No. _____

IN THE

Supreme Court of the United States

CLAYTON R. HULBERT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY W. HULBERT, KEVIN HULBERT, AND MARYLAND SHALL ISSUE, INC.,

Petitioners,

v.

BRIAN T. POPE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether any qualified immunity is abrogated by the Notwithstanding Clause of the Civil Rights Act of 1871, which provides that individuals are liable under Section 1983 "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding."
2. Whether the doctrine of qualified immunity is irreconcilable with the clear intent of the legislature as evidenced in the Notwithstanding Clause and in the historical context under which the Civil Rights Act of 1871 was enacted.
3. Whether the doctrine of qualified immunity as developed by this Court is untenable and must be abrogated as it arises from impermissible judicial law-making.
4. Whether individuals have the right to record police activity under the First Amendment, a right that has never been explicitly recognized by the Fourth Circuit and which was effectively rejected *sub silentio* in the opinion below.

PARTIES TO THE PROCEEDING

Petitioners are Clayton R. Hulbert, as personal representative of the Estate of Jeffrey W. Hulbert, Kevin Hulbert, and Maryland Shall Issue, Inc., for itself and its members. Petitioners were plaintiffs in the district court proceedings and appellees in the appellate proceedings.

Petitioner Maryland Shall Issue, Inc. does not have any parent corporations and there are no publicly held corporations or entities that own 10% or more of the corporation's stock.

Respondent is Brian T. Pope. Respondent was a defendant in the district court proceedings and appellant in the appellate proceedings.

RELATED PROCEEDINGS

1. *Hulbert, et al. v. Pope, et al.*, No. SAG-18-00461, United States District Court for the District of Maryland. Judgment Entered: April 22, 2021.
2. *Hulbert, et al. v. Pope, et al.*, No. 21-1608, United States Court of Appeals for the Fourth Circuit. Judgment Entered: June 14, 2023. Mandate issued: July 19, 2023.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit their petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit reversing the decision of the trial court is reported at 70 F.4th 726 (4th Cir. 2023) and is reproduced at A1. The Fourth Circuit's order denying Petitioner's petition for rehearing *en banc* is unreported and reproduced at A82. The opinion of the United States District Court for the District of Maryland denying summary judgment is reported at 535 F. Supp. 3d 431 (D. Md. 2021), and is reproduced at A38. The opinion of the United States District Court for the District of Maryland denying reconsideration is unreported and available on Westlaw at 2021 WL 4640668 (D. Md. Oct. 6, 2021), and is reproduced at A26.

JURISDICTION

This Court has jurisdiction to grant this petition for a writ of certiorari under 28 U.S.C. § 1254(1), which permits review "after rendition of judgment or decree" of a court of appeal. The Fourth Circuit rendered its judgment on June 14, 2023 reversing the decision of the trial court. *Hulbert v. Pope*, 70 F.4th 726 (4th Cir. 2023). Petitioners petitioned the Fourth Circuit for a rehearing *en banc*, which was denied on July 11, 2023. A82. This petition is timely filed pursuant to Rule 13 of this Court as Petitioners filed this petition within 90 days of the denial of a rehearing.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States provides, in relevant part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fourth Amendment of the United States provides, in relevant part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

I. Factual Background.

On the evening of February 5, 2018, brothers Jeff and Kevin Hulbert were assembled in Annapolis, Maryland, for a political demonstration "to display signs and talk to voters and legislators about '[their] belief … that government needs to follow constitutional principles.'" A39. The brothers are founders of an informal gun rights advocacy group, Patriot Picket, and members of a nonprofit organization dedicated to preserving gun owners' rights and were present that night with other members of those groups. *Id*. The small group was set up on a public sidewalk near the Maryland legislative buildings where the group believed they would be "seen by the most people and the most legislators," nearby but not within a "grassy square called Lawyers' Mall," which was "frequently used for political demonstrations" but often required "a permit from the Capitol Police." A39-40.

Sgt. Brian T. Pope, an officer with the Maryland Capitol Police, was working that night when he "received a call from dispatch alerting him that a group was setting up a demonstration in front of Lawyers' Mall." A40. He was told "that someone at the Governor's Mansion had called about the group and that [directed] that Sgt. Pope should 'straighten out' what the group was doing." *Id*. The caller "relay[ed] that the Lieutenant Governor 'did not want [the protestors] giving him a bunch of stuff for whatever reason.'" A46.

Sgt. Pope knew that no "pre-approved demonstration" was scheduled for that evening, but when he viewed the live video of the cameras mounted near Lawyers' Mall he only observed a single person in the area; Kevin Hulbert, who was "standing on the public sidewalk in front of Lawyers' Mall with a number of signs on the ground around him." *Id*.

Sgt. Pope sought guidance from his supervisor, Sgt. Donaldson, and later the Chief of the Maryland Capitol Police, Col. Wilson, on what he should do. A40-41. Sgt. Donaldson then directed Sgt. Pope "to let the picketers continue their demonstration in Lawyers' Mall, even though the group did not have a permit to use the mall." A41. When Sgt. Pope approached the area, he found Kevin Hulbert standing alone in the middle of the public sidewalk. *Id*. Sgt. Pope "did not note any particular safety hazards at the time," but still "told Kevin Hulbert that because of safety concerns, even though they did not have a permit, he wanted the group to move their demonstration off the sidewalk and into Lawyers' Mall." *Id*. Kevin Hulbert did not respond to Sgt. Pope's direction and Sgt. Pope left the scene. *Id*.

