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

APPENDIX

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October 6, 2023

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1608

CLAYTON R. HULBERT, as personal representative of the Estate of Jeffrey W. Hulbert;
KEVIN HULBERT; MARYLAND SHALL ISSUE, INC., for itself and its members,
Plaintiffs - Appellees

v.

BRIAN T. POPE, Sgt.
Defendant - Appellant

and

MICHAEL WILSON, Colonel
Defendant

NATIONAL POLICE ASSOCIATION
Amicus Supporting Appellant.

Appeal from the United States District Court for the District of Maryland at Baltimore. Stephanie A. Gallagher, District Judge. (1:18–cv–00461–SAG)

Argued: May 3, 2023 Decided: June 14, 2023

Before WILKINSON, AGEE, and HEYTENS, Circuit Judges.

Reversed and remanded by published opinion. Judge Wilkinson wrote the opinion, in which Judge Agee and Judge Heytens joined.

ARGUED: James Nelson Lewis, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellant. Cary Johnson Hansel, III, HANSEL LAW, P.C., Baltimore, Maryland, for Appellees. **ON BRIEF:** Brian E. Frosh, Attorney General, OFFICE OF THE ATTORNEY GENERAL OF MARYLAND, Baltimore, Maryland, for Appellant. Robert S. Lafferrandre, Jeffrey C. Hendrickson, PIERCE COUCH HENDRICKSON BAYSINGER & GREEN, L.L.P., Oklahoma City, Oklahoma, for Amicus Curiae.

WILKINSON, Circuit Judge:

Sergeant Brian Pope, a Maryland Capitol Police officer, appeals the district court's denial of qualified immunity on several First and Fourth Amendment claims brought by picketers whom he arrested on the sidewalk outside the Maryland State House. Pope arrested the picketers after they disobeyed his orders to back up off the sidewalk and protest instead from an adjoining square. Because a reasonable officer in Pope's position could have believed that the orders constituted lawful time, place, or manner restrictions on the picketers' First Amendment rights, Pope is entitled to qualified immunity. We therefore reverse and remand with directions to the district court to enter judgment for Pope.

I.

A.

Brothers Jeff and Kevin Hulbert created an informal group, "The Patriot Picket," that advocates for gun rights. The group stages regular picketing demonstrations near the Maryland State House in Annapolis during the legislative session.

On the evening of February 5, 2018, the Hulbert brothers and six other members of the group began picketing on a 15.5-foot-wide strip of public sidewalk at the intersection of two streets in downtown Annapolis. They chose the location for its visibility to the public and state lawmakers. The picket was situated one block from the State House, separated only by a grassy square known as Lawyers' Mall.

Sergeant Brian Pope, an officer with the Maryland Capitol Police (MCP), was in his office when a dispatcher told him that picketers were gathering in front of Lawyers' Mall. The dispatcher specified that an aide with the Governor's Mansion had requested the Capitol Police sort out the situation.

Pope went over to the dispatcher's office and obtained a video feed of the area. He observed an individual—later identified as Kevin Hulbert—standing alone on the sidewalk with signs around him. The dispatcher explained that the other picketers had recently left.

Pope next sought the guidance of his supervisor, Sergeant Dennis Donaldson, who in turn called the chief of the Capitol Police, Colonel Michael Wilson. After discussing potential safety issues, Wilson advised Donaldson to have Pope evaluate the

demonstration and, if necessary, relocate it. Donaldson relayed the order to Pope, instructing him to let the picketers continue their demonstration from Lawyers' Mall.

Pope went out to the sidewalk and encountered Kevin Hulbert, who remained alone. Kevin Hulbert told Pope that the other picketers were getting food. Pope did not observe the immediate obstruction of vehicular or pedestrian traffic but contends that he anticipated safety issues would arise. He instructed Kevin to move the demonstration off the sidewalk and onto the adjoining Lawyers' Mall, thereby creating a buffer between the picketers and traffic on the sidewalk and streets. Kevin did not respond.

An hour later, Pope returned to the area and noticed that the other picketers had come back and were demonstrating on the sidewalk. He approached the group and ordered them to back up onto Lawyers' Mall. Some members of the group initially complied, but Jeff Hulbert then declared that they were not moving. Pope repeated his command at least two more times, threatening to arrest those who did not comply.

The picketers held firm. Pope called for backup. Once several officers arrived on the scene, Pope arrested Jeff Hulbert. Kevin Hulbert and multiple passersby filmed the arrest, and Pope ordered them to back up off the sidewalk as well. After Kevin alone failed to comply, Pope placed him under arrest too.

The Hulbert brothers were searched and transported to a city police station for processing. At the station, Pope issued each brother a single criminal citation for disobeying a lawful order under § 10-201(c)(3) of the Maryland Criminal Law Article.

He then released the brothers, who had been in custody for just over an hour.

The following day, per a decision by Colonel Wilson, Pope and other officers issued the Hulbert brothers additional citations for hindering passage in a public place and for refusing to leave public grounds under § 10-201(c)(1) and § 6-409(b) of the Criminal Law Article, respectively. Three days later, all charges against the Hulbert brothers were dropped.

B.

The Hulbert brothers and Maryland Shall Issue, Inc.—a non-profit organization to which they belong—sued Pope and Wilson in the U.S. District Court for the District of Maryland. They brought federal First Amendment and Fourth Amendment claims under 42 U.S.C. § 1983 as well as several state-law claims. Pope and Wilson moved for summary judgment primarily on the grounds of qualified immunity. The district court granted summary judgment to the defendants on all counts except for four of the claims against Pope: Count I (First Amendment right to demonstrate); Count II (First Amendment right to film police officers); Count III (First Amendment right to be free from retaliation for lawful speech); and Count IV (Fourth Amendment right to be free from unreasonable seizure).

With respect to Count I, the district court analyzed Pope's orders for the picketers to move off the sidewalk as time, place, or manner restrictions on speech. The court concluded that genuine disputes of material fact precluded summary

judgment for Pope. Applying the Supreme Court's test for whether a time, place, or manner restriction in a public forum passes constitutional muster, the court held that Pope's orders satisfied two of the three criteria. *See* J.A. 745–46 (citing *United States v. Grace*, 461 U.S. 171, 177 (1983)). First, the orders were "content-neutral" because "[t]he testimony uniformly show[ed]" that the conversations between Pope, his dispatcher, and Donaldson "were about potential safety concerns and the fact that the Plaintiffs did not have a pre-approved permit"; "[n]othing in the record . . . entailed any discussion of the content of the Plaintiffs' message." *Id.* at 747. Second, the orders left open "ample alternative channels" because the Hulberts were allowed to continue demonstrating in the same manner and only needed to move, at most, about fifteen feet. *Id.* at 747–48.

When it came to the third criterion for a constitutional speech restriction, however, the court found that genuine disputes of material fact precluded a finding that "a significant government interest was served" by his orders. *Id.* at 754. The court recognized that the state generally has a significant interest "in maintaining the safety, order, and accessibility of its streets and sidewalks." *Id.* at 749 (quoting *Ross v. Early*, 746 F.3d 546, 555 (4th Cir. 2014)). But the court determined that there remained "factual disputes requiring jury resolution as to whether [that] interest was served by the police action." *Id.* at 751. In particular, it noted that there was no evidence that the picketers were impeding pedestrian or vehicular traffic at the moment when they were asked to move onto Lawyers' Mall. It also pointed to a factual dispute over whether any

picketers were in the street or using the crosswalk. In the court's view, "whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions" was a "genuine issue of material fact" that precluded summary judgment on Count I. *Id.* at 753–54.

With respect to Count II, the court held that Kevin Hulbert had a clearly established right to film the police despite the lack of binding Supreme Court or Fourth Circuit caselaw because a majority of other circuits had recognized such a right. The court found that Pope arrested Kevin "because he did not comply with repeated orders to move to Lawyers' Mall, not because he was filming." *Id.* at 756. But it framed Pope's interference with the demonstration as a time, place, or manner restriction on Kevin's right to film and concluded that summary judgment was inappropriate because of the genuine dispute of material fact as to whether the interference served a significant government interest.

