subscribers.[2] The Hulberts did indeed post their footage of their arrests on YouTube, however, the video garnered a mere 2,519 views, and the channel that the video is posted on has 134 subscribers.[3] These qualifications do not remotely meet those required by YPP and therefore it is impossible for the Hulberts to have profited from the video of their arrests.

Kevin Hulbert's recording of Jeff Hulbert's arrest also does not rise to the level of interfering with "the ability of law enforcement to carry out their obligations" "unfettered by needless harassment." Br. of Amicus at 20-21. The District Court found 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. The fact that Kevin

[2] *Youtube Partner Program Overview & Eligibility*, YouTube (last accessed on March 23, 2022) https://support.google.com/youtube/answer/72851.
[3] 2A_for_MD, *1st Amendment Under Attack*, YouTube (Last Accessed March 23, 2022). https://www.youtube.com/watch?v=oIu6SPpFG4A

Hulbert recorded Sgt. Pope simply does not yield the NPA's conclusion that the circumstances of his arrest amounted to a First Amendment audit.

Finally, this is the first time that any of the pleadings in this case--either in this Court or the court below--have ever alleged that the Hulberts' purpose in demonstrating was to perform a First Amendment audit. First Amendment auditors are described by the NPA as individuals who antagonize police officers, hoping to evoke a negative reaction. In stark contrast, the interactions between Patriot Picket members and Sgt. Pope can only be described as polite and respectful. Because Patriot Picket regularly demonstrates on almost every Monday that the Maryland legislature is in session (which lasts approximately three months), they have a cordial relationship with the MCP and have an interest in maintaining said relationship so that they may continue their demonstrations without interference. This was the first adverse interaction that Patriot Picket has ever had with law enforcement. The Hulberts and Patriot Picket were not motivated by any malicious intent. Their only motivation was a genuine desire to disseminate their message to Maryland legislators and other passersby, as is their constitutional right.

## CONCLUSION

For the foregoing reasons, Appellees respectfully requests that this Honorable Court uphold the decision of the District Court and remand this case for trial.

Respectfully submitted,

/s/

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## REQUEST FOR ORAL ARGUMENT

Appellees respectfully requests oral argument.

/s/
Cary J. Hansel

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) and contains 12,992 words, excluding the parts of the brief exempted from the word count by Fed. R. App. P. 32(f). The foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) and was prepared with proportionately spaced type and a typeface of 14-point Times New Roman.

/s/
Cary J. Hansel

# TEXT OF PERTINENT PROVISIONS

**Annotated code of Maryland, Criminal Law Article (Westlaw 2018)**

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

### Prohibited--During regularly closed hours

(a) 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 the time when the public building or grounds, or specific part of the public building or grounds, is regularly closed to the public if:

(1) the surrounding circumstances would indicate to a reasonable person that the person who refuses or fails to leave has no apparent lawful business to pursue at the public building or grounds; and

(2) a regularly employed guard, watchman, or other authorized employee of the government unit that owns, operates, or maintains the public building or grounds asks the person to leave.

### 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**

(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.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 24th day of March, 2022, the foregoing brief was filed with the Court's CM/ECF system which shall effect service on all parties so entitled.

/s/
Cary J. Hansel