IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, *et al.*

***Plaintiffs*,**

v.

SGT. BRIAN T. POPE, *et al.*

Defendants.

Jury Trial Demanded

Civil Case No.: 1:18-cv-004610-GLR

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND CONDITIONAL REQUEST FOR A HEARING

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND PLAINTIFFS' CONDITIONAL REQUEST FOR HEARING

COMES NOW, Plaintiffs, by and through undersigned counsel, and file this opposition to Defendants' Motion to Dismiss, and in support thereof, states as follows:

I. INTRODUCTION

Plaintiffs Jeff and Kevin Hulbert were unlawfully arrested and erroneously charged with misdemeanor criminal citations for lawfully exercising their First Amendment rights. In further violation of the Plaintiffs' constitutional rights, on the day following the unlawful arrests, the Defendants retaliated against them for speaking to the press about what had occurred by issuing them additional criminal citations. Numerous state representatives spoke out against the unlawful arrests and the charges against both Kevin and Jeff Hulbert were dropped. Following the violations of Plaintiffs' constitutional rights, this action was filed, bringing ten claims against the Defendants, including the following: 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; Count IV, Fourth Amendment Unconstitutional Search and Seizure; Count V, Fourth Amendment Excessive Force; Count VI, Maryland Declaration of Rights- Freedom of Speech; Count VII, Maryland Declaration of Rights

Articles 24 & 26; Count VIII, Maryland Declaration of Rights Articles 24 & 26; Count IX, False Arrest; Count X, False Imprisonment.

II. FACTS

On February 5, 2018, Plaintiffs, Jeff and Kevin Hulbert ("the Hulberts"), were peacefully picketing in Maryland's capital, as they had done nearly every Monday evening on the same sidewalks for the previous two years. ECF 1 (Complaint), para. 1, 21. The Hulberts were lawfully protesting against state laws and policies which they passionately believe are wrong. *Id.* Their demonstrations occurred in the evening, after standard business hours when the sidewalks and walkways were relatively free from pedestrian traffic. *Id.* On the evening of February 5, 2018, the weather conditions were poor and there was little foot traffic on the streets. The Hulberts were on the public sidewalk, neither impeding nor interfering with the movement of other pedestrians. *Id.* They were accompanied by a "small group" of "approximately five" members of the Patriot Picket, an informal group founded by the Hulberts who gather to peacefully oppose infringement of Second Amendment rights. *Id.* at paras. 20-25.

During their demonstration, as they had done on dozens of evenings before on the exact same public sidewalk, members of the Patriot Picket, including Jeff Hulbert, were holding signs addressing Second Amendment concerns and rights. *Id.* at paras. 22. While the others held signs, Kevin Hulbert used video and audio recording on his cell phone to record the demonstration. *Id.* at para. 30. The Hulberts were familiar with the Defendants, Officer Pope and Chief Wilson, from prior interactions with them during such demonstrations. *Id.* at para. 26. The Defendants regularly approached the Hulberts while demonstrating and requested that they move to the Lawyer's Mall, an area restricted to demonstrators who had obtained the necessary permits to assemble in that location. *Id.* at para. 28. Each time the request was made, however, the Hulberts informed the

Defendants of their rights to demonstrate on the public forum, and maintained their position without further issue. *Id.*

On the evening of February 5, 2018, Defendant Pope approached the Hulberts and stated, "I'm advising you that you have to be in the Lawyer's Mall," and went on to explain that policy had changed, making reference to orders coming down from the Chief of Police, Defendant Wilson. *Id.* Defendant Pope then left the Hulberts and other members of the Patriot Picket as they continued to peacefully picket on the public sidewalk. Defendant Pope's statement caused some of the members to relocate to the Lawyer's Mall, while the others stayed on the public sidewalk. *Id.* at para. 32. Of those who remained on the public sidewalk, Jeff Hulbert was the only one remaining who was holding a sign. *Id.* at para. 33.

Shortly after his departure, Defendant Pope returned to the Hulberts' location and placed Jeff in handcuffs, while Jeff calmly explained, "This is a public sidewalk, we have a right to engage in First Amendment activity here." While merely recording the incident from a reasonable and lawful distance, Kevin was also placed under arrest at the direction of the Defendants. *Id.* at para. 35. While handcuffed, the Hulberts were taken by patrol car to the Annapolis City Police Precinct, where they were escorted inside and locked to a bench. *Id.* at para. 35-37. The Hulberts were eventually released and each issued a single citation which by CJIS code, referenced Md. Code, Crim. Law § 10-201 for failure to obey a reasonable lawful order. *Id.* at para. 38.

The following day, February 6, 2018, the Hulberts agreed to meet with numerous members of the press for interviews on the very sidewalk on which they had been arrested. *Id.* at para. 46. In addition to the interviews being conducted that day, various social media web-sites were reporting the incident and videos of the arrests had been widely circulating on the internet. *Id.*

While on the sidewalk discussing their unlawful arrests with members of the press, Defendant Wilson approached the Hulberts. *Id.* at para. 4. He informed them that he and his staff

had spent "all day" reviewing the social media and news coverage of the night before, which notably, portrayed the Defendants in a negative light. *Id*. After making this statement, Defendant Wilson personally informed the Hulberts that they were each being cited with two *additional* charges. *Id*. These citations, dated February 6, 2018, charged the Hulberts with separate and distinct misdemeanor crimes from the citations issued to them the night before. *Id*. This action was in direct retaliation for the Hulberts' exercising their rights and speaking out to the press about the Defendants' violations of their constitutional rights. *Id*.

III. STANDARD OF REVIEW

In ruling on a Rule 12(b)(6) motion to dismiss, the court must "accept the well-pled allegations of the complaint as true," and "construe the facts and reasonable inferences derived therefrom in the light most favorable to the plaintiff." *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). Consequently, a motion to dismiss under Rule 12(b)(6) may be granted only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Furthermore, the court must "disregard the contrary allegations of the opposing party." *Gillespie v. Dimension Health Corp.*, 369 F. Supp. 2d 636, 640 (D. Md. 2005).

A motion to dismiss for failure to state a claim for relief should not be granted if the complaint is plausible on its face. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (*citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible on its face if "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Thus, the defendant must prove that plaintiff's complaint does not allow the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1940. The law requires that, in order to maintain the motion as a motion to dismiss, the defendant must prove

these elements without presenting evidence extrinsic to the plaintiff's complaint. Fed. R. Civ. P. 12(d). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

IV. ARGUMENT

Each of the Defendants' unsupported arguments is discussed in turn below, and for the reasons stated, their motion should be denied. The facts presented provide a viable basis for each of Plaintiffs' claims, as the Hulberts were unlawfully arrested, subjected to excessive force, and charged for crimes for which there was no probable cause to maintain. As detailed below, the constitutional rights alleged in the complaint were "clearly established" at the time of the arrests and thus the Defendants have no right to qualified immunity. Defendants' motion fails at this stage as it rests upon arguments based on *disputed material facts* and presentation of matters outside of the pleadings. For all of these reasons, Defendants' motion should be denied.

A. The Facts As Alleged Are Sufficient To Plead That Defendants Have Violated Plaintiffs' Clearly Established First Amendment Rights.

