IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1608

Sergeant Brian T. Pope,

Defendant/Appellant

v.

Clayton R. Hulbert, as Personal Representative of the Estate of Jeffrey Hulbert, *et al.*,

Plaintiffs/Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(The Honorable Stephanie A. Gallagher presiding)

APPELLEES' MOTION FOR REHEARING EN BANC

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INTRODUCTION

Appellees respectfully petition this Honorable Court for a rehearing *en banc* of the decision rendered in this case on June 14, 2023 (ECF 66) under Fed. R. App. P. 35(a).

STATEMENT OF PURPOSE

This Court should grant a rehearing *en banc*. *First*, the panel failed to resolve the question of whether a bystander has a First Amendment right to film police activity in a public space. This is a question of exceptional importance as this Court has not yet settled the issue of whether individuals have a right to record police when the individual is not subject to a stop or an arrest and the public has an essential interest in utilizing such recordings and public opinion to serve as a meaningful check on police. *See* Section I.

Second, the panel failed to address Appellees' Count III, which pled a First Amendment retaliation claim arising out of Appellant filing additional criminal charges for each Appellee the day following their initial arrest despite having no probable cause for those additional charges. Whether the addition of more severe and unwarranted charges after Appellees spoke to the media violates Appellees' First Amendment rights is of exceptional importance. *See* Section II.

Third, *en banc* review is necessary to maintain uniformity of this Court's decisions as the panel decision improperly relies on facts not supported by the record

or explicitly contradicted by the record. The panel's speculative fact-finding deprived Appellees of due process and *en banc* review is vital to ensure uniformity and protect Appellees from the arbitrary. *See* Section III.

Fourth, new scholarship has recently emerged which demonstrates that the Civil Rights Act of 1871 abrogated qualified immunity. This issue impacts hundreds of litigants across the circuit and will continue to repeatedly arise until this Court resolves the question. *See* Section IV.

BACKGROUND

On February 5, 2018, Appellees were peacefully picketing in Maryland's capital during a legislative session as members of Patriot Picket, an informal group opposing infringement of Second Amendment rights. J.A.443. Appellees were on a long section of wide public sidewalk in a group of eight people. J.A.95, 751. The group was not impeding or interfering with the movement of pedestrian or vehicle traffic. J.A.85, 443.

Appellees had picketed in the area before at the same time and on the same day of the week. J.A.519-20. Appellant had observed then there numerous times before. J.A.521-22, 263-64. Appellant had never previously arrested any individual connected with Patriot Picket or ordered them to move. J.A.68, 522.

Prior to arriving on scene, Appellee had no information that anything unlawful was occurring. J.A.86-87, 122. An individual from the Lieutenant Governor's staff

contacted the Maryland Capitol Police to request that the picketers be moved from the sidewalk so the Lieutenant Governor could walk by without seeing them. J.A.666. The dispatcher forwarded the request to Appellee. J.A.666. Appellee admitted he received this request. J.A.75.

When Appellant interacted with Appellees that night, he never witnessed any unsafe condition, any obstruction of pedestrian or vehicular traffic, or any other indication that the Appellees were interfering with public order. J.A.522, 533-34. Appellant was able to traverse the area freely without obstruction. J.A.94-96. Although Appellees were not obstructing anyone and Appellant did not even see anyone else in the area, Appellant asked Appellees to move to Lawyer's Mall, an area where it would be more difficult to be seen. J.A.93-94. Demonstrating in Lawyer's Mall required a permit, which Patriot Picket did not have. J.A. 76, 426.

After Appellee Jeff Hulbert exercised his First Amendment right to continue peacefully demonstrating in a public forum and remained on the public sidewalk holding a sign, he was arrested by Appellant. J.A.101. Appellee Kevin Hulbert, who was neither picketing nor carrying a sign, began filming Appellee Jeff Hulbert's arrest from a reasonable distance before being arrested himself. J.A.101. Although several other individuals were filming Appellee Jeff Hulbert's arrest, Appellee Kevin Hulbert was the only individual arrested for doing so. J.A. 103-04, 740.