The court denied summary judgment on Count III, the First Amendment retaliatory-arrest claim, and Count IV, the Fourth Amendment unreasonable-seizure claim, for a similar reason. It noted that the existence of probable cause would defeat both claims, *see Nieves v. Bartlett*, 139 S. Ct. 1715, 1725 (2019) (retaliatory arrest); *Brown v. Gilmore*, 278 F.2d 362, 367 (4th Cir. 2002) (unreasonable seizure), but the failure to obey an *unconstitutional* order could not serve as the basis for probable cause. Reasoning that factual disputes precluded the court from determining whether Pope's orders complied with the First Amendment, it denied summary judgment on these claims.

Pope filed a motion for reconsideration, which the district court denied. He proceeded to file this interlocutory appeal.

II.

We review a "district court's denial of qualified immunity on summary judgment . . . de novo, applying the same legal standards as the district court did on summary judgment." *Yates v. Terry*, 817 F.3d 877, 883 (4th Cir. 2016). "Generally, our jurisdiction is limited to final decisions of the district court." *Williams v. Strickland*, 917 F.3d 763, 767 (4th Cir. 2019); *see* 28 U.S.C. § 1291. But qualified immunity is an "*immunity from suit* rather than a mere defense to liability" and is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). A district court's denial of qualified immunity at summary judgment is therefore a collateral order "subject to immediate appellate review, despite being interlocutory." *Williams*, 917 F.3d at 768.

We have jurisdiction to review the denial of qualified immunity "to the extent that the court's decision turned on an issue of law," *Danser v. Stansberry*, 772 F.3d 340, 344 (4th Cir. 2014), or an "ostensibly fact-bound issue that may be resolved as a matter of law," *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 221–22 (4th Cir. 2012) (en banc). We may "determine as a matter of law whether the defendants violated [plaintiff's] constitutional rights, considering the facts as the district court viewed them as well as any additional undisputed facts." *Danser*, 772 F.3d at 345. And even where certain facts remain disputed, we have jurisdiction to decide

the legal question of whether those facts are "material" to the question of the officer's qualified immunity. *Jackson v. Long*, 102 F.3d 722, 727 (4th Cir. 1996); *see Johnson v. Caudill*, 475 F.3d 645, 649–50 (4th Cir. 2007).

An officer is entitled to qualified immunity unless he (1) "violated a federal statutory or constitutional right, and (2) the unlawfulness of [his] conduct was clearly established at the time." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (quotation marks omitted). Qualified immunity thus shields officers "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Ray v. Roane*, 948 F.3d 222, 228 (4th Cir. 2020) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). It thereby requires the dismissal of suits against "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The doctrine of qualified immunity addresses the concern that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638. To that end, it protects officers by providing them with a sphere of limited discretion in which to perform their duties—"breathing room to make reasonable but mistaken judgments." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011); *see Anderson*, 483 U.S. at 638.

So if, on the undisputed facts, Pope's "actions could reasonably have been thought consistent with" the Hulberts' First and Fourth Amendment rights,

Anderson, 483 U.S. at 638, he is entitled to qualified immunity as a matter of law. For the reasons that follow, this case presents a classic exercise of reasonable judgment that qualified immunity protects.

III.

Pope challenges on appeal the district court's denial of qualified immunity on the plaintiffs' First and Fourth Amendment claims. We discuss each in turn.

A.

Pope first argues that he deserves qualified immunity from the plaintiffs' claim that he violated their First Amendment right to lawfully demonstrate. He does not dispute that this right encompassed the Hulberts' February 5, 2018 demonstration. Rather, he maintains that his on-the-spot intervention—ordering the picketers to move off the sidewalk—"could reasonably have been thought consistent" with this First Amendment right. *Anderson*, 483 U.S. at 638. Pope's actions must be evaluated based on their "objective legal reasonableness," *id.* at 639, and on this score, Pope contends that he is entitled to qualified immunity even if he was ultimately mistaken.

We agree. Any "unlawfulness of [Pope's] conduct" with respect to the picketers' First Amendment right to demonstrate was not "clearly established at the time," *Wesby*, 138 S. Ct. at 589 (quotation marks omitted), or "beyond debate," *White v. Pauly*, 580 U.S. 73, 79 (2017) (quotation marks omitted). That

is, a reasonable officer in Pope's shoes could have believed that his orders were consistent with the picketers' First Amendment rights.

The First Amendment's monumental rights to speech and assembly are not without limit. As the district court recognized, the First Amendment does not guarantee a right to protest "at all times and places or in any manner that may be desired." J.A. 745 (quoting *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981)). Rather, the Supreme Court has long recognized that the government may impose reasonable "time, place, or manner" restrictions on First Amendment freedoms. *McCullen v. Coakley*, 573 U.S. 464, 486 (2014); *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Linmark Assocs., Inc. v. Willingboro Twp.*, 431 U.S. 85, 93 (1977). Such restrictions, which specify when, where, or how speech may be delivered, "stand on a different footing from laws prohibiting speech altogether." *Linmark*, 431 U.S. at 93.

Pope's orders constituted an *ad hoc* restriction on the picketers' time and place of protest, commanding them to retreat for a time from the strip of sidewalk where they stood. Because Pope was imposing a time, place, or manner restriction in a public forum, his orders were lawful if they (1) were "content neutral," (2) preserved "ample alternative channels for communication," and (3) were "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791 (quotation marks omitted).

The record makes clear that Pope's orders satisfied the first two of these criteria. The district court found "no evidence" suggesting that Pope was hostile to the picketers' views or motivated by the

content of their speech. J.A. 747. Indeed the arrests here were plainly based on the failure of the protesters to obey a lawful order, not on anything related to the message the protesters sought to convey. Based on the uncontradicted testimony that Pope was responding to safety concerns, the court properly held that his orders were content-neutral. Likewise, the court was correct to find that Pope's orders had left the picketers with wide "avenues for the more general dissemination of [their] message." *Id.* (quotation marks omitted) (quoting *Ross*, 746 F.3d at 559). Pope had indeed proposed a close alternative: The picketers could continue their demonstration from Lawyers' Mall, an area bordering the sidewalk that was "frequently used for political demonstrations." *Id.* at 738.

To assess whether Pope's orders were lawful, then, the only remaining question would be whether the orders were also "narrowly tailored to serve a significant governmental interest." *Ward*, 491 U.S. at 791 (quotation marks omitted). This third criterion of a permissible time, place, or manner restriction would be satisfied if Pope's orders both "promot[ed] a substantial government interest" and did "not burden substantially more speech than [wa]s necessary to further the government's legitimate interests." *Ross*, 746 F.3d at 552–53 (quotation marks omitted).

1.

We start with whether Pope's orders promoted a substantial governmental interest. There is no doubt that Pope's proffered interest, "public safety," can be "substantial." *Ross*, 746 F.3d at 555; *see* J.A. 332

("Out of concern for public safety . . . the demonstrating group was asked to relocate to Lawyers' Mall."). We have repeatedly held that the "safety, order, and accessibility of . . . streets and sidewalks" are interests sufficient to justify a time, place, or manner restriction. *Ross*, 746 F.3d at 555 (quotation marks omitted); *see Green v. City of Raleigh*, 523 F.3d 293, 301 (4th Cir. 2008); *Cox v. City of Charleston*, 416 F.3d 281, 284 (4th Cir. 2005); *see also McCullen*, 573 U.S. at 496–97 (noting the government's "undeniably significant interests in maintaining public safety on . . . streets and sidewalks"). Pope's safety rationale may thus constitute a substantial state interest.

Our inquiry does not stop there, however. Mere lip service to "an interest that is significant in the abstract" does not show that an officer's conduct actually *promoted* the stated interest. *Ross*, 746 F.3d at 556. So Pope's orders were lawful only to the extent "the recited harms [were] 'real, not merely conjectural,'" and his orders "'alleviate[d] these harms in a direct and material way.'" *Id.* (quoting *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir.2001)). The district court ruled that summary judgment was improper on this basis—due to "a genuine issue of material fact as to whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions." J.A. 753–54.