In primarily arguing that they are shielded by immunity, the Defendants attack the viability of the Plaintiffs' claims, including each of the claims brought pursuant to the Plaintiffs' First Amendment rights. The First Amendment guarantees freedom of speech and the right to petition the government for redress of grievances.[1] This right would be meaningless if governments and government officials were free to retaliate against citizens with impunity for exercising such rights.

[1] Article 40 of the Maryland Declaration of Rights is read in *pari materia* with First Amendment protections. *Pendergast v. State*, 99 Md. App. 141, 636 A.2d 18 (1994). Therefore, the arguments set forth herein as to Counts I-III of the Complaint are fully incorporated as to Count VI.

As stated by the Supreme Court in *N.Y. Times Co. v. Sullivan*, because, "the Constitution created a form of government under which the people, not the government, possess the absolute sovereignty," the "right of free public discussion of the stewardship of the public officials" is "fundamental." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 274-75 (1964) (internal citations & quotations omitted). In that case, the Court went on to state that, "debate on public issues should be uninhibited, robust, and wide-open," and that "it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and government officials." *Id*. at 270. It has further been stated that, "speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values,' and is entitled to special protection." *Connick v. Meyers*, 461 U.S. 138, 145 (1983) (quoting *NAACP v. Clairborne Hardware*, 458 U.S. 886, 913 (1983)). Furthermore, the right of a private citizen to petition the government and publicly address grievances "without thereby risking arrest," is a "principal characteristic by which we distinguish a free nation from a police state." *City of Houston v. Hill*, 482 U.S. 451, 462-63 (1987); *Mills v. Alabama,* 384 U.S. 214, 218 86 S. Ct. 1434 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs."); *Tobey v. Jones*, 706 F.3d 379 (4th Cir. 2013) (holding that, "A bedrock First Amendment principle is that citizens have a right to voice dissent from government policies.").

1. The Right To Engage In A Lawful Demonstration On A Public Sidewalk Was Clearly Established.

Count I of the Complaint addresses the Defendants' violation of the Plaintiffs' First Amendment right to peacefully assemble and take part in a demonstration on the public sidewalks, a long understood traditional public forum. ECF 1, para. 72-76. In their motion, the Defendants attempt to mitigate their actions by pointing to irrelevant statutory provisions which charge the

Defendants "with the responsibility of protecting the grounds and buildings" of the General Assembly Building complex. ECF 11-1, pg. 8 (citing State Fin. & Proc. Art., §§ 4601, 4-604 and 4-605). Yet, the Plaintiffs were **not** on grounds and buildings referenced by these provisions. Rather, as the Defendants even recognize, the Hulberts were on the public sidewalk. *Id*. The Defendants go on to argue that because the Plaintiffs were only asked to relocate, rather than altogether cease their demonstrating, that they were not deprived of their First Amendment rights. *Id*. That contention fails for multiple reasons.

First, the Hulberts have every right to be on the sidewalk and the police have no power to demand that they move on pain of arrest. As the Supreme Court stated in *United States v. Grace*, 461 U.S. 171, 180 (1983), in striking down a statute that made it a crime to protest on the public sidewalk in front of the Supreme Court building:

> 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.,

S*ee also Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983) ("[S]treets and parks… 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (quoting *Hague v. CIO,* 307 U.S. 496, 515 (1939)).

In this case, the Hulberts and others demonstrating on the sidewalk were not "impeding traffic, causing a nuisance, disturbing the peace, or otherwise impacting the rights of others." ECF 1, para. 25. The video evidence of the arrest, referenced in the complaint (ECF 1, para. 58), will make that quite clear to the jury. Rather, the Plaintiffs were exercising their rights to demonstrate

regarding the Second Amendment, therefore taking part in protected speech on a public forum. There was no reason for the request to relocate.

Any intrusion upon the Plaintiffs' First Amendment rights on a public forum is a violation of those rights. Requesting that Plaintiffs relocate impeded upon their rights of freedom of expression and assembly. *Schneider v. State of New Jersey, Town of Irvington*, 308 U.S. 147 (1939). As explained by the Court in *Schneider*:

> The streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Id. at 163. Even in a non-public forum, such as an airport, "a government official cannot 'suppress expression merely because [they] oppose the speaker's view.'" *Tobey*, 706 F.3d at 391 (4th Cir. 2013), quoting *United States v. Kokinda*, 497 U.S. 720, 721, 571 (1990).

Furthermore, such request was not a reasonable time, place, or manner restriction as (1) other demonstrators on the public sidewalk expressing different views have not been asked to relocate, (2) the request was that the Plaintiffs relocate to an area (Lawyer's Mall) that required a permit even though defendants knew full well that Plaintiffs did not have a permit, and (3) there was no need for relocation as there was no circumstance or other urgent need, as the Plaintiffs were not impeding the flow of traffic or in any way blocking other pedestrians' ingress or egress on the public sidewalk..

Second, most plausibly viewed, Defendants' demand that Plaintiffs relocate was a set up for harassment. Defendant Pope knew from prior experience that the Hulbert brothers viewed the sidewalk as a public forum, as they had, in the past, similarly refused for years to relocate from the sidewalk. (ECF 1, para. 26). Yet, defendants this time asserted to the Hulbert brothers that the "policy had changed" and that they could no longer stand on the public sidewalk (Id. at para. 27).

Defendants make no attempt to defend the new "policy." Defendants knew full well, or should have known, that public sidewalks are a fully protected public forum and thus available for precisely the type of activities in which the Hulbert brothers were engaged. The inference is unavoidable that the changed "policy" was contrived and then used as a pretext to make the arrests that followed. Those arrests completely deprived the Hulberts of their First Amendment rights, precisely the intended result of the "changed policy." In short, the demand to relocate was a pretext and was designed to set up the Plaintiffs for an arrest for disobeying Defendant Pope's order. There is nothing lawful about the order in these circumstances

Contrary to Defendants' argument, ECF 11-1, the complaint alleges that Defendant Wilson is fully implicated in all these actions.

The Complaint specifically states:

> 27. Shortly after Kevin Hulbert's arrival, Defendant Pope stated, "I'm advising you that you have to be in the Lawyer's Mall," and went on to explain that policy had changed, making reference to orders coming down from the Chief of Police, Defendant Wilson.
> ***
> 44. Chief Wilson, who suddenly ordered the citations after years of the same lawful conduct, was previously employed working for or at the direction of the President of the Maryland Senate. The President of the Maryland State Senate recommended Chief Wilson for his current job and was instrumental in Chief Wilson obtaining it. The protest signs carried by the plaintiffs are critical of the President of the Maryland State Senate, who has commented on them on the floor of the Senate.
> 45. Chief Wilson ordered that these citations be issued in retaliation for the content of the Plaintiffs' protected speech.

ECF 1, para 27, 44-45.

The Complaint thus alleges that Defendant Wilson ordered that the Plaintiffs be arrested and charged with the citations. Defendant Pope willfully disregarded his duties and illegally carried out those orders, despite knowing that doing so was in violation of the Plaintiffs' rights.