Sgt. Pope returned to the area about an hour later and noticed that the members of Patriot Picket were still demonstrating on the public sidewalk. A42. There were approximately six people other than the Hulbert brothers who were "holding large signs somewhere in the middle of a fifteen- and one-half-foot walkway in front of Lawyers' Mall." A56. The legislative session was not currently convened and was not expected to convene for another few hours. Id. "There was no evidence that Jeff Hulbert and the rest of his group were actually impeding the flow of pedestrian or vehicular traffic prior to being told to move to Lawyers' Mall," and Sgt. Pope admitted that "he did not see the group blocking traffic or creating any unsafe conditions," and "people could 'come and go freely' and there was 'no disturbance or disruption of the normal business in the area.'" A.56-57.

Sgt. Pope "told the entire group that … they needed to back up their demonstration approximately fifteen feet into Lawyers' Mall." A42. Jeff Hulbert told Sgt. Pope that "they were not going to move anywhere," and Sgt. Pope

"repeated his command to move … at least two more times." *Id*. When the members of Patriot Picket did not comply, Sgt. Pope called for additional officers and started to place Jeff Hulbert, who he had identified as the leader of the group, under arrest. *Id*.

Multiple people, including "apparent passersby, a member of the media, and Kevin Hulbert," were filming Jeff Hulbert's arrest. A42. Sgt. Pope directed "Kevin Hulbert and two others who were also filming to back up." Id. The two others complied; Kevin Hulbert did not. *Id*. Sgt. Pope then placed Kevin Hulbert under arrest as well. *Id*.

After transporting the brothers to the police station and processing them, Sgt. Pope issued both brothers a single criminal citation "for disobeying a lawful order under the Section 10-201 of the Criminal Law Article of the Maryland Code." A43. After issuing the citation, the brothers were released. *Id*. Despite the arrests occurring late in the evening, the arrests "had apparently already garnered the attention of some Maryland legislators and a member of the media." A44.

Media reports on the arrests were already released by the following morning. A44. Col. Wilson, the Chief of the Maryland Capitol Police, read those reports, which "prompted him to look further at the Capitol Police's records regarding the incident." *Id*. He had already sent an email to other members of the Capitol Police the night before stating that the Hulbert brothers had each been issued two criminal citations, the disorderly conduct that each brother had actually been cited for and an additional charge of Refusal or Failure to Leave Public Building or Grounds under Section 6-409 of the Criminal Law Article of the Maryland Code. *Id*. When he reviewed the reports the following morning and noted that the brothers had been issued only the single citation for disorderly con-

duct, he instructed Sgt. Pope "to write two more criminal citations for the more appropriate charges." A44-45.

The Hulbert brothers had returned to Lawyers' Mall that morning to do media interviews about the arrests the previous night. A45. Sgt. Pope, Sgt. Donaldson, Col. Wilson, and a fourth officer approached the brothers at Lawyers' Mall "to serve the additional charges." Id. Col. Wilson rarely ever was personally present to "serve charges on an individual," but felt that his presence was necessary in this instance "to explain to the Hulberts why new charges were being added." *Id*.

The charges were dismissed only a few days later, on February 9, 2018. A45.

II. Procedural Background.

On February 14, 2018, Jeff and Kevin Hulbert ("**Petitioners**")[1], along with Maryland Shall Issue, Inc., the nonprofit organization dedicated to preserving gun owners' rights that the Hulbert brothers were members of, filed suit against Sgt. Brian T. Pope ("**Respondent**") and Col. Michael Wilson in the United States District Court for the District of Maryland. The Petitioners raised several claims, including claims arising under the First and Fourth Amendments and common law claims of false arrest and false imprisonment. A38.

On December 16, 2020, the defendants filed a motion for summary judgment seeking judgment in favor of both defendants on all claims pled against them. The district court granted the defendants' motion in part and denied the defendants' motion in part, granting judgment in favor of Defendant Col. Wilson on all claims and denying

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[1] Jeff Hulbert passed away during the pendency of this case and Clayton R. Hulbert, as personal representative of his estate, was substituted.

judgment in favor of Respondent on four claims: (1) Petitioners' First Amendment claim arising out of the Jeff Hulbert's lawful demonstration on a public sidewalk, (2) Petitioners' First Amendment claim arising out of Kevin Hulbert's arrest while lawfully filming Jeff Hulbert's arrest, (3) Petitioners' First Amendment retaliation claim arising out of the defendants' issuance of criminal citations without probable cause, and (4) Petitioners' Fourth Amendment claim arising out of the arrest, citation, and search of the Hulbert brothers without probable cause. A5, 60, 65, 68, 71, 81.

The district court denied summary judgment as it concluded that factual disputes barred qualified immunity. Specifically, the court concluded that there were genuine issues of material facts as to (1) "whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions," that could support a determination "as to whether a significant government interest was served" by the violation of Jeff Hulbert's First Amendment rights, A59, (2) whether "Sgt. Pope's interference with the demonstration … actually serve[d] any significant government interest" so as to constitute "a proper time, place, and manner restriction on Kevin Hulbert's First Amendment rights," A63, and (3) whether Sgt. Pope was motivated to arrest the Hulbert brothers because of their conduct in lawfully demonstrating, given that "[t]here is no evidence that Sgt. Pope would have arrested the Hulberts if they had merely been standing on the sidewalk and not communicating their political beliefs." A67.