Appellant issued one criminal citation to each Appellee for willfully failing to obey a reasonable and lawful order. J.A.575-76. But Appellant admitted that there was no disturbance of the peace that could have supported his order and arrest of Appellees. J.A. 543-46, 552, 554-55.

The next morning after the arrests, Appellant's supervisor, Lt. Michael Wilson, began to read media reports critical of the handling of the incident. J.A.578-80. Lt. Wilson was upset and directed Appellant to add additional charges. J.A.573-75, 585-86, 232, 597. Appellant added additional charges and served Appellees with the additional charges while Appellees were giving media interviews about the incident. J.A.248, 556-57. Appellant then filed even more additional charges against Appellees, all related to February 5. J.A.561-66. The charges were dismissed by the State's Attorney. J.A.443, 607.

PANEL OPINION

The trial court entered an order granting summary judgment in part and denying summary judgment in part. J.A.771. The trial court denied summary judgment as it concluded that outstanding factual issues needed to be resolved by a jury as Appellant's own testimony raised questions regarding the lawfulness of his orders and whether he had probable cause to arrest. J.A.751, 753-54, 759, 763.

On June 14, 2023, the panel issued its published opinion reversing the decision of the trial court. ECF 66. The panel concluded that Appellant was entitled to

qualified immunity. ECF 66 at 11. The panel's conclusion was premised entirely on its assessment that even though there was no safety risk at the time there was a potential future safety risk sufficient to warrant restriction of Appellees' First Amendment rights because (1) it was allegedly dark, (2) there had been prior accidents in the area, and (3) there would purportedly be an influx of pedestrian traffic in a few hours because of the convening of the legislative session. ECF 66 at 13. The panel did not separately address Counts III and IV, instead determining simply that "[b]ecause Pope reasonably could have believed that his orders to Jeff and Kevin Hulbert were lawful, he is also entitled to qualified immunity on their First Amendment retaliatory-arrest and Fourth Amendment unreasonable-seizure claims." ECF 66 at 19.

REASONS FOR GRANTING APPELLEES' PETITION

I. The Panel's Decision Did Not Resolve the Question of Whether Bystanders Have a Right to Film Police, a Question of Exceptional Importance.

The ability of individuals to film police in public has become the last and best defense against police brutality. The recordings of bystanders serve an essential public interest in placing police activity before the court of public opinion to serve as a meaningful check on government power. As a result, the First, Third, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits have all affirmed this vital right. *See* J.A. 754-55.

This Court, on the other hand, has not addressed this issue in a published decision. In 2009, this Court issued an unpublished decision that concluded that a "First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct." *Szymecki v. Houck*, 353 F. App'x 852, 853 (4th Cir. 2009). Earlier this year, this Court found that *the subject of a traffic stop* was not entitled to broadcast the stop live—a case factually distinct from this one. *Sharpe v. Winterville Police Dep't*, 59 F.4th 674 (4th Cir. 2023). As neither *Sharpe* nor *Szymecki* conclusively determine this question, the issue remains unresolved by this Court.

Without a published opinion of this Court or the Supreme Court addressing the issue, and an unpublished opinion of this Court that stands against the overwhelming consensus of sister circuits and district courts, there is ambiguity and a risk that trial courts will reach divergent outcomes on this issue. This Court should provide crucial guidance to litigants, trial courts, and the general public and establish whether a bystander witnessing police activity in a public space has the right to pull out their phone and record. This Court should find, as most sister circuits have, that "under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas" and any restrictions thereto must

be "restrained" in "public places." *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017).

According to the panel, Appellant's order to move was a reasonable time, place, and manner restriction because (1) he had an alternative channel for communication in the form of moving fifteen feet and continuing to film from there, and (2) the order served a government interest in ensuring the safety of pedestrians and drivers and Appellant himself, given how close Appellee Kevin Hulbert was standing to Appellant. ECF 66 at 17.