2. The First Amendment Right to Lawfully Film Officers Was Clearly Established.

Count II of the Complaint is filed pursuant to the First Amendment's protection of citizens' rights to record police conduct. ECF 1, para. 77-81. During the arrest of Jeff Hulbert for holding a sign on a public sidewalk addressing Second Amendment laws, Kevin Hulbert was peacefully recording the interaction from a reasonable and prudent distance. ECF 1, para. 35. Nevertheless, Kevin was also placed under arrest, handcuffed, and taken to the Annapolis Police Precinct where he also received his first of three misdemeanor criminal citations. *Id*. para. 35-58.

The right to record police activity is a clearly established First Amendment right under uniform and overwhelming Court of Appeals precedent. *See*, *e.g*., *Gericke v. Begin*, 753 F.3d 1, 7–8 (1st Cir. 2014) (holding that an arrest of a citizen for illegal wiretapping when she recorded a traffic stop without interfering with the police activity violated her First Amendment rights); *American Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir.2012) (enjoining the enforcement of a state anti-eavesdropping statute against the audiovisual recording of police officers performing their duties in public because "[a]udio recording is entitled to First Amendment protection," and such protection includes "prohibit[ing] government from limiting the stock of information from which members of the public any draw"); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2002) ("The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir.1995) (recognizing a "First Amendment right to film matters of public interest" in a case where police officers interfered with a citizen seeking to film a public demonstration directed in part against the police); *see also Robinson v. Fetterman*, 378 F.Supp.2d 534 (E.D. Penns. 2005) ("Videotaping is

a legitimate means of gathering information for public dissemination and can often provide cogent evidence, as it did in this case.").

In this case, the Complaint makes clear that Kevin Hulbert was arrested simply for recording the arrest of his brother, Jeff Hulbert, alleging:

> While not holding a sign and merely recording the incident on video and audio from a reasonable and lawful distance, Kevin Hulbert was placed under arrest as well at the direction of Defendant Pope. When he was arrested, Kevin Hulbert was not carrying a sign or otherwise engaged in a demonstration, but simply video and audio recording the police response.

ECF 1, para. 38.

The Plaintiffs were exercising this right when the Defendants unlawfully arrested Kevin Hulbert, with no probable cause to do so. Under the foregoing authorities, this arrest violated the clearly established First Amendment rights of the Plaintiffs to film police conduct.

3. The Right To Be Free Of Retaliation For The Exercise of First Amendment Rights Was Clearly Established.

The First Amendment protects the right to free speech, which includes "the right to be free from retaliation by a public official for the exercise of that right." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir.2000) (citation omitted). "[B]y engaging in retaliatory acts, public officials place informal restraints on speech...." *Id*. Thus, retaliation by a public official for the exercise of a constitutional right is actionable under § 1983. *See ACLU v. Wicomico County*, 999 F.2d 780, 785 (4th Cir.1993). To sustain a cause of action under 42 U.S.C. § 1983 on this basis, a claimant must allege that defendants *directed or participated* in the alleged constitutional violations. *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976). In order to plead a § 1983 retaliation claim based on the First Amendment, a claimant has to allege: 1) that his speech was protected; 2) that "alleged retaliatory action adversely affected [the claimant's] constitutionally protected

speech," and 3) "that a causal relationship exists between [his] speech and the retaliatory action." *Suarez*, 202 F.3d at 686.

In this case, there were two instances of retaliation. First were the actions which took place on February 5, 2018, when Defendant Pope arrested, handcuffed and carted the Hulbert brothers' off to the jailhouse in retaliation for exercise of their First Amendment rights. See ECF 1, para. 43 ("The initial charges violated the First Amendment rights of freedom of speech and assembly. They also constituted content-based retaliation for the political messages contained on sign boards carried by the individual defendants."). The second instance occurred when Defendant Chief Wilson issued two additional citations to each of the Hulbert brothers charging them each with two, new additional crimes. See ECF 1, para. 44 ("Chief Wilson, who suddenly ordered the citations after years of the same lawful conduct, was previously employed working for or at the direction of the President of the Maryland Senate. The President of the Maryland State Senate recommended Chief Wilson for his current job and was instrumental in Chief Wilson obtaining it. The protest signs carried by the plaintiffs are critical of the President of the Maryland State Senate, who has commented on them on the floor of the Senate."). The Complaint alleges none of these arrests and citations were supported by probable cause. ECF 1, paras 85, 86. Rather, they were instigated by Defendants as retaliation for engaging in the protected activity of exercising their rights to freedom of speech." ECF 1, para. 87.

The Complaint thus alleges that "Defendants' violations of the constitutional rights of Plaintiffs Jeff Hulbert and Kevin Hulbert do, and were intended to, have a chilling effect on the exercise of the First Amendment rights of others similarly situated, including plaintiff MSI and its members. MSI members who become aware, now and in the future, of the retaliation against the Hulbert brothers will be, and are in, reasonable and actual fear that their own exercise of their constitutional rights will be met with the same or similar results. ECF 1, para. 14, 60, 75, 80, 87.

"For fear of retaliation, MSI members are unable to freely exercise their constitutional rights without undue and unlawful burdens. The inability of MSI members to reasonably exercise their individual rights free from retaliation significantly impedes MSI's mission by reducing or eliminating MSI's ability to deliver its message to the public." *Id*. at para. 87. In short, "Defendants' actions in retaliating against Plaintiffs for engaging in a protected activity were undertaken for the purpose of suppressing Plaintiffs' freedom of speech rights and were done to silence Plaintiffs' viewpoint and further suppress their First Amendment Rights." *Id*. at para 88.

There can be no dispute that the Plaintiffs were partaking in protected political speech at all relevant times. *Suarez*, 202 F.3d at 686. Specifically, the Defendants' actions were in retaliation for the Plaintiffs' expression of opinions on legislative matters and of the actions of politicians in the General Assembly that, in their view, infringed on the Second Amendment right recognized in *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Such matters are political speech which lies at the very core of the First Amendment and may not be suppressed. *See*, *e.g*., *FEC v. Wis. Right to Life*, 551 U.S. 449, 464–65 (2007) (applying strict scrutiny to a statute prohibiting political speech at the core of the First Amendment); *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473 (6th Cir. 2016) ("Political speech is at the core of First Amendment protections.").

In addition to the facts outlined above, the Complaint alleges that when Plaintiff Jeff Hulbert was speaking (while Plaintiff Kevin Hulbert was filming) to the news media the next day on the very public sidewalk on which he and his brother Kevin were arrested the night before and was being highly critical of the arrests as hogwash (ECF 1, paras. 46-47), Defendant Chief Wilson was standing by and approached Plaintiffs after the end of the interview. The Chief expressed his irritation with the press coverage and made "light of his officers' misconduct and even chuckling about it." ECF 1, paras. 48, 49. Defendant Wilson then issued these two new citations to Jeff and

Kevin Hulbert "in retaliation for the plaintiffs' lawful comment in the media about their treatment by law enforcement officers." *Id*. at para. 51. The Complaint alleges that "Chief Wilson intensely disliked the criticism and abused his power by ordering the issuance of additional citations," that "Officer Pope knowingly issued the citations in retaliation for the Plaintiffs' exercise of protected First Amendment rights" and that "Chief Wilson ordered that these citations be issued in retaliation for the content of the Plaintiffs' protected speech." *Id*. at paras. 52-53. All these actions had a stifling effect on the Plaintiffs' First Amendment rights, as it further displayed an intent to continue impeding upon the Plaintiffs' freedom of speech. *Suarez*, 202 F.3d at 686.