Sgt. Pope filed a motion for reconsideration to the district court, which was denied. A37. He then filed an appeal to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit concluded that Sgt. Pope was "entitled to qualified immunity," and reversing and remanding the case with instructions for judgment to be entered

in favor of Sgt. Pope on all claims. A24. Petitioners filed a request for rehearing *en banc*, which was denied on July 11, 2023. In the petition for rehearing, Petitioner cited to Professor Alexander Reinert's groundbreaking scholarship on an uncodified portion of the Civil Rights Act of 1871, discussed further below, which challenged the very foundation of the concept of qualified immunity, as an additional basis to challenge the Fourth Circuit's conclusion that Sgt. Pope was shielded from Petitioners' claims by qualified immunity. The Fourth Circuit did not address this argument in its summary denial.

Petitioners timely filed this petition within 90 days of the denial of a rehearing.

REASONS FOR GRANTING THE WRIT

I. The Foundation of the Doctrine of Qualified Immunity is Fatally Flawed.

In 1871, Congress enacted the Civil Rights Act, which included Section 1, a provision modeled on a section in the Civil Rights Act of 1866 that had been enacted "for the express purpose of 'enforc(ing) the Provisions of the Fourteenth Amendment.'" *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (quoting 17 Stat. 13). This statute was intended to alter the federal system in the post-Civil War era to place the Fourteenth Amendment at the centerpiece of federal governance and cement "the role of the Federal Government as a guarantor of basic federal rights against state power." *Id*. at 238-39. This provision—which later became 42 U.S.C. § 1983—acted to "open[] the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Mitchum*, 407 U.S. at 239. The explicit

language of the statute, as codified in the modern United States Code, broadly applies to hold liable *every person* who deprives another of rights secured by the United States Constitution:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress…

42 U.S.C. § 1983.

Justice Douglas has described the historical context surrounding the enactment of the Civil Rights Act as an attempt to remedy the "condition of lawlessness" that existed following the Civil War:

> The congressional purpose seems to me to be clear. A condition of lawlessness existed in certain of the States, under which people were being denied their civil rights. Congress intended to provide a remedy for the wrongs being perpetrated.
>
> …
>
> The members supporting the proposed measure were apprehensive that there had been a complete breakdown in the administration of justice in certain States and that laws nondiscriminatory on their face were being applied in a discriminatory manner,

> that the newly won civil rights of the Negro were being ignored, and that the Constitution was being defied. It was against this background that the section was passed, and it is against this background that it should be interpreted.

Pierson v. Ray, 386 U.S. 547, 559-60 (1967) (Douglas, J., dissenting).

Undoubtedly due to the nature of this enactment—intended to protect the underprivileged, those who are discriminated against, those marginalized and victimized by government action—very few cases arose under this statute at the beginning. As Justice Scalia later noted, this provision "generated only 21 cases in the first 50 years of its existence." *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998).[2]

As more cases began to arise under this statute towards the mid-1900s, this Court faced a conundrum: what, if any, immunities applied to government officials or entities sued pursuant to Section 1983? The Civil Rights Act itself "made no mention of defenses or immunities," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017), which left this Court to decide what to do with "the immunities afforded state officials at common law." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981).

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[2] Justice Scalia noted this in connection with his warning that the Court should not permit this provision to "degenerat[e] into a general tort law." *Crawford-El*, 523 U.S. at 611. Justice Scalia is incorrect in contending that an increase in the number of civil rights cases is indicative that the statute is not functioning as intended—rather, the statute has only now begun to truly fulfill its purpose, as those that were routinely denied access to justice have greater opportunity to bring their cases to court.

This Court first tackled the issue over seventy years ago in *Tenney v. Brandhove*, 341 U.S. 367 (1951). There, when faced with the question of whether legislators retained an immunity to civil suit that pre-dated the 1871 Civil Rights Act, this Court concluded that Congress would not have abolished immunities "well grounded in history and reason" through silence:

> Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here? Did it mean to subject legislators to civil liability for acts done within the sphere of legislative activity? Let us assume, merely for the moment, that Congress has constitutional power to limit the freedom of State legislators acting within their traditional sphere. That would be a big assumption. But we would have to make an ever rasher assumption to find that Congress thought it had exercised the power. These are difficulties we cannot hurdle. The limits of ss 1 and 2 of the 1871 statute—now ss 43 and 47(3) of Title 8—were not spelled out in debate. We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.

Id. at 376. This Court reached the same conclusion when considering the immunity of judges, expounding on the principles first established in *Tenney* and explaining that

those immunities must still exist if Congress did not explicitly abolish them:

> We do not believe that this settled principle of law was abolished by s 1983, which makes liable 'every person' who under color of law deprives another person of his civil rights. The legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities. Accordingly, this Court held in *Tenney v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), that the immunity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.

Pierson, 386 U.S. at 554–55. But even though this Court justified that common law immunities for legislators, judges, and prosecutors must still exist given Congress's failure to explicitly abolish those immunities, this Court was hesitant to further expand those immunities; this Court opined that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does," but simultaneously acknowledged that this principle "is not entirely free from doubt." *Id*. at 555.

Ultimately, this Court concluded that police officers were entitled to the "defense[s] of good faith and probable cause" which arose out of common law. *Id*. at 557. In other words, *Pierson* extended the logic in *Tenney* that any common law immunity existing at the time of the en-

actment of the Civil Rights Act must remain in the absence of any act of Congress expressly abolishing it.

This principle was re-established by this Court several times over the following two decades, emphasizing that common law immunities remained *solely* because the Court declined to read an automatic abolishment into Congress's silence.

