No. 21-1608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SGT. BRIAN T. POPE,

Defendant-Appellant,

v.

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

Plaintiffs-Appellees.

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

REPLY BRIEF OF APPELLANT

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May 6, 2022

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REPLY ARGUMENT

I. IT IS UNDISPUTED THAT SGT. POPE ADVANCED A SIGNIFICANT GOVERNMENTAL INTEREST, AND THE DISTRICT COURT ERRED WHEN IT DENIED QUALIFIED IMMUNITY BASED ON AN IMMATERIAL FACT.

The district court concluded that the time, place, and manner restriction on speech was fully satisfied, with the exception of one narrow issue on which it believed a dispute of material fact existed. The court concluded that the instruction

to move a short distance was content neutral (J.A. 746-47) and left open ample alternative channels of communication (J.A. 747-49). In reviewing whether the instruction was narrowly tailored to serve a significant government interest, the district court also acknowledged that "[t]here is no doubt that the state has significant interest 'in maintaining the safety, order, and accessibility of its streets and sidewalks.'" (J.A. 749 (quoting *Ross v. Early*, 746 F.3d 546, 555 (4th Cir. 2014)).) Despite those conclusions, the district court erred when it further concluded that it could not grant summary judgment to Sgt. Pope based on qualified immunity because there was a factual dispute as to "whether any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope ordering the group to move." (J.A. 753.) That particular fact was not material because Sgt. Pope's orders were based on a *potential* safety concern under the circumstances that existed on February 5, 2018.

To constitute a valid time, place, and manner restriction on speech, Sgt. Pope's instruction to move must have served a significant government interest and not have "'burden[ed] substantially more speech than [was] necessary to further the government's legitimate interests.'" *Ross*, 746 F.3d at 555 (internal citation omitted). As argued in his principal brief, the record is replete with uncontested evidence that Sgt. Pope was acting to avert anticipated threats to public safety. Appellant's Br. 15-19. The Hulbert brothers wrongly argue that anticipated safety

issues are insufficient for Sgt. Pope to lawfully move protestors a short distance. Appellees' Br. 20-21, 25. There is no question that taking action to protect public safety—and to do so before public safety is compromised—fits squarely within Sgt. Pope's authority as a law enforcement officer. *Ross*, 746 F.3d at 556 (holding that a policy can advance the government's interest "'by redressing past harms *or preventing future ones*.'" (internal citation omitted) (emphasis added)); *Kass v. City of New York*, 864 F.3d 200, 209 (2d 2017) (holding that an officer does not need "to refrain from intervening until [plaintiff] actually impeded pedestrian traffic or caused a security issue."); *Evans v. Sandy City*, 944 F.3d 847, 858 (10th Cir. 2019) (holding that the government is not required "to wait for accidents to justify safety regulations.").

Sgt. Pope's proactive effort to protect public safety is, as a matter of law, a significant interest to maintain "'the safety, order, and accessibility of its streets and sidewalks.'" (J.A. 749 (quoting *Ross*, 746 F.3d at 555).) After "[c]onsidering all facts and reasonable inferences in Plaintiff's favor," the district court concluded that "Sgt. Pope, who had been working in Annapolis for only about a month, sought guidance from his supervisor, Sgt. Donaldson, before addressing the Hulberts. Although he recognized no apparent immediate threat to public safety, based on his discussion with dispatch and with Sgt. Donaldson, *Sgt. Pope believed there was a*

potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway." (J.A. 768 (emphasis added).)

Sgt. Pope's entitlement to qualified immunity is not measured by whether others believe his actions protected public safety after robust discovery and analysis. *See City & County of San Francisco v. Sheehan*, 575 U.S. 600, 615 (2015) (observing that courts "must not judge officers with the 20/20 vision of hindsight" (citation and internal quotation marks omitted)). Nor is it measured by the subsequent success or failure of his efforts. Indeed, it would yield absurd results if law enforcement officers were *only* entitled to qualified immunity when reasonable efforts to protect public safety are ultimately successful. To so limit the doctrine would completely alter the qualified immunity analysis. *See id.* at 611 (observing that qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law'") (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

Here, Sgt. Pope told a group to move a few feet for the purposes of protecting public safety. Sgt. Pope reasonably believed, under the circumstances, that moving the group such a short distance would protect against anticipated threats to public safety. Any analysis reviewing the outcome of those reasonable efforts deviates from the way qualified immunity jurisprudence applies in these circumstances,

which has never required perfection. In fact, the district court granted immunity under the Maryland Tort Claims Act to Sgt. Pope on the state law claims. (J.A. 766-69.) The court reasoned that "there is no evidence that the decision [to move the group] was made 'without the exertion of any effort to avoid' inflicting injury or a 'thoughtless disregard of the consequences' of moving the demonstrators approximately fifteen feet." (J.A. 768 (internal citation omitted).) The district court also recognized that "Sgt. Pope only arrested the Hulberts after giving them multiple opportunities to comply with his orders and allowed other members of their group to continue their activities inside Lawyers' Mall." (J.A. 768.) As argued above, qualified immunity "'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'" *Sheehan*, 575 U.S. at 611 (quoting *Ashcroft*, 563 U.S. at 743). The undisputed, material facts in the record clearly demonstrate that Sgt. Pope's efforts were reasonable and that he was neither plainly incompetent, nor did he knowingly violate the law.