In denying that their conduct was retaliatory, the Defendants argue that the second set of citations was issued based upon the probable cause existing for the first citations, and that the second citations were merely "to correct the incompleteness of the first set based upon the first arrest." ECF 11-1, pg. 11-12. However, this argument is plainly false as the second set of citations, on their face, charged new and additional misdemeanors to the one cited the day before. By the next day, it must have also been clear to Defendants that there had never been any probable cause for the initial arrest. So, Defendants "doubled down" with new charges with the citations made by Chief Wilson. As discussed more fully below, there was no probable cause for those new charges either. The jury is entitled to conclude that the real reasons for these actions was in retaliation for the Hulbert brothers' exercise of their First Amendment rights. The Defendants' motion should therefore be denied.

B. The Facts, As Alleged, Are Sufficient To Establish That Defendants Violated Plaintiffs' Clearly Established Fourth Amendment Rights To Be Free Of Unlawful Arrest and The Use Of Excessive Force.

The Fourth Amendment protects citizens from unlawful searches and seizures. Fourth Amendment protections extend to warrantless arrests and require that an officer have probable cause before effectuating the arrest of a citizen without a warrant. It is equally well-established

that citizens have every right to be free of the use of excessive force by the police and this is so regardless of the extent of the injuries received as a result of the force used.[2] *See Thompson v. Virginia*, 878 F.3d 89, 99-101 (4th Cir. 2017) (collecting cases).

1. There Was No Probable Cause for the Arrests.

As explained in *Collins v. State*, 322 Md. 675, 678–79, 589 A.2d 479, 481 (1991), probable cause is a non-technical concept based upon an analysis of the totality of the circumstances which gives reasonable grounds for belief of guilt. *Id.* "Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person arrested," or when a misdemeanor is committed in the presence of an officer. *Id*. It is a "totality-of-the circumstances" approach. *Illinois v. Gates*, 462 U.S. 213, 230 (1983). It is an objective standard of probability that reasonable and prudent persons apply in everyday life. *Id.* The probable-cause inquiry "turns on two factors: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct" and "we do not examine the subjective beliefs of the arresting officers to determine whether they thought that the facts constituted probable cause." *Smith v. Munday*, 848 F.3d 248, 253 (4th Cir. 2017) (internal quotations and citations omitted).

[2] Articles 24 and 26 of the Maryland Declaration of Rights are read in *pari materia* with their federal constitutional equivalents, and for these reasons, the arguments as to Counts IV and V are fully incorporated to Counts VII and VIII. *Widgeon v. E. Shore Hosp. Ctr.*, 300 Md. 520, 532, 479 A.2d 921, 927 (1984) (explaining that, "because Articles 24 and 26 of the Maryland Declaration of Rights, which are at issue here, have consistently been held to be in "*pari materia*" with or "equated with" the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Supreme Court decisions with regard to those amendments are particularly persuasive."). Article 26 provides that the police may not detain or restrain a person without reasonably articulated suspicion that the person has committed a crime. *Padilla v. State*, 180 Md. App. 210, 232 (2008) ("Article 26 is read *in pari materia* with the Fourth Amendment"); *Whren v. United States*, 517 U.S. 806, 809-10 (1996) (the "[t]emporary detention of individuals…by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]"). Article 24 prohibits arrest or detention without probable cause, and further prohibits the use of excessive force. *Hines v. French*, 157 Md. App. 536, 574 (2004).

In this case, the Defendants knew the Plaintiffs and had interacted with them on many prior occasions, during each of which, the Plaintiffs were in the exact same location of the public sidewalk, expressing the same protected speech, and peacefully assembling. ECF 1, para. 26. On each of those prior occasions, the Plaintiffs publicly demonstrated without incident or arrest, all within the Defendants' presence. *Id*. The Plaintiffs were not disturbing the peace, did not fail to obey a reasonable lawful order, and were not otherwise affecting the rights of other citizens.

Based upon the foregoing totality-of-the-circumstances, there is no plausible argument that the facts alleged, viewed in the light most favorable to the Plaintiffs, support a finding or a maintenance of probable cause for any of the citations issued. With probable cause for an arrest completely lacking, the arrest and detention of an innocent citizen, as demonstrated above, is a direct constitutional violation. *Hines v. French*, 157 Md. App. 536, 574 (2004). Defendants therefore violated the Plaintiffs' rights when they placed them under arrest.

2. Because There Was No Probable Cause for the Arrests, Any Force Used Was Excessive.

Where there is no right to arrest an individual, there is no right for an officer to use force against that individual, much less use the painful force of tight handcuffs and prolonged detention handcuffed to a metal bench, as in the facts presented here. ECF 1, paras. 36-38. A gratuitous use of force against an unsuspecting citizen, who does not present a danger, a threat, or is not willingly disobeying lawful orders, is *per se* an unlawful use of force. *Jones v. Buchanan*, 325 F.3d 520, 532 (4th Cir. 2003) (*citing Graham v. Connor,* 490 U.S. 386, 394 (1989)); *Park v. Shiflett,* 250 F.3d 843, 848, 853 (4th Cir. 2001) (holding that the plaintiff, having committed no crime, was subjected to excessive force by police officer).

In this case, no force was authorized or permitted given the stated facts and lack of probable cause for the arrests. However, even assuming arguendo that the Defendants had

probable cause to effectuate an arrest, the amount of force used in this case was excessive. Even where the right to arrest exists, it is recognized that excessive force, or force that is greater than is reasonably necessary to effectuate the arrest, is a violation of an individual's rights and gives rise to a claim against an officer for battery. *French v. Hines*, 182 Md. App. 201, 266, 957 A.2d 1000, 1037 (2008). The use of unreasonable force is *per se* excessive force. *Id.* As claims against officers for excessive force are evaluated under a reasonableness standard, here, the defendants' actions were far from reasonable. *French v. Hines*, 182 Md. App. at 260. Defendant Pope grabbed Jeff Hulbert by the arms, forcing them behind his back, and then caused the same actions to be taken against Kevin. They were painfully handcuffed for hours and painfully chained to a metal bench at the police station. ECF 1, paras 33-38. Neither of the brothers ever offered any resistance whatsoever. At the very least, a jury is entitled to decide whether this amount of force was beyond what was necessary to effectuate the arrest of a compliant citizens, and therefore violates the Plaintiffs' well established and protected Fourth Amendment rights. *French v. Hines*, 182 Md. App. at 266. The defendants' motion should therefore be denied.