> It is by now well settled that the tort liability created by § 1983 cannot be understood in a historical vacuum. In the Civil Rights Act of 1871, Congress created a federal remedy against a person who, acting under color of state law, deprives another of constitutional rights. See *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961). Congress, however, expressed no intention to do away with the immunities afforded state officials at common law, and the Court consistently has declined to construe the general language of § 1983 as automatically abolishing such traditional immunities by implication. *Procunier v. Navarette*, 434 U.S. 555, 561, 98 S.Ct. 855, 859, 55 L.Ed.2d 24 (1978); *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976); *Pierson v. Ray*, 386 U.S. 547, 554–555, 87 S.Ct. 1213, 1217–1218, 18 L.Ed.2d 288 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 376, 71 S.Ct. 783, 788, 95 L.Ed. 1019 (1951). Instead, the Court has recognized immunities of varying scope applicable to different officials sued under the statute. One important assumption underlying the Court's decisions in this area is that members of the 42d Congress

> were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.

City of Newport, 453 U.S. at 258. Yet even then, this Court recognized that Congress could not have intended to "incorporate[] *all* immunities existing at common law," as it would "defeat the promise of the statute" to apply preexisting immunities that are not compatible with "the policies that [the statute] serves." *Id*. at 258-59 (emphasis in original); see *Malley v. Briggs*, 475 U.S. 335, 340 (1986) ("while we look to the common law for guidance, we do not assume that Congress intended to incorporate every common-law immunity into § 1983 in unaltered form.").

But even though this Court acknowledged that overbroad immunities could destroy the purpose of the Civil Rights Act, this Court nevertheless continued to expand immunities, concluding again and again that Congress's silence justified the ever-broadening immunity shield. See *City of Newport*, 453 U.S. at 266 ("Finding no evidence that Congress intended to disturb the settled common-law immunity, we now must determine whether considerations of public policy dictate a contrary result); *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quotation omitted) ("Certain immunities were so well established in 1871, when § 1983 was enacted, that we presume that Congress would have specifically so provided had it wished to abolish them.").

And yet *none* of the immunities this Court has applied are contained within the statute itself. *Tower v. Glover*, 467 U.S. 914, 920 (1984) ("On its face § 1983 admits no immunities."); *Malley*, 475 U.S. at 339 ("the statute on its face admits of no immunities"); *Imbler v. Pachtman*, 424

U.S. 409, 417 (1976) ("The statute thus creates a species of tort liability that on its face admits of no immunities, and some have argued that it should be applied as stringently as it reads.").

Crucially, although this Court has continued to draw ever expanding boundaries for immunities under Section 1983, this Court has simultaneously acknowledged that it does not possess the authority to *create* immunity were none otherwise exists. It is solely within the province of the legislature to create immunities:

> We do not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether § 1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.

Tower, 467 U.S. at 922–23; *Malley*, 475 U.S. at 342 ("our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice.").

Thus, in the first few decades of qualified immunity jurisprudence, this Court set the following foundations: (1) no immunities are contained within Section 1983 itself, but (2) the legislature was silent on abolishing preexisting common law immunities, so therefore (3) common law immunities that existed prior to the enactment of Section 1983 still existed following its enactment, but (4) not *all* common law immunities, only (5) the preexisting common law immunities that do not "defeat the promise of the statute," which (6) this Court may define and expand but not create, given that only Congress has the authority to establish immunities anew.

Even at the time of *Tenney* over seventy years ago, members of this Court doubted the integrity of the structural foundation on which qualified immunity rests. Justice Douglas wrote of his doubt that immunities applied under Section 1983 would align with the legislative purpose:

> It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.

Tenney, 341 U.S. at 383 (Douglas, J., dissenting). Years later, Justice Douglas challenged the majority's view that legislative silence justified the ever-expanding application of immunity, noting that the Civil Rights Act was enacted specifically to address the inadequacies of pre-existing law, *including* common law:

> It is said that, at the time of the statute's enactment, the doctrine of judicial immunity was well settled and that Congress cannot be presumed to have intended to abrogate the doctrine since it did not clearly evince such a purpose. This view is beset by many difficulties. It assumes that Congress could and should specify in advance all the possible circumstances to which a remedial statute might apply and state which cases are within the scope of a statute.
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> Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the 'common law

> before the making of the Act.' Heydon's Case, 3 Co.Rep. 7a, 76 Eng.Rep. 637 (Ex. 1584). But Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law. It cannot be presumed that the common law is the perfection of reason, is superior to statutory law (Sedgwick, Construction of Statutes 270 (1st ed. 1857); Pound, Common Law and Legislation, 21 Harv.L.Rev. 383, 404—406 (1908)), and that the legislature always changes law for the worse. Nor should the canon of construction 'statutes in derogation of the common law are to be strictly construed' be applied so as to weaken a remedial statute whose purpose is to remedy the defects of the preexisting law.

Pierson, 386 U.S. at 560-61 (Douglas, J., dissenting).

This line of case law became known to legal scholars as the Derogation Canon: a canon of statutory interpretation which states that "absent clear language, statutes in "derogation" of the common law should be strictly construed." Alexander A. Reinert, Qualified Immunity's Flawed Foundation, 111 Cal. L. Rev. 201, 217 (2023). Justice Douglas did not stand alone in questioning the foundation of the Derogation Canon, which has been "subjected to trenchant criticism" throughout the years, including by Justice Scalia, who "rejected the canon as 'a relic of the courts' historical hostility to the emergence of statutory law.'" *Id*. at 218.