The unresolved factual disputes noted by the district court—such as whether picketers "were in the street or crosswalks"—are not "material" in light of the undisputed facts of this case. J.A. 753. Given those *undisputed facts*, it was objectively reasonable for Pope to anticipate a real safety threat and respond with the modest directive that the picketers

back up, at most, fifteen feet. Those facts are as follows: It was dark out, and accidents "may result from the darkness of the night." *The Teutonia*, 90 U.S. 77, 84 (1874). Pope's supervisor had warned of a safety issue related to the demonstration. The Maryland legislature was set to soon convene just one block away, generating significant pedestrian traffic. And the picketers were brandishing large signs at an intersection where pedestrians had twice been struck by vehicles in the preceding year.

Even if the picketers were merely crowded along the sidewalk and not on the street, a reasonable officer could have inferred a safety risk from these facts. In determining whether there is a substantial state interest, an officer may rely on "common sense and logic, particularly where, as here, the burden on speech is relatively small." *Ross*, 746 F.3d at 556 (citation and quotation marks omitted). And the intuitions supporting Pope's orders, made under the pressure of the moment, are not difficult to follow. That large signs will attract notice from passing cars and that "distracted" drivers could endanger pedestrians, J.A. 332, are "common-sense conclusions," *Wesby*, 138 S. Ct. at 587 (quotation marks omitted). Pope's solution—making the sidewalk a buffer between picketers and roadway—in turn placed a "relatively small" burden on the picketers' rights. *Ross*, 746 F.3d at 556. Pope did not say "disperse"; all he said was to move back a few feet. His directive logically served to make the picket less striking to passing traffic, thereby reducing the risk of an accident in a "direct and material way." *Id.* (quotation marks omitted).

Plaintiffs counter that the level of traffic congestion was low at the time Pope gave his orders.

But if every fact had to favor his intervention, the doctrine of qualified immunity would be a dead letter. Qualified immunity protects reasonable judgments precisely when some facts cut the other way. Pope's inference that activity would soon pick up was, in any case, "not merely conjectural." *Satellite*, 275 F.3d at 356. A legislative session was "expected to convene within a few hours." J.A. 751. Pope thus had grounds to suppose that legislators, staffers, and lobbyists would soon be converging on the capitol grounds.

One can quibble over when exactly Pope should have acted. But no law, clearly established or otherwise, required Pope to wait for an imminent traffic accident. Preventive measures to promote public safety are a basic contribution of government. *See, e.g.*, *Ross*, 746 F.3d at 550, 556 (upholding municipal policy "to manage the potential disruption to pedestrian and automotive traffic caused by protesters"); *Kass v. City of New York*, 864 F.3d 200, 209 (2d Cir. 2017) (upholding order to disperse although plaintiff had not yet "actually impeded pedestrian traffic or caused a security issue"); *Evans v. Sandy City*, 944 F.3d 847, 858 (10th Cir. 2019) (stating that the government need not "wait for accidents to justify safety regulations"). Prophylactic traffic-safety measures serve a substantial governmental interest.

Pope's assessment of safety risks and attempts to mitigate them were informed by common sense and the facts on the ground, not animus or conjecture. It was at least *reasonable* for him to believe that his orders promoted a substantial governmental interest.

2.

The narrow-tailoring criterion also requires that the time, place, or manner restriction "not burden substantially more speech than is necessary to further the government's legitimate interests." *Ross*, 746 F.3d at 555 (quotation marks omitted). On the record at summary judgment, Pope's orders did not substantially exceed their safety-enhancing purpose so, *a fortiori*, their unlawfulness was not clearly established.

To satisfy this criterion, Pope's orders need not have been "the least restrictive or least intrusive means" to achieve the stated governmental interest. *Ward,* 491 U.S. at 798. Here, however, it is difficult to imagine narrower orders that Pope could have given to realize the desired effect. Although Pope told the picketers to move off the sidewalk, he allowed them to continue their demonstration mere steps away and did not seek any change to their "manner or type of expression." *Id.* at 802. For the purposes of qualified immunity, then, it was at the very least reasonable for Pope to suppose that such a directive did not burden substantially more speech than was necessary.

In sum, the undisputed material facts establish Pope acted reasonably when he arrested the Hulbert brothers for disobeying clear orders. *See* Md. Code Ann., Crim. Law § 10-201(c)(3) (criminalizing the willful failure to obey a police officer's reasonable and lawful order). Pope is thus entitled to qualified immunity on plaintiffs' First Amendment right-to-demonstrate claim.

B.

Pope next challenges the district court's denial of qualified immunity on Kevin Hulbert's First Amendment right-to-film claim. The court denied qualified immunity because it held that there was a genuine dispute of material fact as to whether Pope's interference with Kevin's filming served a significant governmental interest. The trial court erred, however, because "the unlawfulness of [Pope's] conduct" with respect to the filming was not "clearly established at the time." *Wesby*, 138 S. Ct. at 589 (2018) (quotation marks omitted).

We first note the district court's finding that Pope arrested Kevin "because he did not comply with repeated orders to move to Lawyers' Mall, not because he was filming." J.A. 756. "[T]here is no evidence that Sgt. Pope ever told Kevin Hulbert that he could not film"; Pope simply ordered him off the sidewalk. *Id.* Pope only arrested Kevin after he disobeyed this order; Pope did not stop or arrest others who were filming. *Id.* Given these facts, Pope is entitled to qualified immunity unless it was clearly established that ordering Kevin to move back while he was filming would violate his First Amendment rights.

Pope's order imposed a reasonable time, place, or manner restriction on Kevin's filming: Kevin could continue to film but had to do so from off the sidewalk. This order did not violate Kevin's clearly established rights. Neither this court, nor the Supreme Court, nor any other circuit has recognized an unlimited First Amendment right to film police free of otherwise reasonable limitations. In fact, the circuits that recognized a right to film explicitly

noted that it "may be subject to reasonable time, place, and manner restrictions." *Turner v. Lieutenant Driver*, 848 F.3d 678, 690 (5th Cir. 2017) (quotation marks omitted); *see Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *ACLU of Illinois v. Alvarez*, 679 F.3d 583, 605 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). So even assuming that there was some clearly established right to film police, that right would have been subject to reasonable time, place, and manner restrictions.

"Viewing these circumstances as a whole, a reasonable officer could conclude" that ordering Kevin to move back less than fifteen feet and film from off the sidewalk was a permissible time, place, and manner restriction. *Wesby*, 138 S. Ct. at 588. The order "could reasonably have been thought consistent with" any First Amendment right to film. *Anderson*, 483 U.S. at 638. On the undisputed facts, the order was "content neutral" because it had nothing to do with the content of what Kevin was filming. *Ward*, 491 U.S. at 791. It left open "ample alternative channels for communication" because Kevin was allowed to continue filming from off the sidewalk, just a little farther away. *Id.* at 802. And a reasonable officer could have believed that moving Kevin and the other onlookers farther away, off the sidewalk and a greater distance from Pope and Jeff, was "narrowly tailored to serve a significant governmental interest." *Id.* at 796 (quotation marks omitted).

First, as explained above, it was reasonable to believe that the order served a significant governmental interest in ensuring the safety of

pedestrians and drivers in the area. *See supra* Section III.A.1. Second, Kevin was filming while standing relatively close "behind" Pope as he arrested Jeff. J.A. 540–41 ("The second Hulbert was up on me filming when I asked him to back up. . . . [A]nd I wasn't sure what he was going to do."). A reasonable officer could have believed that ordering Kevin and the other onlookers to stand farther away while the officer arrested Jeff served a significant interest in reducing any possible risk to the officer's safety. In fact, we recently held that prohibiting the subject of a traffic stop from livestreaming the encounter because of a potential threat to an officer's safety did not violate a clearly established First Amendment right in 2018. *Sharpe v. Winterville Police Dep't*, 59 F.4th 674, 684 (4th Cir. 2023). Given the "relatively small" limitation imposed by Pope's order to back up a few feet, Pope reasonably could have believed that limitation was justified by either traffic safety or his own safety. *Ross*, 746 F.3d at 556. And given that Kevin was allowed to continue filming, Pope also reasonably could have believed the order was "narrowly tailored" because it did not "burden substantially more speech than [was] necessary" to further these interests. *Ward*, 491 U.S. at 799.