C. The Facts Support the Claims for False Arrest and False Imprisonment.

The common law tort claims of false arrest and false imprisonment consist of the deprivations of one's liberty without consent or legal justification. *Cooper v. Dyke*, 814 F.2d 941, 946 (4th Cir. 1987) (holding that whether the officer's arrest of complainant was legally justified was a question for the jury.); *Okwa v. Harper*, 360 Md. 161, 189–90, 757 A.2d 118, 133 (2000) ("Although the intentional torts of false arrest and false imprisonment are separate causes of action, they share the same elements."). As explained in *Cooper v. Dyke*, and as discussed above (*supra* pgs. 16-18), "[u]nder Maryland law, the existence of 'legal justification' is judged according to the principles derived from the law of arrest." 814 F.2d at 946. Thus, in the case of

police officers, "a warrantless arrest is justified only if (a) a misdemeanor or felony was committed in their presence—not even arguably the case here, or (b) if the officers have probable cause to believe that a felony has been, or is about to be, committed." *Id*. *See also Okwa v. Harper*, 360 Md. at 190 (citing former Article 27, recodified in Md. Crim. Proc. § 2-202, which states, "[a] police officer may arrest without a warrant a person who commits or attempts to commit a felony or misdemeanor in the presence or within the view of the police officer.").

In *Okwa v. Harper*, the Maryland Court of Appeals held that the factual allegations against officers for false arrest and false imprisonment presented a jury question where the appellant argued that the officers did not have probable cause for his arrest. *Id*. at 187. In that case, the officers argued that the appellant was "waiving his hands in the air, yelling, repeatedly refusing to obey Officer Potter's orders to cease and desist this activity in the Airport," and that "a reasonable person observing Mr. Okwa's conduct could believe that Mr. Okwa committed the offense of disorderly conduct." *Id*. The Court reversed the circuit court's granting of summary judgment in favor of the officers, explaining that a jury question existed as to probable cause for the arrest, and therefore the court was precluded from ruling on the claims of false arrest and false imprisonment. *Id*. at 191 (The court likewise held that the officers were not entitled to qualified immunity).

As in *Okwa*, here, should the Court determine that there is a question of whether the Defendants' had probable cause for the arrests, there is at minimum a jury question presented regarding the legal justification for the Defendants' actions, which deprived the Plaintiffs of their personal liberties without consent. ECF 1, para. 140-41 ("The individual Defendants' actions caused Plaintiffs to be unlawfully deprived of their liberty. Plaintiffs did not consent to the individual Defendants' deprivation of their liberty.").

Moreover, the facts alleged here go beyond merely establishing a jury question, and unequivocally present facts which cannot support the finding of probable cause. In justification

for his actions, the Defendants state that Defendant Pope "found himself confronted with several demonstrators at the scene. He was also confronted with the two Hulbert brothers willfully defying his order to move back a few feet into Lawyer's Mall. This defiance could be reasonably interpreted by Officer Pope as an indicator that the situation could become volatile." ECF 11-1, pg. 16. That argument is absurd and directly conflicts the well-established principles of warrantless arrests. Md. Crim. Proc. § 2-202(b) ("the police officer may arrest without a warrant any person whom the police officer reasonably believes *to have* committed the crime" for which the officer has probable case) (emphasis added). Officers cannot haphazardly arrest citizens where they unreasonably believe that a situation *could* become worse or that a citizen *could* commit a misdemeanor in the future. Unlike Tom Cruise in the 2002 film "*Minority Report*," in real life, officers are not privileged to make arrests for "pre-crimes" that may exist only in the officers' minds. https://www.rogerebert.com/reviews/minority-report-2002.

Here, there was no probable cause that the Hulbert brothers posed any threat whatsoever. A "civil and respectful disobedience of the unlawful order to move" (ECF 1, para 33), is not probable cause that the citizen will commit some crime. Indeed, Defendants' contention that they made the arrest on the mere possibility that the situation "could" become "volatile" simply makes clear that there was no probable cause for Defendants' unlawful relocation demand. As explained above, the jury is entitled to consider whether the command to relocate on the basis of a new "changed policy" was a mere pretext for a retaliatory arrest that Defendants had already decided to make, knowing full well that the Hulbert brothers had previously insisted on their right to peacefully demonstrate on the public sidewalks.

The Defendants rely on *Prince George's Cty. v. Blue* as support for their incorrect argument that probable cause existed in this case to support the arrests, and therefore, the claims of false arrest and false imprisonment must fail. ECF 11-1, pg. 20 (citing *Prince George's Cty. v.*

Blue, 206 Md. App. 608, 51 A.3d 42, (2012), *aff'd,* 434 Md. 681, 76 A.3d 1129 (2013)). While *Blue* holds that the claims of false arrest and false imprisonment cannot lie where probable cause exists for the arrest, nothing in *Blue* remotely suggests that probable cause was present here. In *Blue*, the arresting officer reasonably believed that the claimant had committed a crime by carrying a handgun outside his employer's business establishment without a carry permit. *Prince George's Cty. v. Blue*, 206 Md. App. at 611. That arrest was supported by probable cause because the court held that the plaintiff there had actually violated state firearms law in carrying a handgun outside the business establishment and thus probable cause was "establish[ed] as a matter of law." *Id*. at 623. Here, no such facts support a finding of probable cause for the crimes charged. The Plaintiffs were not creating a public disturbance, were not disobeying lawful orders, and were not obstructing the public or otherwise infringing upon the rights of others. ECF 1, para. 39-41 ("The Plaintiffs did not disturb the public peace. No lawful order was ever given to the Plaintiffs. The Plaintiffs had every right to walk peaceably on the sidewalk carrying a sign and to film police conduct from a safe and respectful distance. The State's Attorney promptly entered a *nolle prosequi* as to all citations issued to the Hulbert brothers."). For all these reasons, the Defendants' motion should be denied.

D. <u>Defendant Wilson is Subject to Supervisory Liability</u>.

Not only is Defendant Wilson personally liable for his actions detailed herein which directly violated the Plaintiffs' rights, but he is also subject to supervisory liability for the actions of Defendant Pope. Liability of supervisory officials under § 1983 "is not based on ordinary principles of *respondeat superior*, but rather is premised on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Baynard v. Malone*, 268 F.3d 228, 235 (4th Cir. 2001) (citing *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir.1984) *cert. denied*,

470 U.S. 1035 (1985) (internal quotations omitted)). "The principle is firmly entrenched that supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates." *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994) (citing *Slakan*, 737 F.2d at 372-73; *Orpiano v. Johnson*, 632 F.2d 1096 (4th Cir.1980), *cert. denied*, 450 U.S. 929 (1981); *Withers v. Levine*, 615 F.2d 158 (4th Cir.1980)).

Supervisory liability pursuant to § 1983 claims must be supported by evidence that: "(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices,; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." *Shaw*, 13 F.3d at 799 (internal quotations omitted).

Thus, a supervisory official can be liable for injuries based on a supervisor's knowledge that the subordinate engaged in conduct that posed a risk of constitutional injury to citizens when the supervisor's response showed deliberate indifference to the conduct and there is a causal link between the supervisor's inaction and the plaintiff's injuries. *Id*. Under the analysis, deliberate indifference can be shown through "continued inaction in the face of documented widespread abuses." *Slakan v. Porter*, 737 F.2d at 373; *Vinnedge v. Gibbs*, 550 F.2d 926, 928 (4th Cir.1977).

Here, Defendant Pope conveyed that this order came from Defendant Wilson, demonstrating his actual or constructive knowledge of Defendant Pope's actions in violating the Plaintiffs' constitutional rights. *Shaw*, 13 F.3d at 799.