In any event, the Derogation Canon eventually faded as subsequent jurisprudence built higher, unsteady towers upon a rickety, baseless foundation. In recent decades, this Court has continued to diverge further from the Derogation Canon and towards judicial law-making, con-

structing a judge-made affirmative defense where none existed before—not in statute and not in common law.

In 1982, this Court first defined a "qualified immunity" that was an affirmative defense with both a subjective and objective aspect. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Recognizing that this new formulation represented an immunity embedded in "principles not at all embodied in the common law," this Court made a turn from its prior precedent to now claim that Section 1983 immunities should not be "slavishly derived from the often arcane rules of the common law." *Anderson v. Creighton*, 483 U.S. 635, 645 (1987). This represented a complete departure from the foundation reestablished only a year prior to *Harlow*, where this Court explained that qualified immunity "cannot be understood in a historical vacuum" and only exists because such common law immunities existed prior to the enactment of the Civil Rights Act. *City of Newport*, 453 U.S. at 258.

This divergence from the already-shaky Derogation Canon is perfectly captured by Justice Douglas's concurrence in *Ziglar*:

> The Civil Rights Act of 1871, of which § 1985(3) and the more frequently litigated § 1983 were originally a part, established causes of action for plaintiffs to seek money damages from Government officers who violated federal law. See §§ 1, 2, 17 Stat. 13. Although the Act made no mention of defenses or immunities, "we have read it in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Malley v. Briggs*, 475 U.S. 335, 339, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986) (internal quotation marks omitted). We have done so because "[c]ertain

immunities were so well established in 1871 ... that 'we presume that Congress would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993); accord, *Briscoe v. LaHue*, 460 U.S. 325, 330, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). Immunity is thus available under the statute if it was "historically accorded the relevant official" in an analogous situation "at common law," *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976), unless the statute provides some reason to think that Congress did not preserve the defense, see *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984).

...

In further elaborating the doctrine of qualified immunity for executive officials, however, we have diverged from the historical inquiry mandated by the statute. See *Wyatt*, *supra*, at 170, 112 S.Ct. 1827 (KENNEDY, J., concurring); accord, *Crawford–El v. Britton*, 523 U.S. 574, 611, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998) (Scalia, J., joined by THOMAS, J., dissenting). In the decisions following *Pierson*, we have "completely reformulated qualified immunity along principles not at all embodied in the common law." *Anderson v. Creighton*, 483 U.S. 635, 645, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (discussing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

…

> Because our analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, we are no longer engaged in "interpret [ing] the intent of Congress in enacting" the Act. *Malley*, 475 U.S., at 342, 106 S.Ct. 1092; see *Burns*, *supra*, at 493, 111 S.Ct. 1934. Our qualified immunity precedents instead represent precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to make.

Ziglar, 137 S. Ct. at 1870–72 (Thomas, J., concurring in part); see *Crawford-El*, 523 U.S. at 611 (Scalia, J., dissenting) (recognizing that "our treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.").

Legal scholars as well have noted that modern qualified immunity jurisprudence is more akin to judicial lawmaking than statutory interpretation:

> The Court, of course, has concluded that qualified immunity is necessary to further interests in effective government. Even granting that role, judicial construction of an immunity defense in constitutional tort litigation should not replicate the balancing already undertaken with respect to the definition of substantive constitutional rights or the scope of § 1983. Nor should it provide the means for an end-run around settled judicial interpretation of these provisions. The Court has stressed repeatedly

> the deterrent and compensatory purposes of § 1983, and it should tread lightly in recognizing defenses that interfere with these legislative goals.

David Rudovsky, The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights, 138 U. Pa. L. Rev. 23, 74 (1989); see Reinert, Flawed Foundation, *supra*, at 205 ("Critics have long argued that the modern extension of qualified immunity is an improper form of federal common law-making.").

Thus, modern qualified immunity jurisprudence is untenable on three separate grounds: *first*, the Derogation Canon and its progeny is simply inapplicable, as recently uncovered texts have demonstrated that Congress was not silent on immunities as has been presumed for the past hundred and fifty years. *Second*, even if the Derogation Canon was still applicable, it is fatally flawed in its application to qualified immunity.[3] *Third*, even if the Derogation Canon did make logical sense in the context of qualified immunity jurisprudence, this Court has diverged so far from the canon as for it to be unrecognizable, and modern qualified immunity is no more than impermissible judicial law-making that cannot substitute for Congress's explicit determination to the contrary.

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[3] As many legal scholars including Professor Reinert have noted, the Derogation Canon, at its core, "has almost always been concerned with protecting common law claims or rights," which is directly at odds with the legislative purpose of Section 1983. Reinert, Flawed Foundation, *supra*, at 234.

II. The Rediscovery of the Notwithstanding Clause Completely Reshapes Section 1983 and Eradicates the Foundation of Qualified Immunity.

It is within this framework that Professor Reinert took a closer look at the original text of the Civil Rights Act. As Professor Reinert described, the entirety of modern qualified immunity jurisprudence is built on one central tenet: "common law should not be displaced by statute, *absent explicit command by the legislature*." Reinert, Flawed Foundation, *supra*, at 235 (emphasis in original). But the original text of the Civil Rights Act *provides* that explicit command.