Many cases that review time, place, and manner restrictions on speech analyze a policy that is being enforced. *Ross*, for example, concerned a policy of moving protestors to designated areas when the Circus was in Baltimore. *Ross*, 746 F.3d at 550, 557. The Hulbert brothers try to distinguish their case from *Ross* by arguing that in *Ross*, there was a prior safety issue directly tied to Circus protests. Appellees'

Br. 21-22. The government, however, may "advance its interests by arguments based on appeals to common sense and logic." *Ross*, 746 at 556. Unlike *Ross*—where the officers had a policy to follow independent of any environmental factors—Sgt. Pope was making a real-time decision based on circumstances that existed on the evening of February 5, 2018. When Sgt. Pope assessed the situation to include multiple people carrying signs adjacent to a roadway during evening darkness, immediately before a busy legislative session was about to begin, and at a location where pedestrians had twice before been struck by vehicles within the prior eight months, common sense dictates that he acted reasonably to protect against an anticipated threat to public safety. The distinction between this case and *Ross* that the Hulberts identify bolsters Sgt. Pope's claim for qualified immunity.

Sgt. Pope observed a group of demonstrators on the sidewalk, communicated with his superior officer about how to respond, and based on a litany of safety concerns (J.A. 335-36; *see also* J.A. 747 ("The testimony uniformly shows these conversations were about potential safety concerns . . ."), 768 (acknowledging that "Sgt. Pope believed there was a potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway."), Sgt. Pope told the group to move a few feet for safety reasons. Unlike *Ross*, where the officers were following a written policy, Sgt. Pope was making a situational, real-time decision based on the

circumstances, which makes this case more akin to *Kass v. City of New York*, 864 F.3d 200 (2d 2017).

In *Kass*, the New York Police Department was monitoring a protest taking place in a park. *Id.* at 204. At 4:40 p.m., one pedestrian, Stephen Kass, stopped on the sidewalk adjacent to the park so he could speak with protestors. *Id.* He was standing on the sidewalk, engaged in non-confrontational conversation, and was not impeding pedestrian or vehicular traffic. *Id.* An officer approached him after a minute or two, and told him to "keep walking." *Id.* Mr. Kass "replied that he wanted to hear the protestors' views, he was not blocking pedestrian traffic, and he had a right to remain on the sidewalk." *Id.* The officer repeated her order, Mr. Kass continued to refuse to comply, the officer called for assistance, and one of the protestors began recording the interaction. *Id.*

After several orders to move and several refusals by Mr. Kass, one of the responding officers placed his hand on Mr. Kass's elbow and attempted to guide him away, but Mr. Kass objected to being touched and insisted that he wanted to continue talking with protestors. *Id.* The officer then suggested that he "go inside the park to continue his conversation with the protestors." *Id.* After further objection, Mr. Kass was grabbed, handcuffed, and brought to the precinct where he was issued a summons for disorderly conduct under New York law. *Id.* Similar to the dropped charges in this case, "[t]he charge was ultimately dismissed for failure to prosecute."

Id. On these facts, the Second Circuit concluded that "because the officers' orders were content neutral, narrowly tailored, and allowed an adequate, alternative channel of communication, they were a permissible time, place, and manner restriction on speech and did not violate the First Amendment." *Id.* at 209. The Second Circuit—reviewing circumstances similar to those in this appeal—concluded that "the officers' repeated orders that [plaintiff] either 'keep walking' or enter the protest area to continue his conversation were narrowly tailored to maintain crowd control and security." *Id.*

Here, when the district court partially denied the motion for summary judgment based on a single alleged dispute of fact, Sgt. Pope filed a motion for reconsideration. Specifically, the court stated "there is a factual dispute as to whether *any of the Patriot Picket* members were in the street or crosswalks prior to Sgt. Pope ordering the group to move." (J.A. 753 (emphasis added to highlight that the district court was concerned with whether any member of Patriot Picket was in the street or crosswalks, and not whether the Hulbert brothers, in particular, were in the street or crosswalks).) Sgt. Pope maintains that the answer to this question is immaterial to the qualified immunity analysis, but because the district court was only dissuaded from granting summary judgment on one narrow factual dispute, Sgt. Pope filed a motion for reconsideration, in part, to provide the court with video surveillance footage conclusively resolving the only stated obstacle to summary

judgment. It seemed illogical to subject the parties to a jury trial when the only alleged factual dispute could easily be resolved with video footage that answers the question articulated by the court.