> 27. Shortly after Kevin Hulbert's arrival, Defendant Pope stated, "I'm advising you that you have to be in the Lawyer's Mall," and went on to explain that policy had changed, making reference to orders coming down from the Chief of Police, Defendant Wilson.

ECF 1, para. 27.

Defendant Wilson not only knew about the unconstitutional conduct, but *ordered it. Id*.; *Shaw*, 13 F.3d at 799. Then, Defendant Wilson personally assisted in furthering the violations against the Plaintiffs by hand-delivering the additional citations to the Plaintiffs on the day following the arrests:

> 48. At the close of the interviews, Defendant Wilson approached the Plaintiffs and began discussing what had taken place over the previous twenty-four hours, making light of his officers' misconduct and even chuckling about it.
> 49. Jeff Hulbert and Kevin Hulbert remarked that they were talking about the incident amongst their Patriot Picket members. In response, Defendant Wilson commented that he and members of his Capitol Police force had been looking at social media coverage of the arrests all day. Defendant Wilson's irritation at the tone of the coverage was evident to the Hulberts given Wilson's comment that he and others had spent "all day" reviewing the almost universal condemnation of the arrests.
> 50. After his displeasure at the media coverage of the event had been made apparent, Defendant Wilson presented two additional citations to Jeff Hulbert and Kevin Hulbert.
> 51. Notably, the two new citations were once again signed by Defendant Pope, but they were dated February 6, 2018. These citations were issued after a substantial amount of the media condemnation which obviously angered Chief Wilson.

ECF 1, para 48-51.

Based upon these actions, not only did Defendant Wilson directly violate the Plaintiffs' rights, but he is also subject to supervisory liability.

E. <u>The Defendants Are Not Shielded By Immunity</u>.

Defendants incorrectly claim that immunity bars any liability on the part of defendants Pope and Wilson. Defendants' immunity is conditional and cannot be applied at this juncture where facts support findings which would overcome those immunities for a variety of reasons.

1. <u>Maryland Statutory Immunity</u>.

The Defendants state that statutory immunity under the Maryland Tort Claims Act ("MTCA") protects them from any liability in this case. ECF 25-1, pg. 16. However, the language of the MTCA precludes immunity where the state actor's conduct is committed with

gross negligence or malice. Md. Code Ann., Cts. & Jud. Proc. § 5-522(b) (emphasis added). Application of the statutory immunity is therefore conditional upon a finding that the Defendants did not act with gross negligence or malice.

"To state a claim for gross negligence the plaintiff must allege that the defendant "'intentional[ly] fail[ed] to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another'" or "'thoughtless[ly] disregard [ed] the consequences [of its breach of duty] without the exertion of any effort to avoid them.'" *Brooks v. Jenkins*, 220 Md. App. 444, 104 A.3d 899, 908 (Md. Ct. Spec. App. 2014), *quoting Barbre v. Pope*, 402 Md. 157, 935 A.2d 699, 717 (2007) (emphasis removed) (citation omitted)). "Gross negligence has been equated with 'wilful and wanton misconduct,' a 'wanton or reckless disregard for human life or for the rights of others.'" *Foor v. Juvenile Services Admin.,* 78 Md.App. 151, 170, 552 A.2d 947, *quoting White v. King,* 244 Md. 348, 223 A.2d 763 (1966)).

The most recent case in which the Maryland Court of Appeals has defined "gross negligence" for purposes of governmental liability is *Newell v. Runnels*, 407 Md. 578, 638, 967 A.2d 729, 764-65 (2009). In that case, newly-elected State's Attorney Newell terminated the employment of certain staff in his new office. Two of the discharged employees, Susan Runnels and Marjorie Cooper, brought suit in the Circuit Court for Worcester County against Newell, alleging that their firings were unconstitutional because they were based on the employees having campaigned on behalf of Newell's opponent in the recent election. *Newell*, 407 Md. at 590-591, 967 A.2d at 735-736.

The trial court dismissed the case against *Newell*, finding insufficient allegations of gross negligence to permit individual liability under the Maryland Tort Claims Act. The Court of Appeals reversed. In so holding, the court ruled that the standard for "gross negligence" under the Act was "something more than simple negligence, and likely more akin to reckless conduct," and

included "a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Newell*, 407 Md. at 638, 967 A.2d at 764-65; *see also Liscombe v. Potomac Edison Co*., 303 Md. 619, 635, 495 A.2d 838, 846 (1985); *Romanesk*, 248 Md. at 423, 237 A.2d at 14. See also *Catterton v. Coale*, 84 Md. App. 337, 344, 579 A.2d 781, 784-85 (1990) ("Again, the allegation of a fabrication by Coale is sufficient to show malice or gross negligence. She is, therefore, not entitled to the immunity provided in the Maryland Tort Claims Act.").

The Defendants inaccurately posit that the facts presented could not support a finding of gross negligence or malice on the part of either Defendant Pope or Wilson. ECF 11-1, pg. 19. To the contrary, here, Defendants' conduct, as alleged, easily constitutes a "thoughtless disregard" of the First Amendment and Fourth Amendment rights of Plaintiffs. *Newell*, 407 Md. at 638, 967 A.2d at 764-65. The alleged "changed policy" was a transparent and lamest of excuses for the relocation demand. It illustrates how the real intent was to effect an arrest so as to discourage the expression of views that Defendants and others in powerful positions found objectionable. The new, subsequent charges issued by Chief Wilson on the next day simply confirm that Defendants did not hesitate to "double down" in this effort. This course of conduct constitutes, at a minimum, "thoughtless disregard" of Plaintiffs' rights and were thus "grossly negligent."

Moreover, the complaint states that the Defendants acted intentionally, despite knowing that their conduct directly violated the Plaintiffs' rights. See ECF 1, para. 44 ("Chief Wilson, who suddenly ordered the citations after years of the same lawful conduct, was previously employed working for or at the direction of the President of the Maryland Senate"), para 45 (" Chief Wilson ordered that these citations be issued in retaliation for the content of the Plaintiffs' protected speech"), para 63 ("Defendants knowingly, willingly, intentionally and with malicious intent or gross negligence, violated Plaintiffs constitutional rights as described herein, thereby waiving any statutory or common law immunity." Indeed, based on such facts, the jury could easily find the

Defendants' actions were as a result of ill-will and malice towards the Plaintiffs, given their history and the fact that years passed without incident until February 5, 2018, when the Defendants decided to put a stop to the Plaintiffs' message.

Finally, it is well settled that "gross negligence, is a question for the jury to decide." *Romanesk v. Rose*, 248 Md. 420, 424 (Md. 1968); *Keesling v. State*, 288 Md. 579, 591 (Md. 1980) ("It is *a question for the jury* to decide whether this conduct of the police fell so far below the duty of police to protect the welfare of the public as to amount to negligence.") (emphasis added); *Brooks v. Jenkins*, 220 Md. App. 444, 463, 104 A.3d 899, 910 (2014) (in a police dog shooting case, "it is 'for the trier of fact' to determine whether a defendant acted with gross negligence"); *Taylor v. Harford County Dept. Of Social Services,* 384 Md. 213, 229, 862 A.2d 1026 (2004) (holding that "[o]rdinarily, unless the facts are so clear as to permit a conclusion as a matter of law, it is for the trier of fact to determine whether a defendant's negligent conduct amounts to gross negligence."); *see also Artis v. Cyphers,* 100 Md. App. 633, 652, 642 A.2d 298 (1994). Given the facts pled and provided at this point, the motion to dismiss based upon statutory immunity should be denied as such immunity cannot be obtained except upon a jury finding that the Defendants' actions did not constitute gross negligence. *Henry v. Purnell*, 652 F.3d 524, 536 (4th Cir. 2011) (under Maryland law, "[w]hether an officer's actions are grossly negligent, and therefore unprotected by statutory immunity, is generally a question for the jury.").