But there is no evidence that Appellee Kevin Hulbert posed any danger to pedestrians, drivers, or Appellant, and therefore there was no governmental interest in moving him. Further, finding that he had an "alternative channel" if he moved away and continued filming from further away ignores the reality of these types of encounters.

First, there is no evidence that Appellee Kevin Hulbert participated in the demonstration or held a picket sign. J.A.101, 353. All he did was record with a small cell phone. There is no evidence that Appellee Kevin Hulbert obstructed pedestrians or traffic. There is no evidence that anything Appellee Kevin Hulbert did had any impact at all on any other person or any vehicle in the vicinity.

There is also no evidence at all that Appellee Kevin Hulbert posed any threat to Appellant, regardless of the proximity between them. In fact, as is evident on the

video footage of the encounter, it was Appellant who approached and passed by Appellee Kevin Hulbert, not the other way around—in other words, it was Appellant who placed Appellee Kevin Hulbert at his back, the key factor pointed to by the panel to support its contention that an order to move "served a significant interest in reducing any possible risk to the officer's safety." ECF 66 at 17-18. There was no reason for Appellant to approach and pass Appellee Kevin Hulbert at that point anyways: there were already several officers on scene standing around doing nothing on the side that Appellant was crossing to. If there was any legitimate purpose for Appellant to cross so close to Appellee Kevin Hulbert's person, it could have been met by any one of the numerous other officers standing around with nothing to do. In total, eight officers responded to the scene. J.A.543-546.

As this case involves a vital First Amendment issue that has not previously been resolved by this Court in a published opinion, this Court should review this appeal *en banc*. As Judge Gregory has noted, "[t]here can be no doubt that [an] issue is one of exceptional importance, [where] a fundamental First Amendment question … has not been directly addressed by the Supreme Court or our Sister Circuits." *United States v. Sterling*, 732 F.3d 292, 294 (4th Cir. 2013) (Gregory, J., dissenting). Every citizen in Maryland that faces an encounter with the police "will look to [this Court's] decision for guidance" as to whether they can pull out their smartphone and record another person's arrest or not. *Id*. at 295. Until this issue is resolved, cases

will "come up repeatedly in the future" as individuals continue to document police activity, believing that they have the same right to do so as they would in other circuits. *Id*.

Protecting an individual's right to record police when they are not the subject of a stop or arrest is vital so that "public opinion [can] serve as a meaningful check on governmental power." *Id*. In sum, "an unsettled issue of First Amendment law … should have been heard *en banc*." *Sons of Confederate Veterans, Inc. v. Comm'r of Virginia Dep't of Motor Vehicles*, 305 F.3d 241, 248 (4th Cir. 2002) (Niemeyer, J., dissenting).

II. The Panel's Decision Did Not Resolve One of Appellees' Claims.

In addition, the panel's decision failed to address another question of exceptional importance: whether the increase of the charges against Appellees *ex post facto* violated Appellees' First Amendment rights. Appellant charged Appellees with failing to obey a lawful order under Md. Code, Crim. Law § 10-201(c)(3) on the night of their arrest. J.A. 561-563. Appellant's superior, Lt. Michael Wilson, read media reports related to the arrests the next morning, which were critical of the handling of the incident. J.A. 580. Lt. Wilson was upset by the reports and directed Appellant to add additional charges. J.A. 232, 558, 573-575; 585-586; 597. Appellant added the additional criminal citations once he arrived on duty. J.A. 248.

The original charges carried a maximum penalty of a $500 fine and 60 days in jail. J.A.262. The newly-added charges carried possible penalties of a $1000 fine and up to six months in prison. J.A.561-566. This increase in potential consequences lead to increased emotional distress, which is a harm separate and distinct from the actual arrest. In other words, even if the arrest were justified by an alleged failure to move when ordered, the additional charges added later give rise to a claim for the additional distress they caused, separate and apart from the arrest.