In sum, the caselaw on the right to film has explicitly recognized the permissibility of time, place, and manner restrictions and has not clearly delineated "the limits of this constitutional right." *Fields*, 862 F.3d at 360; *see also, e.g.*, *Turner*, 848 F.3d at 690 (declining to decide "which specific time, place, and manner restrictions would be reasonable"). And Pope reasonably could have believed that his order was a permissible time, place,

or manner restriction given the general criteria governing such restrictions. *See Ward*, 491 U.S. at 791. The right to film police, to the extent one existed, was not the right to a close-up. "[E]xisting law" thus failed to "place[] the constitutionality of the officer's conduct beyond debate" because that law was not sufficiently particularized to "clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 589–90 (quotation marks omitted). Pope is therefore entitled to qualified immunity for ordering Kevin to move off the sidewalk while he was filming.

Because Pope reasonably could have believed that his order was consistent with any First Amendment right to film, it was also reasonable for him to believe that arresting Kevin for disobeying that order was constitutional. *See* Md. Code Ann., Crim. Law § 10-201(c)(3) (failure to obey a police officer's reasonable and lawful order). While the arrest effectively prevented Kevin from continuing to film, we are aware of no precedent suggesting that there is a First Amendment right to continue filming even after one has been formally arrested and subjected to custody. Pope is therefore entitled to qualified immunity on Kevin Hulbert's First Amendment right-to-film claim.

C.

Because Pope reasonably could have believed that his orders to Jeff and Kevin Hulbert were lawful, he is also entitled to qualified immunity on their First Amendment retaliatory-arrest and Fourth Amendment unreasonable-seizure claims. A First Amendment retaliatory-arrest claim fails as a

matter of law if there was "probable cause for the arrest." *Nieves*, 139 S. Ct. at 1724. So does a Fourth Amendment unreasonable-seizure claim. *See Brown*, 278 F.3d at 367 ("To establish an unreasonable seizure under the Fourth Amendment, [one] needs to show that the officers decided to arrest . . . without probable cause."). But as established above, a reasonable officer in Pope's shoes could have believed that his orders for the Hulberts to back up off the sidewalk were lawful time, place, or manner restrictions on their speech. It was therefore reasonable for Pope to believe he had probable cause to arrest them for disobeying these orders, *see* Md. Code Ann., Crim. Law § 10-201(c)(3), and hence reasonable for him to believe that the arrests did not violate their rights. Pope is thus entitled to qualified immunity on these claims.

IV.

This case is not without its context. The Hulbert brothers were not just protesting anywhere, and Pope was not just a member of any police force. That the controversy arose near the Maryland State House sets a backdrop to this case.

It is undeniable that capitol grounds occupy a special place in our First Amendment tradition. For example, protests during the civil rights movement often took place in the proximity of the state house grounds. *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 545–46 (1965) (college students peacefully protesting segregation at state capitol building); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (civil rights protesters peacefully marching on sidewalk around state house grounds). The right to petition in the

First Amendment would seem hollow if it did not encompass those venues where petitioning was most likely to bear fruit. As natural symbols of the political process, state capitols are places where the public is understandably drawn to express its views. Peaceful protest can thus strengthen the bond between government and governed when citizens speak most directly to their elected representatives. At their best, state house protests show democracy in action.

But there is another side of the coin. State houses are more than mere monuments. They are the working offices of lawmakers whose business is essential to the whole art and practice of governance. Lawmakers must be able to carry out their constitutional duties without disturbances that "divert their time, energy, and attention from their legislative tasks." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). In addition, capitol grounds are traditionally "open to the public." *Adderly v. Florida*, 385 U.S. 39, 41 (1966). The visitors, journalists, lobbyists, and staffers who stroll their pathways are entitled to safety, just as they would be on any public sidewalk or street. *See McCullen*, 573 U.S. at 496–97.

Protest must therefore respect the "ordered liberty" that is the hallmark of free and functioning democratic governments. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). Both liberty and order must be held in balance; one without the other would ensure that neither is preserved. One may take notice of recent incidents where this balance has not been struck. In Michigan, armed protesters in military-style gear prompted the cancelation of a legislative session. *See, e.g.*, David Welch, *Michigan Cancels*

Legislative Session to Avoid Armed Protesters, Bloomberg (May 14, 2020). In Tennessee, unruly crowds disrupted House proceedings. *See, e.g.*, *Hundreds Protest at Tennessee Capitol for Tighter Gun Controls after Nashville Shooting*, CBS News (Mar. 20, 2023). And a mob stormed our national Capitol on January 6, 2021, prompting the evacuation of lawmakers during a joint session of Congress dedicated to the peaceful transfer of power. *See, e.g.*, *Trump v. Thompson*, 20 F.4th 10, 18 (D.C. Cir. 2021).

We realize the protest here did not rise to the level of those incidents. But our decisions ripple beyond the parties before us. Given the critical and sensitive issues they address, legislatures will no doubt remain a focus of the most passionate protest. And it is in this context that time, place, and manner restrictions have a vital role to play. They allow protests to proceed, while ensuring that legislative sessions can go forward and that the safety of the public is guaranteed.

Not every time, place, or manner restriction will prove lawful. But to yank the leash on capitol police officers too tight would at this most delicate of moments prevent them from taking necessary measures out of an "undue apprehension of being sued." *Nieves*, 139 S. Ct. at 1725. The upshot would be to discourage actions, even the most modest and incremental, that guard the sanctity of legislative proceedings and provide for the safety of the public. Hence the "breathing room" that qualified immunity affords. *al-Kidd*, 563 U.S. at 743. Properly and carefully applied, the doctrine protects the reasonable judgments that help sustain our constitutional democracy.

Pope's conduct is an example of the "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving"—that those responsible for securing our capitols are regularly called to make. *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014) (quotation marks omitted). Because his "actions could reasonably have been thought consistent with" the First and Fourth Amendments, Sergeant Pope is entitled to qualified immunity. *Anderson*, 483 U.S. at 638. Judgment on the claims herein must thus be entered on remand for Pope.

Capitol police officers are asked to preserve a delicate balance between protest and order. Neither that balance nor the officers who maintain it should ever be taken for granted.

REVERSED AND REMANDED

Filed: June 14, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1608

CLAYTON R. HULBERT, as personal representative of the Estate of Jeffrey W. Hulbert;
KEVIN HULBERT; MARYLAND SHALL ISSUE, INC., for itself and its members,
Plaintiffs - Appellees

v.

BRIAN T. POPE, Sgt.
Defendant - Appellant

and

MICHAEL WILSON, Colonel
Defendant

NATIONAL POLICE ASSOCIATION
Amicus Supporting Appellant.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is reversed. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon the issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Filed: October 6, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, *et al.*,
Plaintiffs,

v. Civil Case No. SAG-18-00461

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

MEMORANDUM OPINION

Plaintiffs Jeff and Kevin Hulbert ("the Hulberts") and Maryland Shall Issue, Inc. ("MSI") (collectively "Plaintiffs") filed this case against Sergeant ("Sgt.") Brian T. Pope and Colonel ("Col.") Michael Wilson (collectively "Defendants"), alleging several constitutional and state law claims arising from the Hulberts' arrest during a demonstration on February 5, 2018. ECF 1. On April 22, 2021, this Court issued a Memorandum Opinion, ECF 88 ("the Opinion"), and Order, ECF 89, granting in part and denying in part Defendants' Motion for Summary Judgment, ECF 76. Sgt. Pope has now filed a Motion for Reconsideration of this Court's Order, ECF 91. The issues have been fully briefed, ECF 101, 102, and no hearing is necessary. *See* Loc. R. 105.6 (D.