2. <u>Qualified Immunity</u>.

In overcoming qualified immunity, a plaintiff must 1) demonstrate that the officer violated some right secured to the Plaintiff by the Federal Constitution or Federal Statute, and that 2) the right so violated was "clearly established" at the time of the violation. *See Schultz v. Braga*, 455 F.3d 470, 476 (4th Cir. 2006). In determining whether an official is entitled to qualified immunity, the court must examine (1) whether the facts illustrate that the defendant violated the

plaintiff's constitutional right, and (2) whether the right 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. *Miller v. Prince George's County*, 475 F.3d 621, 627 (4th Cir. 2007). 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. See *District of Columbia v. Wesby*, 138 S.Ct. 577, 589-90 (2018) (per curiam); *Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015) (per curiam)). As stated in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 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").

Thus, "the 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) (internal quotations omitted); *Booker v. S.C. Dep't of Corr.,* 855 F.3d 533, 538 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 755 (2018) ("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." (internal citations & quotations omitted)); *Smith v. Ray,* 781 F.3d 95, 100 (4th Cir. 2015). 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. *See also Okwa v. Harper*, 360 Md. 161, 201–02, 757 A.2d 118, 140 (2000) ("To accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be inconsistent with the purpose of the constitutional provisions.").

The assertion of a qualified immunity defense at the motion to dismiss stage is highly disfavored. As the Fourth Circuit has noted, at that stage, "'the defense faces a formidable hurdle' and 'is usually not successful.'" *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014) (quoting *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 191–92 (2d Cir. 2006)). *See also Tobey*, 706 F.3d at 291 (on the facts alleged, "Mr. Tobey's right to display a peaceful non-disruptive message in protest of a government policy without recourse was clearly established at the time of his arrest.").

Here, the Plaintiffs' right to be free from an unlawful arrest and excessive force were clearly established at the time of the Defendants' actions, as were the Plaintiffs' rights to peacefully assemble on the public sidewalk as well as record police interactions. *See, supra* pgs. 5-21; *Graham v. Connor*, 490 U.S. 386, 394 (1989). Equally clearly established was the right to be free of retaliatory arrests that lack probable cause. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 257 (2006) ("Official reprisal for protected speech 'offends the Constitution [because] it threatens to inhibit exercise of the protected right,'"), quoting *Crawford–El v. Britton*, 523 U.S. 574, 588, n. 10 (1998). *See also Perry*, 408 U.S. at 597 (noting that the government may not punish a person or deprive him of a benefit on the basis of his "constitutionally protected speech"). As the Supreme Court explained in *Hartman*, "[d]emonstrating that there was no probable cause for the underlying criminal charge will tend to reinforce the retaliation evidence and show that retaliation was the but-for basis for instigating the prosecution . . ." (547 U.S. at 261).

Defendants attempt to narrow the scope of the rights established by stating that the Plaintiffs have failed to plead facts that show "(1) how being ordered to move back from the sidewalk into Lawyer's Mall to continue their demonstration was a violation of their First Amendment rights of free speech and assembly; (2) how the actions of the Defendants were outside the realm of settled authority when the orders were given, the arrests were made and the

citations were given to Jeff and Kevin Hulbert." ECF 11-1, pg. 8. That is a grossly distorted summary of the facts at issue before this Court. As explained, the Defendants had no right to issue such a relocation order to begin with, especially where, as here, the order was issued on the pretext of using this supposed "changed policy" to retaliate against the Hulbert brothers for their exercise of their First Amendments rights. Chief Wilson then compounded the egregiousness of the initial arrests when he, on the next day, personally issued additional citations to the Hulbert brothers in retaliation for the adverse press the arrests the night before had generated.

The Defendants cite *Ross v. Early*, 746 F. 3d 546 (4th Cir. 2014) to support their position that Defendant Pope was enforcing a regulation and could not have reasonably known that his actions would violate the Plaintiffs' First Amendment rights. ECF 11-1, pg. 10. The *Ross* case is hardly dispositive in this matter as it involved a city ordinance that placed restrictions on a *designated area* of the public sidewalk during public events. *Ross v. Early*, 746 F. 3d 546 (4th Cir. 2014). In that case, the court addressed that it was a city ordinance that had never before been challenged, and therefore, for purposes of imposing qualified immunity, it could not be held that the officer reasonably believed that he was violating a well-settled constitutional right. *Id*. As addressed above, that is not the case here. See *Tobey*, 706 F.3d at 392 (holding that a complaint challenging an arrest under the First Amendment adequately stated a violation of a clearly established right, noting "we must credit Mr. Tobey's allegation that Appellants arrested or caused him to be arrested without probable cause. He has, therefore, satisfied the requirement in *Hartman* and *Reichle* [*v. Howards,* 132 S.Ct. 2088 (2012)] to plead an absence of probable cause.").

Indeed, the very citations issued make clear that the relocation order and the citations the next day were pretextual and retaliatory. In this case, the Defendants point to COMAR 04.05.01.02 and 04.05.01.03 and argue that the Defendants were merely carrying out their duties

under such provisions. Yet, those provisions do not even facially encompass the conduct for which the Hulbert brothers were arrested. They provide:

> *A. The property is closed to the public after regular business hours.*
> B. Property or portions of it may be closed to the public during regular business hours in emergency situations:
> (1) Necessary to the orderly conduct of State business;
> (2) For safety reasons; or
> (3) For security reasons.

Md. Code Regs. 04.05.01.02 (emphasis added).

> A. An individual shall be subject to arrest if the individual:
> (1) Damages or defaces the property;
> (2) Creates loud, unusual noise, including profanity;
> (3) Disturbs employees performing their duties;
> (4) Prevents or disturbs the general public from obtaining services provided on the property; or
> (5) Obstructs:
> (a) Entrances,
> (b) Walks,
> (c) Corridors,
> (d) Elevators,
> (e) Offices,
> (f) Stairways, or
> (g) Parking lots.

Md. Code Regs. 04.05.01.03.

The definitions section of the regulations cited by the defendants defines "property" as "State public buildings, improvements, grounds, and multiservice centers under the jurisdiction of the Department of General Services." Md. Code Regs. 04.05.01.01. Public sidewalks in Annapolis are not included in this definition, and nor could they be, as the regulations apply, by their very terms, only to where "[t]he property is closed to the public after regular business hours." Md. Code Regs. 04.05.01.02(a). Reading these provisions collectively, it is clear that the public sidewalk is not intended to be part of the "property" subject to these provisions which close to the public after regular business hours. Not even the Defendants assert that the public sidewalk in front of Lawyer's Mall is ever "closed" to the public, much less during the hours at which these

arrests and citations took place. The Complaint quite specifically alleges that there was no probable cause to believe that the Hulbert brothers engaged in any of the conduct specified in these regulations. Plaintiffs did not "deface" public property. There was no obstruction to any government building. There was no prevention of public employees from doing their duties or rendering services. There were no safety or security reasons for the arrests. The jury will find all of these allegations to be confirmed by the video taken of these events. The arrests and citations were retaliation, pure and simple.