Appellant admitted that neither Appellee ever obstructed a public sidewalk as charged in the obstruction citation, J.A.529-30, 533-38, and Appellant admitted that neither Appellee ever disrupted any business in any way, as charged in the trespass citation. J.A.541, 554-555. As Appellant admits the elements of these citations are not met, it is evident that no probable cause existed to charge the Appellees with either citation. But the panel failed to address the addition of more severe and admitted false charges.

III. The Panel Impermissibly Based Its Opinion on Facts Not Supported By or Directly Contradicted By the Record.

First, the panel speculated that "[t]he Maryland legislature was set to soon convene just one block away, generating significant pedestrian traffic." ECF 66 at 13. The trial court found that "the Maryland legislative session was expected to convene within a few hours." J.A. 751. The trial court did not find that the convening of the session would "generat[e] significant pedestrian traffic." ECF 66 at 13. In

direct contradiction of the panel's assumptions, the trial court emphasized 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" and there is no evidence to suggest that this would have changed, even after the session had convened. J.A. 751.

Appellant knew that Patriot Picket demonstrated in that area most Monday nights during the legislative session. J.A.519. Appellees had been there before and Appellant was familiar with their activities. J.A.519-20. As Appellees had been there before, *during times when the legislature convened*, there is no evidence that any pedestrian traffic connected with the legislative session would create an emergent situation on February 5, 2018 when it had never done so before.

In reality, there is little to no chance that any pedestrian traffic would have been generated by the session. In Annapolis, lawmakers and aids have access to an underground tunnel to travel from building to building, and there is no reason for legislators to leave the indoor tunnels and traverse outside on a cold February night. Moreover, even if lawmakers and aids bypassed the tunnel, the physical layout of the streets means that they would have to go out of their way, *unnecessarily crossing two streets and taking a longer route*, to need to walk on the same sidewalk as the picketers. It is simply not accurate, and without record evidence, for the panel to find that there was about to be any significant number of people on the sidewalk near

the picketers. Without the speculative influx of future pedestrian traffic, which is not supported by any record evidence, there is no discernable future safety risk on which the panel's opinion can rely.

Second, the panel speculated that Appellant had been informed there was "a safety issue related to the demonstration" because "pedestrians had twice been struck by vehicles in the preceding year." ECF 66 at 13. But the trial court explicitly found that "there is no evidence that the circumstances surrounding these vehicle accidents or complaints had anything in common with the Patriot Picket's February 5 demonstration," especially as those prior incidents "occurred during daylight hours in June." J.A.753. In addition, given the factual dispute over whether "any of the Patriot Picket members were in the street or crosswalks," prior incidents involving vehicles may be completely irrelevant. *Id*.

In any event, Appellant admitted that he had no knowledge of the two prior incidents at the time of the arrest. When asked if he was aware of any pedestrians ever being hit in the area, Appellant testified "[n]ot that I was aware of." Appellant's Deposition Tr. at 211.

This Court has unequivocally held that "[a] court should only consider the information the officers had at the time" when determining whether probable cause existed. *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017). But Appellant admitted he did not know about the prior vehicle incidents at the time, so the panel's

determination that there were "safety issue[s]" arising out of pedestrians having been struck by vehicles twice in the prior year cannot support probable cause. ECF 66 at 13.

The panel also premised its opinion on the fact that "[i]t was dark out." ECF 66 at 13. While it was evening, the area was well-lit with artificial light, so there was no safety hazard. The video evidence in this case readily demonstrates that the area was well-lit, even at night, with streetlamps and a large floodlight on the other side of the street. The Picketers stood in a well-lit area precisely so that their signs could be read.