Md. 2021). For the reasons that follow, Sgt. Pope's Motion will be denied.[1]

I. Background

The alleged facts in this case are set forth in detail in this Court's earlier Opinion, ECF 88, and will not be fully reiterated herein. As relevant here, this lawsuit began, as alleged, when the Hulberts were arrested during a demonstration outside the Maryland State House on February 5, 2018. *See* ECF 88. Plaintiffs filed suit in this Court against Defendants alleging claims under the First and Fourth Amendments, the Maryland Declaration of Rights, and the common law. ECF 1. After discovery, Defendants filed a Motion for Summary Judgment. ECF 76. After considering the parties' briefing, this Court issued its Opinion and Order, which granted Defendants' motion: (1) as to all claims against Col. Wilson; (2) entirely as to Counts V, VI, VII, VIII, IX, and X; (3) as to all claims for punitive damages; and (4) as to all claims in Count III relating to charges filed on the day after the arrest. ECF 88, 89. This Court, in its Opinion, also identified several genuine disputes of material fact, which precluded summary judgment as to the remaining claims against Sgt. Pope in Counts I, II, III, and IV. *Id.*

On May 7, 2021, Sgt. Pope sought reconsideration of this Court's order. ECF 91. While that motion was pending, Sgt. Pope filed a notice of interlocutory appeal in the United States Court of Appeals for the Fourth Circuit, ECF 94. This Court

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[1] As a result of the rulings made herein, Defendant's motion for leave to file electronic video file in physical format, ECF 93, is denied as moot.

stayed the case pending the outcome of the appeal, ECF 98. The Fourth Circuit subsequently remanded the case for the limited purpose of allowing this Court to rule on the pending motion for reconsideration, ECF 99.

II. Legal Standards

Federal Rule of Civil Procedure 54(b) provides that "any order or other decision" that "adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time" before entry of a final judgment. *See also Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469-70 (4th Cir. 1991) (approving the trial court's reference to Rule 54(b) in reconsidering its ruling on the defendant's Rule 12(b)(6) motion to dismiss); *Lynn v. Monarch Recovery Mgmt, Inc.*, 953 F. Supp. 2d 612, 618 (D. Md. 2013) ("Motions for reconsideration of an interlocutory order are governed by Federal Rule of Civil Procedure 54(b) . . . ."). In this Court, motions for reconsideration must be filed within fourteen days after the Court enters the order. Loc. R. 105.10.

While the Fourth Circuit has not clarified the precise standard applicable to motions for reconsideration, *Butler v. DirectSAT USA, LLC*, 307 F.R.D. 445, 449 (D. Md. 2015), it has stated that motions for reconsideration "are not subject to the strict standards applicable to motions for reconsideration of a final judgment" under Rules 59(e) and 60(b), *Carrero v. Farrelly*, 310 F. Supp. 3d 581, 584 (D. Md. 2018) (quoting *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514 (4th Cir.

2003)); *see Fayetteville Investors*, 936 F.2d at 1470 (expressing "vigorous[] disagree[ment]" with a trial court's use of a Rule 60(b) standard in reconsidering its previous order on a Rule 12(b)(6) motion). However, courts in this District frequently look to the standards used to adjudicate Rule 59(e) and 60(b) motions for guidance when considering Rule 54(b) motions for reconsideration. *Carrero*, 310 F. Supp. 3d at 584; *Butler*, 307 F.R.D. at 449; *Cohens v. Md. Dep't of Human Resources*, 933 F. Supp. 2d 735, 741 (D. Md. 2013); *see also Fayetteville Investors*, 936 F.2d at 1470 (positively discussing a district court's reference, but not strict adherence, to the Rule 60(b) standards in reconsidering its prior ruling (citing *Gridley v. Cleveland Pneumatic Co.*, 127 F.R.D. 102 (M.D. Pa. 1989)).

Motions to amend final judgments under Rule 59(e) may only be granted "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993). Further, Federal Rule of Civil Procedure 60(b) explicitly provides that a court may only afford a party relief from a final judgment if one of the following is present: "(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud or misconduct by the opposing party; (4) voidness; (5) satisfaction; or (6) any other reason that justifies relief." In light of this guidance, "[m]ost courts have adhered to a fairly narrow set of grounds on which to reconsider their interlocutory orders and opinions." *Blanch v. Chubb & Sons, Inc.*, 124 F. Supp. 3d 622, 629 (D. Md. 2015); *see also, id.* ("Courts will reconsider an

interlocutory order in the following situations: (1) there has been an intervening change in controlling law; (2) there is additional evidence that was not previously available; or (3) the prior decision was based on clear error or would work manifest injustice." (quoting *Nana-Akua Takyiwaa Shalom v. Payless Shoesource Worldwide*, 921 F. Supp. 2d 470, 481 (D. Md. 2013))). As a general matter, "'a motion to reconsider is not a license to reargue the merits or present new evidence' that was previously available to the movant." *Carrero*, 310 F. Supp. 3d at 584 (quoting *Royal Ins. Co. of Am. v. Miles & Stockbridge, P.C.*, 142 F. Supp. 2d 676, 677 n.1 (D. Md. 2001)). Ultimately, the decision to reconsider interlocutory orders rests in this Court's "broad discretion." *Am. Canoe Ass'n*, 326 F.3d at 515.

III. Analysis

Sgt. Pope asks the Court to reconsider its rulings on whether his orders were narrowly tailored to serve a significant government interest, ECF 91 at 1, and whether he had probable cause to arrest the Hulberts, ECF 91 at 5. Sgt. Pope deploys two primary arguments in support of his requests. First, Sgt. Pope asserts that previously unsubmitted surveillance footage resolves the factual disputes identified in this Court's Opinion as to whether his orders served a significant government interest. ECF 91 at 2. Second, Sgt. Pope contends that relevant precedent and evidence in the record contravenes this Court's conclusion that there are genuine issues of material fact as to whether a legitimate government interest was served by the police action, and whether the arrests were supported by probable

cause. *Id.* at 3-9. The Court will address each argument in turn.

A. Unsubmitted Video Evidence

Sgt. Pope asserts that he is entitled to reconsideration because previously unsubmitted "surveillance footage depicting the Patriot Picket demonstration before and during the arrests [] shows that the group regularly walked across the streets with their signs before the arrests." ECF 91 at 2. Sgt. Pope contends that this surveillance video resolves the factual dispute as to whether the Hulberts or affiliated protestors were impeding pedestrian or vehicular traffic prior to being told to move to Lawyer's Mall. *See* ECF 88 at 15.

A motion to reconsider under Rule 54(b) does not constitute a license to present new evidence that was previously available to the movant. *Carrero*, 310 F. Supp. 3d at 584 (quoting *Royal Ins. Co. of Am*, 142 F. Supp. 2d at 677 n.1); *Weyerhaeuser Corp. v. Koppers Co.*, 771 F. Supp. 1406, 1419 (D. Md. 1991) (clarifying that a 59(e) motion cannot "be used to raise arguments . . . . [or] to submit evidence which should have been submitted before."). As a general matter, judgment will not be reconsidered on the basis of exhibits filed after the entry of the court's order, particularly "where the party seeking to amend the judgment has made absolutely no showing that the additional evidence offered could not have been timely submitted in the exercise of reasonable diligence." *Bess v. Kanawha Cty. Bd. of Educ.*, 2008 WL 11429807, at *2 (S.D.W. Va. 2008) (quoting *Jensen v. Conrad*, 570 F. Supp. 114, 128-29 (D.S.C. 1983)).

There is no indication that the evidence, which Sgt. Pope now submits as his predicate for reconsideration, was previously unavailable to him. *See* ECF 101 at 11 (clarifying that the surveillance footage in question was provided to Sgt. Pope in February, 2018). Nor does Sgt. Pope establish that the evidence, although in his possession, could not have been timely submitted to this Court in the exercise of reasonable diligence. Sgt. Pope appears to blame "ongoing technical difficulties" for his failure to submit this evidence to this Court prior to its Opinion. ECF 91 at 2 n.1; ECF 102 at 11. Sgt. Pope's reliance on technical difficulties, however, does not carry the day. Sgt. Pope has since overcome his technical difficulties by using the "screen capture" feature to record the video in a file format acceptable to this Court.[2] ECF 102 at 11-12. In fact, Sgt. Pope now seeks leave to file this video in physical format, ECF 93, in connection with his Motion for Reconsideration. Simply put, if Sgt. Pope used reasonable diligence to convert the evidence into an acceptable format, such that it could be considered with his Motion for Reconsideration, the same reasonable diligence could have been exercised to ensure timely submission of the evidence with his Motion for Summary Judgment.