Terming this the "Notwithstanding Clause," Professor Reinert demonstrates that there is a clause "between the words 'shall' and 'be liable' in Section 1983 which contains the following language: "*any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*." Reinert, Flawed Foundation, *supra*, at 235 (2023) (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13) (emphasis in original). It was clearly understood at the time that "custom or usage" was akin to "common law," and that, therefore, Section 1983 "created liability for state actors who violate federal law, *notwithstanding* any state law to the contrary," *including* common law. Reinert, Flawed Foundation, *supra*, at 235 (emphasis in original).

It is notable that this Court has been aware of this language but never addressed its import. In *Monroe*, Justice Frankfurter wrote:

> The original text of the present s 1979 contained words, left out in the Revised Statutes, which clarified the objective to which the provision was addressed:

> 'That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, **any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding**, be liable to the party injured * * *.'

Monroe v. Pape, 365 U.S. 167, 228 (1961) (Frankfurter, J., dissenting) (emphasis added); see *Ngiraingas v. Sanchez*, 495 U.S. 182, 189 n.8 (1990) (discussing other revisions made during the 1874 recodification); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 723 (1989) (reprinting the original text in full, including the Notwithstanding Clause); *Examining Bd. of Engineers, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 582 n.11 (1976) (same).

But despite this Court's periodic recognition that this language exists, "no opinion, whether for the Court or for individual Justices, has construed the Notwithstanding Clause within the Court's immunity doctrine or more generally." Reinert, Flawed Foundation, *supra*, at 246 n.233. Instead, the removal of this language during the 1874 recodification effectively removed the Notwithstanding Clause from the nation's jurisprudence entirely.

Despite the removal of the Notwithstanding Clause from future iterations of Section 1983 following the 1874 recodification, the clause remains good law. It is the Statutes at Law—the original text—that this Court has held "provides the 'legal evidence of laws,'" even where a provision is subsequently omitted from the current edition of

the United States Code. *U.S. Nat. Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993).

> Certainly where, as here, the 'change of arrangement' was made by a codifier without the approval of Congress, it should be given no weight. If construction (of a section of the United States Code which has not been enacted into positive law) is necessary, recourse must be had to the original statutes themselves.

United States v. Welden, 377 U.S. 95, 98 (1964) (internal quotation omitted).

In sum, the Notwithstanding Clause either (1) provides the explicit abrogation of common law immunities that this Court was looking for but did not find in *Tenney* which would destroy the entire foundation of modern qualified immunity jurisprudence, or (2) "speaks powerfully to Congress's intent that any immunity grounded in state law has no application to the cause of action we now know as Section 1983"—in which case this Court should nevertheless review the foundation and scope of the doctrine. Reinert, Flawed Foundation, *supra*, at 238.

III. Lower Courts Have Recognized that Only This Court Has the Authority to Resolve this Issue.

These issues are vital for this Court to revisit as lower courts have recognized that between the groundbreaking nature of Professor Reinert's scholarship and the significant impact a revisitation of the doctrine may have on thousands of cases across the country, only this Court is situated to conclusively resolve this controversy.

Given the recent publication of Professor Reinert's scholarship, few cases have addressed the issues raised therein to date—including the import of the original text

of the Notwithstanding Clause. The few circuit courts that have uniformly either explicitly reserved these issues for this Court to decide or implicitly did so by noting these issues but declining to resolve them.

In a case involving excessive force, the Second Circuit affirmed a grant of summary judgment in favor of defendant police officers on the basis that "the defendant officers are entitled to qualified immunity." *McKinney v. City of Middletown*, 49 F.4th 730, 734 (2d Cir. 2022). Circuit Judge Guido Calabresi dissented, in part on the basis that "the doctrine of qualified immunity—misbegotten and misguided—should go." *Id*. at 756 (Calabresi, J., dissenting). As Judge Calabresi explained, "qualified immunity cannot withstand scrutiny." *Id*.[4] Citing to Professor Reinert's article, among several others, Judge Calabresi noted that "scholars have demonstrated that there was no common law background that provided a generalized immunity that was anything like qualified immunity," implying that even if the Derogation Canon was appropriate-

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[4] To support this point, Judge Calabresi pointed to dozens of cases from around the country that have each raised significant doubts about the doctrine. Nearly all circuits have had at least one judge address their concerns about qualified immunity, including the Third, Fifth, Eighth, Ninth, and Tenth Circuits. See *Wearry v. Foster*, 33 F.4th 260, 278–79 (5th Cir. 2022) (Ho, J., dubitante); *Jefferson v. Lias*, 21 F.4th 74, 87, 93–94 (3d Cir. 2021) (McKee, J., joined by Restrepo & Fuentes, JJ., concurring); *Goffin v. Ashcraft*, 977 F.3d 687, 694 n.5 (8th Cir. 2020) (Smith, C.J., concurring); *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part); *Cox v. Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., joined by Phillips, J., dissenting from the denial of rehearing en banc); *McCoy v. Alamu*, 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part); *Reich v. City of Elizabethtown*, 945 F.3d 968, 989 n.1 (6th Cir. 2019) (Nelson Moore, J., dissenting); *Zadeh v. Robinson*, 928 F.3d 457, 478–81 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

ly applied, there would be no common law immunity to support a qualified immunity doctrine. *Id*. at 757. Even if the Derogation Canon was not applied, and modern qualified immunity is, in fact, a judicial doctrine as outlined above, Judge Calabresi noted that there "is every reason to doubt that the Court's created immunity from suit strikes the right balance." *Id*. In any event, Judge Calabresi ended with a plea to this Court: "The Supreme Court should do away with this ill-founded, court-made doctrine, and *Congress* should take up the important challenge of ensuring effective law enforcement, deterring misconduct, and providing for those injured while giving municipalities and states protections that might be appropriate." *Id*. at 758 (emphasis in original).