But that was a motion for reconsideration presented to the district court, and we are proceeding in this Court on interlocutory appeal. In the district court, Sgt. Pope responded to that court's specific concern. In this interlocutory appeal, Sgt. Pope maintains that it does not matter how one answers the question presented by the district court. Whether "any of the Patriot Picket members were in the street and crosswalks" does not impact the qualified immunity analysis for Sgt. Pope. The undisputed evidence that he was acting to prevent anticipated threats to public safety—a significant government interest—is unchanged by the presence of Patriot Picket members in the street and crosswalks. The line between granting qualified immunity, or denying it—or the line between constitutionally-protected speech and criminal activity—does not hinge on the determination of this one hyper-specific immaterial fact, because even if it is resolved in the Hulberts' favor, the result is the same. This is especially true here with an undisputed record that otherwise supports a finding of qualified immunity.

Moreover, the Hulbert brothers wholly ignore and fail to respond to the fact that an Assistant State's Attorney agreed that additional charges were appropriate based on the Hulberts' conduct, and assisted with adding charges, which is a

mainstay of Sgt. Pope's claim to qualified immunity. *Wadkins v. Arnold*, 214 F.3d 535, 541-42 (4th Cir. 2012) (holding that a prosecutor's authorization of charges weighs "heavily *toward* a finding that [the officer] is immune" and it "is compelling evidence and should appropriately be taken into account in assessing the reasonableness of [an officer's] actions") (emphasis in original)). The Hulbert brothers only mention the fact that the charges were dropped days later, a decision that the record shows was made by Col. Michael Wilson, but that the Hulbert brothers attribute to the elected State's Attorney. Appellees' Br. 11; (J.A. 443, 606-07.) Even if the State's Attorney had made the prosecutorial decision to drop charges days later, it has no bearing on Sgt. Pope's claim for qualified immunity. Discussions with an Assistant State's Attorney about whether the Hulberts' conduct was criminal—and then adding charges based on that discussion—is the kind of evidence supporting a claim for qualified immunity under *Wadkins*.[1] A subsequent prosecutorial decision about whether to pursue a conviction is irrelevant.

As the Second Circuit held in *Kass*, this Court should conclude that the factual dispute relied on by the district court to deny qualified immunity is immaterial

[1] As argued in his principal brief, the Assistant State's Attorney agreed with adding additional charges based upon the conduct of the Hulbert brothers. In addition to the charge for failure to obey a lawful order, the Hulbert brothers were charged with obstructing sidewalks and trespass based on the same conduct. Appellant's Br. 24-27.

because Sgt. Pope's orders were narrowly tailored to protect public safety. This Court should reverse the district court decision and remand with instructions to enter summary judgment in favor of Sgt. Pope on all remaining claims.

II. THIS CIRCUIT'S PRECEDENT IN FEBRUARY 2018 WOULD NOT HAVE PUT SGT. POPE ON NOTICE THAT HE WAS VIOLATING A CLEARLY ESTABLISHED RIGHT TO RECORD LAW ENFORCEMENT OFFICERS WHEN HE ARRESTED KEVIN HULBERT FOR REPEATEDLY IGNORING LAWFUL ORDERS TO MOVE A SHORT DISTANCE.

Sgt. Pope is entitled to qualified immunity on Kevin Hulbert's claims because the binding precedent in this circuit as of February 2018 would not have put Sgt. Pope on notice that he was violating Kevin Hulbert's First Amendment rights when he arrested him, in part, for disobeying a lawful order. Critically, the district court agreed that the evidence showed that "Sgt. Pope arrested Kevin Hulbert because he did not comply with repeated orders to move to Lawyers' Mall, not because he was filming." (J.A. 756.) The district court further agreed that "[i]t is undisputed that Sgt. Pope told Kevin Hulbert multiple times to move off of the sidewalk and that Kevin Hulbert refused to do so." (J.A. 756.) The district court agreed that, by contrast, there was "no evidence that Sgt. Pope ever told Kevin Hulbert that he could not film. Multiple other people were filming the interaction and were not arrested or otherwise prevented from recording the event." (J.A. 756.) The court therefore "was not persuaded that a reasonable jury could find Kevin Hulbert was arrested because he was filming police." (J.A. 756.) The court nevertheless refused to grant

Sgt. Pope qualified immunity on Kevin Hulbert's claim that Sgt. Pope interfered with his First Amendment right to record law enforcement.

The court erred because, as set forth in Sgt. Pope's principal brief, Appellant's Br. 28-40, the law in this circuit in February 2018 was unsettled regarding whether there was a clearly established First Amendment right to record law enforcement, and the nature, scope, and contours of any such right. This is particularly true where it is undisputed that the arrest was not made to stop the filming and Kevin Hulbert only began recording after ignoring several orders to move for safety reasons. Given the unsettled nature of any such right in February 2018 and the particular facts of this case, a reasonable officer in Sgt. Pope's shoes would not have known that his arrest of Kevin Hulbert violated a clearly established right to film law enforcement. On these undisputed facts, Sgt. Pope is entitled to qualified immunity on Kevin Hulbert's claims and the district court erred when it denied summary judgment.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 2,748 words, excluding the parts of the brief exempted by Rule 32(f).

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

/s/ James N. Lewis
_____
James N. Lewis

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CERTIFICATE OF SERVICE

I certify that, on this 6th day of May, 2022, the Reply Brief of Appellant was filed electronically and served on counsel of record, all of whom are registered CM/ECF users:

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