Sgt. Pope further avers that he did not previously submit the surveillance video to this

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[2] Electronic filing policies issued pursuant to Loc. Rs. 102 and 202 (D. Md. 2021) require parties to seek leave of court to file physical copies of video files. If leave is granted, video files must be submitted in the following file formats: .avi, .mp3, .mp4, .mpeg, .wma, .wav, or .wmv. *See* Electronic Case Filing Policies and Procedural Manual, U.S. Dist. Ct. Md. (Oct. 2020), available at: https://www.mdd.uscourts.gov/sites /mdd/files/ CMECFProceduresManual.pdf.

Court because he "did not anticipate that this would be as significant an issue during briefing of the motion for summary judgment." ECF 91 at 2. This argument misses the mark. It is well established that the party moving for summary judgment bears the burden of showing that there is no genuine dispute of material fact. *See Casey v. Geek Squad*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). The Defendants inevitably made strategic choices regarding their presentation of evidence in support of their Motion for Summary Judgment.[3] Sgt. Pope's subsequent reassessment of these strategies, following an adverse decision, does not justify reconsideration by this Court.

B. Remaining Arguments

Sgt. Pope also argues that evidence in the record justifies reconsideration of this Court's Opinion that genuine disputes of material fact preclude summary judgment as to whether Sgt. Pope's orders served a government interest, and could therefore serve as

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[3] Notably, Defendants submitted several other videos as evidence in support of their Motion for Summary Judgment, *see* ECF 76-2 (Exhibit list), which were considered by the Court prior to the issuance of its Opinion. Defendants apparently decided at the summary judgment stage to submit the "*Bryan Sears Video*," which purportedly depicted demonstrators using crosswalks, rather than the evidence at issue here, which Defendants characterized as a "lengthier surveillance video [which] depicts demonstrators regularly using the crosswalks." ECF 76-1 at 6 n.6. Defendants' presentation of evidence reflects that they possessed the technical capacity to submit video evidence, and chose to highlight certain pieces of video evidence to the exclusion of others. A motion for reconsideration may not be used to revisit these choices.

the basis for probable cause. In support of his motion, Sgt. Pope cites to a body of relevant precedent, much of which was previously cited in Defendants' Motion for Summary Judgment.

"Although there may be many valid reasons to reconsider an order, 'a motion to reconsider is not a license to reargue the merits . . .". *Carrero*, 310 F. Supp. 3d at 584 (quoting *Royal Ins. Co. of Am*, 142 F. Supp. 2d at 677 n.1); *see also In re Marriott Int'l, Inc.*, 2021 WL 1516028, at *3 (D. Md. Apr. 16, 2021) ("[A] motion for reconsideration under Rule 54(b) may not be used merely to reiterate arguments previously rejected by the court." (quoting *Cezair v. JPMorgan Chase Bank*, 2014 WL 4955535, at *1 (D. Md. Sep. 30, 2014))); *Cezair*, 2014 WL 4955535, at *2 ("A Rule 54(b) motion may not be used to rehash previously rejected arguments."). By contrast, a court may grant reconsider its prior judgment "to correct a clear error of law or prevent manifest injustice." *Carrero*, 310 F. Supp. 3d at 584 (quoting *Hutchinson v. Staton*, 994 F.2d 1076, 1081 (4th Cir. 1993)). In the Rule 59(e) context, for a previous judgment to be "clear error," the court's previous decision must be "dead wrong." *TFWS, Inc. v. Franchot*, 572 F.3d 186, 194 (4th Cir. 2009). Indeed, the Fourth Circuit in *TFWS* used even stronger language in describing the standard for clear error: the prior judgment cannot be "just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." *Id.* (quoting *Bellsouth Telesensor v. Info. Sys. Networks Corp.*, 1995 WL 520978, at *5 n.6 (4th Cir. Sept. 5, 1995) (unpublished)).

This Court does not understand Sgt. Pope to assert that this Court's Opinion constituted clear

legal error. Sgt. Pope's motion does not identify any purported legal errors. *See* ECF 91. Sgt. Pope's most strident criticisms are leveled in his reply brief, where he argues that this Court's identification of factual disputes in the record is "incorrect." *See* ECF 102 at 3 ("This Court's statement that there is a factual dispute 'as to whether a legitimate government interest was served by the police action' is incorrect."); *id.* at 7-8 ("This alleged factual dispute is also incorrect . . . The record exclusively contains evidence that Sgt. Pope was attempting to 'avert anticipated safety risks.'") (internal citations omitted). These disagreements with the Court's factual interpretations, however, fall far below the "unrefrigerated dead fish" threshold. *TFWS*, 572 F.3d at 194 (4th Cir. 2009) (quoting *Bellsouth Telesensor*, 1995 WL 520978, at *5 n.6) (unpublished)).

Rather, Sgt. Pope merely disputes the conclusions of law that this Court reached after careful consideration of relevant precedent and the parties' briefings. *See, e.g.*, ECF 91 at 4-5 (arguing that the previously unsubmitted surveillance video, and ECF 74-14, "are, as a matter of law, sufficient to meet the threshold of satisfying the State's burden that the orders to the Hulbert brothers furthered the government's safety interests."); *see also id.* at 9 (claiming that "the facts establishing probable cause [such as ECF 76-17] . . . are not such that 'every reasonable officer' (or prosecutor, for that matter) would understand that the alleged constitutional violation was established 'beyond debate.'"). At bottom, Sgt. Pope's contentions to this effect are an attempt to reargue Defendants' Motion for Summary Judgment on the merits. But courts in this district

have routinely rejected such attempts. *See Carrero*, 310 F. Supp. 3d at 584 (quoting *Royal Ins. Co. of Am*, 142 F. Supp. 2d at 677 n.1); *In re Marriott Int'l, Inc.*, 2021 WL 1516028, at *3; *Cezair*, 2014 WL 4955535, at *2. The claims that Sgt. Pope raises in his motion are not meaningfully distinguishable from arguments that he made, or could have made, in his Motion for Summary Judgment. *Compare* ECF 76-1 at 28, 38 (Motion for Summary Judgment citing ECF 76-14 (Ex. O.) as evidence that Sgt. Pope's order served a significant governmental interest and asserting that *McCormick v. State*, 211 Md. App. 261, 270 (2013) (quoting *Devenpeck v. Alford*, 543 U.S. 146 (2004)) supports a finding of probable cause), *with* ECF 91 at 3, 5 (Motion for Reconsideration citing the same). Sgt. Pope's efforts to use Rule 54(b) to relitigate portions of his Motion for Summary Judgment are unavailing. Thus, this Court sees no basis justifying reconsideration of its decision.

IV. CONCLUSION

For the reasons set forth above, Defendant Pope's Motion for Reconsideration, ECF 91, is DENIED. A separate Order follows.

Dated: October 6, 2021 /s/

/s/
Stephanie A. Gallagher
United States District Judge

Filed: October 6, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, *et al.*,
Plaintiffs,

v. Civil Case No. SAG-18-00461

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

ORDER

For the reasons stated in the accompanying memorandum opinion, it is this 6th day of October, 2021, ORDERED that Defendant Sgt. Pope's Motion for Reconsideration, ECF 91, is DENIED. It is further ordered that Defendant Sgt. Pope's Motion for Leave to File Electronic Video File in Physical Format, ECF 93, is DENIED as moot.

_____/s/_____
Stephanie A. Gallagher
United States District Judge

Filed: April 22, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, *et al.*,
Plaintiffs,

v. Civil Case No. SAG-18-00461

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

MEMORANDUM OPINION

Plaintiffs Jeff and Kevin Hulbert ("the Hulberts") and Maryland Shall Issue, Inc. ("MSI") (collectively "Plaintiffs") have accused Sergeant Brian T. Pope and Colonel Michael Wilson (collectively "Defendants") of violating their rights under the First and Fourth Amendment and the Maryland Declaration of Rights. ECF 1. Plaintiffs also have alleged two common law claims of false arrest and false imprisonment against Sgt. Pope. *Id.* Defendants now move for summary judgment on all counts. ECF 76. Plaintiffs filed a response in opposition, ECF 83, and Defendants replied, ECF 87. No hearing is necessary. *See* Loc. R. 105.6 (D. Md. 2018). For the reasons explained below, the Court will deny in part and grant in part Defendants' motion.