In a concurrence, Fifth Circuit Judge Don R. Willett wrote with respect to the Notwithstanding Clause that "[t]he language is unsubtle and categorical, seemingly erasing any need for unwritten, gap-filling implications, importations, or incorporations. Rights-violating state actors are liable—period—notwithstanding any state law to the contrary." *Rogers v. Jarrett*, 63 F.4th 971, 980 (5th Cir. 2023), cert. denied sub nom. *Rogers v. Jarrett*, *et al.*, No. 23-93, 2023 WL 6378558 (U.S. Oct. 2, 2023) (Willett, J., concurring). He recognized that Professor Reinert's scholarship contained "game-changing arguments, particularly in this text-centric judicial era," and that it has "seismic" implications. *Id*. at 981. But Judge Willett also recognized the limitations of his role as a "middle-management circuit judge[]," determining that *only* this Court is primed to "definitively grapple with § 1983's enacted text and decide whether it means what it says." *Id*.

The Sixth Circuit has similarly recognized the groundbreaking nature of Professor Reinert's scholarship but declined to address the merits. Judge Chad A. Readler noted that "[e]merging scholarship" exists that suggests

that "because the Civil Rights Act of 1871 explicitly abrogated the common-law immunities grounded in state law, those immunities are abrogated now sub silentio under the current version of § 1983." *Price v. Montgomery Cnty., Kentucky*, 72 F.4th 711, 727 n.1 (6th Cir. 2023). But despite recognizing this scholarship, Judge Readler did not address these issues on the merits, presuming without further analysis that "[q]ualified immunity protects government officials who make mistakes while reasonably performing their duties." *Id*. at 723.

IV. This Issue is Exceptionally Important for this Court to Resolve, and Will Continue to Arise Until this Court has Resolved It.

Since the publication of Professor Reinert's groundbreaking scholarship in February 2023, one other petition was submitted to this Court on similar grounds. *Rogers v. Jarret*, Case No. 23-93, arose from the Fifth Circuit and was recently denied by this Court on October 2, 2023. As the petitioner in Rogers indicated to this Court, this Court must expeditiously address this issue as lower courts have no authority to answer to this question in the interim and courts, counsel, and litigants across the nation will have no certainty until this issue is resolved. Professor Reinert's scholarship has "cast a shadow over every qualified immunity case" that will remain "until this Court resolves it." *Rogers* Pet. at 20.

This case, unlike *Rogers*, provides the ideal vehicle for this Court to address these newly raised issues and settle the uncertainty once and for all. In *Rogers*, the Fifth Circuit made an alternative ruling that would resolve the case in the respondents' favor even if this Court struck down the Fifth Circuit's qualified immunity holding, holding that "Rogers failed to show deliberate indifference." *Id*. at 19. The petitioner urged this Court to nevertheless grant the petition, resolve the qualified immunity issue,

then "remand for the Fifth Circuit to reconsider its deliberate-indifference holding in light of this Court's decision" on his vague speculation that the Fifth Circuit's concurrence demonstrated "the panel may have reached a different conclusion had qualified immunity not applied." *Id*.

By contrast, this case is narrowly tailored and ideally poised for this Court to address qualified immunity, without the additional complications attendant in *Rogers*. Here, the Fourth Circuit solely premised its opinion on its conclusion that Respondent was "entitled to qualified immunity." A24. Should this Court find the doctrine of qualified immunity fatally flawed and no longer applicable to Section 1983 claims, the entirety of the Fourth Circuit's decision collapses. This case would not require the Court, as *Rogers* would have, to consider extraneous issues—although this case does also present the ideal vessel for this Court to conclusively address whether a right to film police activity exists, should this Court choose to do so. *See* Section V.

Justice Thomas has aptly noted that it is vital for this Court to return to the question of qualified immunity, to address "whether immunity 'was historically accorded the relevant official in an analogous situation at common law.'" *Baxter v. Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) (quoting *Ziglar*, 137 S. Ct. at 1870) (Thomas, J., concurring). Even prior to the publication of the groundbreaking scholarship cited herein, Justice Thomas urged this Court to grant a petition for certiorari to revisit the doctrine of qualified immunity "[g]iven the importance of this question" and Justice Thomas' continued strong doubts over the foundation of the doctrine. *Id*. at 1865.

Justice Sotomayor has noted a "disturbing trend regarding the use of this Court's resources in qualified-immunity cases," where the "Court routinely displays an

unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these same cases." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (internal quotations omitted). This approach has effectively "transform[ed] the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Id*.

Whether this Court looks at this case from the perspective of Justice Thomas, focusing on the flawed foundation of the doctrine, or the perspective of Justice Sotomayor, focusing on the inconsistent way the doctrine has been applied, this Court should find significant value in revisiting these issues. It is evident, from the newly uncovered Notwithstanding Clause and from the historical context during which the Civil Rights Act was enacted, that Congress did not intend individuals to be effectively barred from recovery under Section 1983 by qualified immunity. But that is precisely what has occurred under modern qualified immunity jurisprudence—from attorneys avoiding cases where possible qualified immunity issues may arise, see Alexander A. Reinert, Does Qualified Immunity Matter?, 8 U. St. Thomas L.J. 477, 494 (2011),[5] to unequitable applications of the doctrine by the judiciary as identified by Justice Sotomayor.