Furthermore, as thoroughly discussed above, the First Amendment constitutional rights at stake in this case have been clearly established by controlling Supreme Court precedent or Fourth Circuit precedent, or by an overwhelming consensus of cases from other jurisdictions. That reality precludes any argument that the Defendants did not have fair warning that their retaliatory conduct was unconstitutional. *Supra* pgs. 5-21; *Logsdon*, 492 F.3d 346 (reversing a grant of qualified immunity, holding that there was a clearly established right to demonstrate on public sidewalks); *Booker*, 855 F. 3d (holding that a citizens' right to not be retaliated against for exercise of constitutional rights is "well established."); *Tobey*, 706 F. 3d at 391 (holding that the "right to display peaceful non-disruptive message in protest of a government policy without recourse was clearly established" at the time of claimants 2011 arrest).

That same conclusion is applicable to all of plaintiffs' Fourth Amendment claims as well. As explained above, the law is clearly established that it is a violation of the Fourth Amendment to make an arrest without probable cause. Here, as explained above, the arrests were made for the purpose of punishing Plaintiffs for the exercise of their First Amendment rights, not on the basis of any remotely plausible violation of law. The order to relocate was unlawful and unreasonable and contrary to the established past practices of Defendants, as applied to Plaintiffs and as applied to other persons who frequently demonstrate at the same public sidewalk. And as explained above,

there was no basis or probable cause for the second set of citations, as even the most cursory examination of the statutory authority for the citations reveals. The jury is entitled to consider all these facts and circumstances. *See Tobey v. Jones*, 706 F.3d at 392 (stating that qualified immunity on a 12(b)(6) motion not appropriate because the plaintiff "specifically alleges that his arrest was not supported by probable cause, and 'probable cause or its absence will be at least an evidentiary issue in practically all [ ] cases.'" quoting *Hartman v. Moore,* 547 U.S.250, 265 (2006). See also *Logsdon*, 492 F.3d at 346 (qualified immunity not available on a motion to dismiss where "[p]laintiff alleges that Defendants were motivated by the content of his speech in removing him from the public forum, and not by any purported criminal trespass"). As the Plaintiffs have pled sufficient facts to state viable claims, and as the constitutional rights in this case were clearly established at the time of the Defendants' violations, the application of qualified immunity is barred.

F. The Claims Against Defendants in Their Official Capacity are Properly Before This Court for Declaratory And Injunctive Relief.

The Defendants correctly recognize that the claims against them in their official capacity are not barred insofar as they seek declaratory or injunctive relief. *In re Young*, 209 U.S. 123 (1908). Indeed, throughout the Complaint, the Plaintiffs establish that they seek declaratory and injunctive relief as follows:

> …Plaintiffs seek a declaration that Defendants violated their clearly established constitutional rights as set forth in this Complaint; a declaration that Defendants' restriction on Plaintiffs' speech violates the U.S. Constitution and 42 U.S.C. § 1983 as set forth in this Complaint; a preliminary and permanent injunction enjoining the enforcement of Defendants' speech restriction as set forth in this Complaint; and all compensatory, punitive and other damages recognized by law for the tortious and constitutional violations stated herein…

ECF 1, para. 6.

Therefore, to the extent that the claims seek declaratory and injunctive relief, as acquiesced to by the Defendants, the motion to dismiss should be denied as to the claims against the Defendants in their official capacities.

G. Additional Discovery is Necessary.

When "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). A motion for summary judgment may only be granted if there is no genuine dispute as to any material fact in the record and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The facts must be construed in the light most favorable to the non-moving party and it is the moving party's burden to show that there is no dispute as to material facts. Fed. R. Civ. P. 56(c); *see U.S. v. Diebold*, 369 U.S. 654 (1962); *Gill v. Rollins Protective Servs. Co.*, 773, F.2d 592, 595 (4th Cir. 1985), *Catawba Indian Tribe of S.C. v. South Carolina*, 978 F.2d 1334, 1339 (4th Cir. 1992). "Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323; *Stewart v. Prince George's County*, 75 Fed. Appx. 198, 202 (4th Cir. 2003); *Proa v. NRT Mid Atl., Inc.*, 618 F. Supp. 2d 447, 452 (D. Md.2009).

The Defendants do not argue that the Complaint fails to give notice of plausible claims and the grounds upon which those claims rest. *Twombly*, 550 U.S. at 555. Rather, they improperly attempt to argue against the merits of Plaintiffs' case prior to Plaintiffs being able to pursue discovery to which they are entitled. *See e.g.*, *Gay v. Wall*, 761 F.2d 175, 177-78 (4th Cir. 1985)

("It was the lack of a reasonable opportunity for discovery which made the conversion of the Rule 12(b)(6) motion 'wholly inappropriate.'"); *Wag More Dogs, LLC v. Cozart*, 680 F.3d 359, 365 (4th Cir. 2012) ("[A] complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations.").

In relying upon documentation outside of the pleadings, Defendants' motion requires a finding that there are undisputed material facts. However, several of the "facts" relied upon by the Defendants are very much in dispute. In support of their motion, Defendants provided the Court a copy of the citations issued to Plaintiffs Jeff and Kevin Hulbert as exhibits to their memorandum. In so doing, Defendants proffer that the additional citations issued to the Hulberts on February 6, 2018, were merely meant to correct the citations issued the day before and not to present additional charges against the Hulberts. ECF 11-1, pg. 12 ("It is apparent that the second set of citations were to correct the incompleteness of the first set based on the same arrest."). This is in direct contradiction to the facts presented by the Plaintiffs, which set forth that the citations were two "additional" citations, notably citing separate and distinct charges from the citation issued on the prior day and that those citations were issued by Defendant Wilson in retaliation for the unfavorable press coverage that the prior arrest, the night before, had generated.

In addition, the Defendants argue that the Plaintiffs "held an unpermitted and unscheduled demonstration on the sidewalk in front of the Lawyers' Mall in Annapolis, Maryland." ECF 11-1, pg. 2. The Plaintiffs vehemently deny this false characterization of their actions, as they were lawfully on the public sidewalks, exercising their First Amendment rights. Discovery in this matter is therefore necessary and the Defendants' motion should be denied. *See* Ex. A (Attorney Affidavit).

V. CONCLUSION

For all of the foregoing reasons, the Defendant's motion should be denied.

CONDITIONAL REQUEST FOR A HEARING

To the extent this Court is not inclined to grant the Plaintiffs' requested relief based upon these filings alone, the Plaintiffs request a hearing.

Respectfully submitted,

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____*/s/* _____
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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2018, a copy of the foregoing was electronically served via the United States District Court for the District of Maryland filing system upon counsel of record for all parties.

____*/s/* _____
Erienne A. Sutherell