In sum, the panel improperly reached its conclusion by speculating a new basis for Appellant's order that is not based on record evidence and ignores the record evidence that clearly demonstrates an alternative basis: that Appellant sought to move Appellees on the Lieutenant Governor's order. This Court may "decide 'purely legal questions relating to qualified immunity,' [but] it may not reweigh the record evidence 'to determine whether material factual disputes preclude summary disposition.'" *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) (quoting *Iko v. Shreve*, 535 F.3d 225, 234 (4th Cir. 2008)).

This issue warrants *en banc* review to maintain uniformity and to address the important due process concerns invoked by speculative appellate fact-finding. Just as a rehearing *en banc* is necessary to maintain uniformity where the panel has

"ignore[ed] the factual evidence and the district court judge's decision," the opposite is also true: rehearing *en banc* is necessary where the panel impermissibly engaged in judicial factfinding to achieve a desired outcome. *Beatty v. Chesapeake Ctr., Inc.*, 835 F.2d 71, 75 (4th Cir. 1987) (Murnaghan, J., concurring).

IV. New Scholarship Demonstrates That Qualified Immunity is Inconsistent with Section 1983's Text and Purpose.

"The Reconstruction Congress intended to create liability notwithstanding contrary state law, meaning that state law immunities have no place in Section 1983." Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 246 (2023).[1] Put simply, Professor Reinert recently unearthed an uncodified portion of the Civil Rights Act of 1871 that contained the clause "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary

[1] In a concurrence, Second Circuit Judge Willett described Professor Reinert's research as "game-changing arguments," but reserved on the merits by finding that "[o]nly [the Supreme Court] can definitively grapple with § 1983's enacted text and decide whether it means what it says." *Rogers v. Jarrett*, 63 F.4th 971, 980-81 (5th Cir. 2023) (Willett, J., concurring).

Fifth Circuit Judge Calabresi filed a dissent citing to Professor Reinert's article and noting that "But scholars have demonstrated that there was no common law background that provided a generalized immunity that was anything like qualified immunity" before concluding that "[t]he Supreme Court should do away with this ill-founded, court-made doctrine." *McKinney v. City of Middletown*, 49 F.4th 730, 757-58 (2d Cir. 2022) (Calabresi, J., dissenting).

No Court of Appeals to date has published an opinion directly addressing the merits of Professor Reinert's research.

notwithstanding." Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. This "Notwithstanding Clause" provides unambiguous text exempting Section 1983 claims from any state or common law immunities. As Professor Reinert points out, this clause was part of the Civil Rights Act as enacted and was only removed because of "a decision by the first Reviser of Federal Statutes to, for unclear reasons, remove [the Notwithstanding Clause] when the first edition of the Revised Statutes of the United States was published in 1874." Reinert, 111 Cal. L. Rev. at 237.

This research is ground-breaking and challenges the very foundation of the concept of qualified immunity.[2] Accordingly, Appellees ask this Court to rehear this case *en banc* to determine whether qualified immunity can shield a state employee from a Section 1983 claim in light of the "Notwithstanding Clause."

[2] Professor Reinert's research was published in February 2023, long after the parties' briefs were submitted in this case. The undersigned was also not aware of this research as of the date of oral argument. Accordingly, Professor Reinert's research has not been previously addressed in this appeal. Nevertheless, this Court may, "when 'deemed necessary to reach the correct result' on matters of public importance," exercise its discretion to address issues not previously raised, especially an issue that functions as an alternative legal theory supporting the district court's decision. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 271 (4th Cir. 2019).

Respectfully submitted,

/s/ Cary J. Hansel

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REQUEST FOR FURTHER BRIEFING

Given the complex factual and legal issues in this case, Appellees respectfully request that this Court permit further briefing if this Court grants Appellees' motion for rehearing.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) and contains 3,900 words or less. 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
Cary J. Hansel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of June, 2023, the foregoing petition was filed with the Court's CM/ECF system which shall effect service on all parties so entitled.

/s/ Cary J. Hansel
Cary J. Hansel