I I. FACTUAL BACKGROUND

Jeff and Kevin Hulbert are brothers and founders of an informal group of Maryland gun rights advocates known as "The Patriot Picket." ECF 1 ¶ 20. The Hulberts are also both members of MSI, a nonprofit organization "dedicated to the preservation and advancement of gun owners' rights in Maryland." *Id.* ¶¶ 11–13. Sgt. Pope and Col. Wilson are Maryland Capitol Police officers. *Id.* ¶¶ 17–18. This case arises out of an incident on February 5, 2018, when the Hulberts were arrested during a demonstration outside the Maryland State House.

A. The Events of February 5, 2018

On the evening of February 5, 2018, the Hulberts and other Patriot Picket members assembled in Annapolis, as they had done on several other Mondays during the legislative session, to display signs and talk to voters and legislators about "[their] belief . . . that government needs to follow constitutional principles." ECF 84 at 36:15–37:6, 41:1–12. They planned to set up on the public sidewalk at the intersection of College Avenue and Bladen Street. *Id.* at 39:10–18–40:6. This area was desirable to the group because it is where they "believe [they're] seen by the most people and the most legislators." *Id.* Directly adjacent to the public sidewalk is a grassy square called Lawyers' Mall, a location frequently used for political demonstrations.[4] Oftentimes larger groups need a

[4] Since this incident occurred, Lawyers' Mall has been deconstructed and redesigned. *See* Maryland State Archives,

permit from the Capitol Police to hold an event in Lawyers' Mall. *See* ECF 76-3; COMAR 04.05.02.02.

Sgt. Pope was working in his office when he received a call from dispatch alerting him that a group was setting up a demonstration in front of Lawyers' Mall. ECF 84-2 at 61:2–5; ECF 76-4 at 66:7–11. The dispatcher told Sgt. Pope that someone at the Governor's Mansion had called about the group and that Sgt. Pope should "straighten out" what the group was doing, or something to that effect. ECF 76-4 at 65:2–9 (recalling that the dispatcher said something to like "the governor's mansion calls and there's a group set up, can we straighten that out"). Sgt. Pope knew that no group had a pre-approved demonstration scheduled for that evening. ECF 84-2 at 61: 2–5. He walked to the dispatcher's office to view the monitors that showed live video of the area near Lawyers' Mall. ECF 76-4 at 66:7–11. At the time, he only observed one person, later identified as Kevin Hulbert, standing on the public sidewalk in front of Lawyers' Mall with a number of signs on the ground around him. *Id.* at 67:1–11. The dispatcher informed Sgt. Pope that more people had been standing there, but recently left the area. *Id.* at 71:8–15. It was not clear to Sgt. Pope what action he needed to take, so he sought guidance from his supervisor, Sgt. Donaldson. *Id.* at 69:17–70:9.

Lawyers' Mall: A Brief Illustrated History (Apr. 1, 2021), https://governor.maryland.gov/wp-content/uploads/2021/04/Lawyers-Mall_-A-Brief-Illustrated-History-_reduced4.pdf. The descriptions of Lawyers' Mall and the surrounding area in this opinion describe the conditions at the time of the incident in February, 2018.

Sgt. Donaldson told Sgt. Pope that he would call the Chief of the Maryland Capitol Police, Col. Wilson, for more guidance. *Id.* at 74. Sgt. Donaldson told Col. Wilson that the Patriot Picket was engaging in an unscheduled demonstration near Lawyers' Mall, which could potentially cause a safety issue. ECF 76-7 at 20:15–21:17. Col. Wilson told Sgt. Donaldson to send someone to evaluate the situation, and, if necessary, to move the group to a safer location. ECF 84-4 at 22. Sgt. Donaldson then told 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. ECF 76-4 at 70, 74.

Sgt. Pope went to Lawyers' Mall, where Kevin Hulbert was still standing by himself with the Patriot Picket signs in the middle of the public sidewalk. *Id.* at 81. Kevin Hulbert told Sgt. Pope that the other members of his group had gone to get something to eat. *Id.* at 82. Although he did not note any particular safety hazards at the time, Sgt. Pope 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 object at the time. ECF 76-15 at 23 (explaining that he "just simply accepted that" and "didn't have a response"). Sgt. Pope then left the scene, believing Kevin Hulbert would convey the command to move to Lawyers' Mall to the rest of the Patriot Picket group when they returned. ECF 76-4 at 83:19–85:6 (recalling that Kevin Hulbert "just said he would let the rest of the group know when they come").

About an hour later, Sgt. Pope returned to the area for other business and noticed that Kevin Hulbert and the other members of his group were still demonstrating on the sidewalk. Sgt. Pope told the entire group that that they needed to back up their demonstration approximately fifteen feet into Lawyers' Mall. ECF 76-4 at 95:20–96:6; ECF 76-15 at 25–26 (stating that Sgt. Pope was "speaking loudly as if to have the entire group hear him"); *see* ECF 76-10 (showing Google Maps distance between the curb of the sidewalk that meets the street and lawyers square to be 15.50 feet). The group started to comply with the order until Jeff Hulbert spoke up and said they were not going to move anywhere. ECF 76-4 at 96:2–13. Sgt. Pope repeated his command to move to Lawyers' Mall at least two more times and warned the group that if they did not comply, he would arrest them. *Id.* at 96:14–20, 98–99. The group refused to comply, so Sgt. Pope called for additional officers to assist him. *Id.* Multiple officers and police vehicles responded to the scene. Sgt. Pope started placing Jeff Hulbert under arrest, since he was the leader of the group who had told the others not to comply with Sgt. Pope's previous orders. *Id.* at 101. Multiple people were filming the interaction including apparent passersby, a member of the media, and Kevin Hulbert. *Id.* at 107–08; ECF at 27–29. Sgt. Pope told Kevin Hulbert and two others who were also filming to back up. ECF 76-4 at 113, 108. The two other people complied, but Kevin Hulbert did not. *Id.* Sgt. Pope then placed Kevin Hulbert under arrest. *Id.* at 107–08. Jeff and Kevin Hulbert were subsequently searched, placed in the back of police vehicles, and

taken to the Annapolis city police station for processing at approximately 7:45 p.m.

When they arrived at the Annapolis police station, Sgt. Pope issued Jeff and Kevin Hulbert citations for disobeying a lawful order under the Section 10-201 of the Criminal Law Article of the Maryland Code. ECF 76-4 at 140–41; ECF 76-18. Sgt. Pope had also intended to write them a citation for blocking the public sidewalk. *Id.* However, this was the first time he had ever issued a criminal citation and he could not locate the proper section of the COMAR to write up the second charge in a timely manner. *Id.* at 120, 140–41, 155. He therefore released the Hulberts at 8:50 p.m., after only issuing the citation for disobeying a lawful order. *Id.* at 155 (explaining he "felt that [it] would have been unnecessary" to make the Hulberts "sit there" and wait for him to locate the appropriate citation because he "already had one charge to charge them with" and "knew we could amend the charge"); ECF 76-18; ECF 76-8 (reporting the Hulberts were transported to the police station and held for one hour and five minutes including travel time). After the Hulberts were released, Sgt. Pope spoke with Sgt. Donaldson about what happened. ECF 76-4 at 154–55. Sgt. Donaldson told Sgt. Pope that he should have issued the separate other citations, and the two discussed the steps to add the charges. *Id.* at 155–57 (stating their conversation was "about how to get those other charges on there since I released them already"); ECF 76-5 at 102, 106 (stating that he told Pope it would not be a problem to issue the other citations since "the Hulberts are always in that area" and would be easy to serve).