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[5] According to a recent study by a law professor, "Circumstantial evidence suggests that the challenges of civil rights litigation--including qualified immunity--may cause many more lawyers to decrease the number of civil rights cases they file or get out of the business of civil rights litigation altogether." Joanna C. Schwartz, Qualified Immunity's Selection Effects, 114 Nw. U. L. Rev. 1101, 1131 (2020). It is difficult to imagine that this bar to recovery was intended by Congress when the Civil Rights Act was enacted.

The doctrine of qualified immunity is a doctrine that impacts numerous litigants across the country every year.

> When qualified immunity applies in litigation, it bars all compensation for victims of unconstitutional conduct, no matter how egregious or injurious. … Qualified immunity also has a harmful systemic impact because courts are free to apply the doctrine without ever considering the underlying merits of a plaintiff's legal claim, making it difficult for constitutional law to change over time. And because it looms over every potential civil rights case, there is good reason to think that the doctrine deters injured people from initiating litigation, or interferes with their attempts to obtain representation.

Reinert, Flawed Foundation, *supra*, at 245. Given the significant impact resolving these issues would have on future litigation—regardless of the outcome—this Court should expeditiously review qualified immunity in light of the scholarship described herein.

In sum, this case presents the perfect vehicle of review of the new groundbreaking scholarship challenging the very foundation of the doctrine of qualified immunity. This Court should elect to grant certiorari in this case.

V. This Case Also Presents the Perfect Vessel for this Court to Conclusively Establish a Right to Film Police Activity.

In addition to the question of qualified immunity's flawed foundation, this case provides the perfect vehicle for this Court to settle another important question: whether individuals have the right to film police activity.

The Fourth Circuit dodged this issue below. Instead of conclusively determining whether there is a right to film police activity, the court instead "assum[ed] that there was some clearly established right to film police" and then concluded that regardless of whether that right *actually* existed, "ordering Kevin to move back less than fifteen feet and film from off the sidewalk was a permissible time, place, and manner restriction." A18.

The Fourth Circuit has continuously refused to rule on whether the right exists and has dodged this question not once but *twice* within the prior year. In a case involving the subject of a traffic stop live broadcasting his own stop, the Fourth Circuit refrained from conclusively determining whether the right existed and instead simply emphasized distinctions between (1) recording and livestreaming, and (2) the livestreaming being done by the subject of the police action rather than a bystander. *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 683 (4th Cir. 2023).[6] The Fourth Circuit then dodged the issue again in this case.

Unlike the vast majority of circuits across the country, the Fourth Circuit has never addressed this right in a published opinion. The closest the court has ever come was addressing the issue in an unreported opinion where the court noted the right may exist but finding that the right was not clearly established at the time, a contrary conclusion to the majority of circuits. *Szymecki v. Houck*, 353 F.

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[6] The plaintiff in *Sharpe* filed a petition for writ of certiorari to this Court on September 18, 2023, asking this Court to resolve whether "it was clearly established by October 2018 that filming police officers in public is First Amendment protected activity." Case No. 23-276. This case presents a much better vessel for this Court to resolve this question, as this case would not require this Court to consider the complexities of livestreaming.

App'x 852, 853 (4th Cir. 2009) ("First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct.").

By contrast, the First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits have all affirmed this vital right. *Fields v. City of Phila.*, 862 F.3d 353, 355–56 (3d Cir. 2017) ("[T]he First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 689–90 (5th Cir. 2017) ("We agree with every circuit that has ruled on this question . . . the First Amendment protects the right to record police."); *Gericke v. Begin*, 753 F.3d 1, 8 (1st Cir. 2014) (recognizing a "First Amendment right to film police activity carried out in public"); *ACLU v. Alvaraez*, 679 F.3d 583, 595–96 (7th Cir 2012) ("The act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights . . . ." (emphasis omitted)); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing plaintiffs had a First Amendment "right to videotape police activities"); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a plaintiff who was attempting to videotape a demonstration had a "First Amendment right to film matters of public interest").

With only an unpublished opinion of the Fourth Circuit that stands against the overwhelming consensus of sister circuits, there is ambiguity and risk that trial courts will reach divergent outcomes on this issue. Leaving Houck in place without firmly and conclusively holding that the right exists is, in effect, a *sub silentio* rejection of the right that does even more violence to the underlying right than if the Fourth Circuit had directly rejected that right in the open: with no conclusive determination in any

reported case, obtaining further review will be incredibly difficult. Despite having two opportunities in the prior year to settle this vital issue, the court has instead bent over backwards to refuse to do so, to the point of resolving factual disputes as to whether the order to move served any significant government interest. A18.

Clearly, this case is an ideal vessel for standard setting as reasonable minds reach divergent results on these facts. The district court concluded that "if Sgt. Pope's interference with the demonstration did not actually serve any significant government interest, then it was not a proper time, place, and manner restriction on Kevin Hulbert's First Amendment rights." A63. The Fourth Circuit reached the complete opposite conclusion, that moving Kevin Hulbert—a man who was simply filming the interaction and not interfering with the arrest of his brother in any manner—was "narrowly tailored to serve a significant governmental interest." A18. This case lands precisely at the border and will provide this Court with the ideal opportunity to not only conclusively settle that the right to film police activity exists, but provide guidance to lower courts on the appropriate standards to apply when considering time, place, and manner restrictions.

This Court should provide crucial guidance to litigants, courts, police, and the general public and clearly and unequivocally establish whether a bystander witnessing police activity in a public space has the right to use their phone to record police.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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