At some point that evening, after the Hulberts were already in custody, Sgt. Donaldson called Col. Wilson and informed him that Sgt. Pope had arrested the Hulberts and they were being issued criminal citations. ECF 76-7 at 67–69. Later, at 9:59 p.m., Col. Wilson sent an email to other members of the Capitol Police reporting that two protestors were arrested at Lawyers' Mall. ECF 76-19 at 3–4. In his email he also stated that the two protestors were given criminal citations and listed two specific citations: Md. Code Ann., Crim. Law § 6-409(b) (Refusal or Failure to Leave Public Building or Grounds) and § 10-201 (Disorderly Conduct, Disturbance of the Public Peace). *Id.* The Hulberts' arrest had apparently already garnered the attention of some Maryland legislators and a member of the media. *Id.* at 4 (reporting that "[s]everal legislators were made aware of this arrest, as one of the Senators announced the arrests on the Senate floor"); Bryan P. Sears, *supra.*

B. The Events of February 6, 2018

The next morning, Col. Wilson read media reports about the Hulberts' arrest. ECF 76-7 at 80. This prompted him to look further at the Capitol Police's records regarding the incident. *Id.* at 86. Col. Wilson noted that it did not appear that the Hulberts were issued the citations he had specified in his email from the night before. *Id.* at 86–87 (stating that it did not appear that the charges were "filled out correctly" and that he thought they were "not even the right changes"). He told Sgt. Donaldson to reach out to the state's attorney's office to see what they needed to do to add the charges. *Id.*

at 88. The state's attorney's office advised it would be fine to add the charges, so Col. Wilson told Sgt. Donaldson to tell Sgt. Pope "to write two more criminal citations for the more appropriate charges." *Id.* at 91.

Meanwhile, the Hulberts had agreed to do media interviews about their arrests. The brothers returned to Lawyers' Mall where reporters interviewed them on camera. ECF 84-4 at 118; ECF 76-13 at 101–02. Sgt. Pope, Sgt. Donaldson, Col. Wilson, and another Capitol Police officer went to Lawyers' Mall to serve the additional charges. ECF 76-4 at 173. Although ordinarily the chief of police would not serve charges on an individual himself, he wanted to be there to explain to the Hulberts why new charges were being added. ECF 76-7 at 115 (explaining he felt it was his responsibility to ensure they understood the situation). In the following days, Col. Wilson had discussions with the state's attorney's office about the incident, and on February 9, 2018, the charges against the Hulberts were dismissed. ECF 76-24; ECF 76-25. A few days later, the Hulberts filed this lawsuit. ECF 1.

C. The Call from the Governor's Mansion

As previously mentioned, this entire chain of events was apparently precipitated by a call from the Governor's Mansion. A person on the Lieutenant Governor of Maryland's security detail radioed Corporal Ryan Bitter, a security officer at the Governor's Mansion responsible for sending communications from the Lt. Governor's security detail to the Maryland Capitol Police. ECF 84-6 at 64, 91–92. Cpl. Bitter then called the dispatcher of

the Maryland Capitol Police, relaying that the Lieutenant Governor "did not want [the protestors] giving him a bunch of stuff for whatever reason."[5] *Id.* at 114. Cpl. Bitter did not say anything about the substance of the protestors' message, since he himself did not know the content. *Id.* at 112 (agreeing that he did not know their message because he could not see their signs). Neither Sgt. Pope nor Col. Wilson ever heard the substance of the call from Cpl. Bitter until after the initiation of this lawsuit.

II. LEGAL STANDARD

Under Rule 56(a) of the Federal Rules of Civil Procedure, summary judgment is appropriate only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The moving party bears the burden of showing that there is no genuine dispute of material facts. *See Casey v. Geek Squad*, 823 F. Supp. 2d 334, 348 (D. Md. 2011) (citing *Pulliam Inv. Co. v. Cameo Props.*, 810 F.2d 1282, 1286 (4th Cir. 1987)). If the moving party establishes that there is no evidence to support the non-moving party's case, the burden then shifts to the non-moving party to proffer specific facts to show a genuine issue exists for trial. *Id.* The non-moving party must provide enough admissible evidence to "carry the burden of proof in [its] claim at trial." *Id.* at 349 (quoting *Mitchell v. Data Gen. Corp.*, 12 F.3d 1310, 1315–16 (4th Cir. 1993)). The mere existence

[5]https://apps.oag.state.md.us/Recorded_05-Feb-2018.mp3 (audio recording of the call).

of a "scintilla of evidence" in support of the non-moving party's position will be insufficient; there must be evidence on which the jury could reasonably find in its favor. *Id.* at 348 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). Moreover, a genuine issue of material fact cannot rest on "mere speculation, or building one inference upon another." *Id.* at 349 (quoting *Miskin v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 669, 671 (D. Md. 1999)).

Additionally, summary judgment shall be warranted if the non-moving party fails to provide evidence that establishes an essential element of the case. *Id.* at 352. The non-moving party "must produce competent evidence on each element of [its] claim." *Id.* at 348-49 (quoting *Miskin*, 107 F. Supp. 2d at 671). If the non-moving party fails to do so, "there can be no genuine issue as to any material fact," because the failure to prove an essential element of the case "necessarily renders all other facts immaterial." *Id.* at 352 (quoting *Coleman v. United States*, 369 F. App'x 459, 461 (4th Cir. 2010) (unpublished)). In ruling on a motion for summary judgment, a court must view all of the facts, including reasonable inferences to be drawn from them, "in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

III. ANALYSIS

A. Plaintiffs' First Amendment Claims

Plaintiffs have asserted three separate First Amendment claims: Count I, violation of the right to speech and assembly, Count II, violation of the right to film officers, and Count III, violation of the right to be free from retaliation for their lawful First Amendment activities. In their opposition, Plaintiffs clarify that they are alleging that Sgt. Pope is directly liable for Counts I, II, and II, and that Col. Wilson is directly liable for Count III and liable under a supervisory liability theory for Counts I and II. ECF 83 at 41–42. Defendants contend that neither Sgt. Pope's nor Col. Wilson's actions violated Plaintiffs' First Amendment Rights and that Defendants are entitled to qualified immunity.

Qualified immunity seeks to balance the need to hold irresponsible public officials accountable with the need to protect government officials who "perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity is properly invoked where an officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). "Clearly established" should not be "defined 'at a high level of generality.'" *Id.* at 551–52 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). Although a previous case need not be "'directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* at 551

(quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam)).

1. Speech and Assembly

The Supreme Court has said that "[t]here is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment." *United States v. Grace*, 461 U.S. 171, 176 (1983). In traditional public forums, such as "streets, sidewalks, and parks . . . the government's ability to permissibly restrict expressive conduct is very limited." *Id.* at 177. Still, the "the first Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Herffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The government may restrict protected speech by regulations that (1) are "content-neutral," (2) are "narrowly tailored to serve a significant government interest," and (3) "leave open ample alternative channels of communication." *Grace*, 461 U.S. at 177 (quoting *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983)); *Ross v. Early*, 746 F.3d 546, 552 (4th Cir. 2014).

Here, there is no dispute that Jeff Hulbert was engaged in constitutionally protected speech, by holding signs and talking to passersby and public officials, in a traditional public forum, the public sidewalk. The issue is whether the decision to move his demonstration off the sidewalk for safety reasons was a permissible time, place, and manner restriction, which therefore would not violate the First Amendment. Since Jeff Hulbert has made an

initial showing that his rights were violated, the government has the burden of proving the constitutionality of its restriction. *Reynolds v. Middleton*, 779 F.3d 222, 226 (4th Cir. 2015).

a. Content-Neutral

The evidence establishes that Sgt. Pope's actions were content neutral. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Here, Sgt. Pope's stated justification for moving the protestors was to avert anticipated safety risks. In fact, he testified that he did not know what the group was specifically protesting about before ordering them to move, ECF 76-4 at 177 (explaining that he "didn't read any of their signs"). Plaintiffs argue that a reasonable juror could "infer" that Sgt. Pope acted based on the speech content because Sgt. Pope knew someone in the Governor's Mansion had inquired about the group, and because Sgt. Pope had seen the group protest in the same location on other occasions without incident. ECF 83 at 29. Without more evidence, these inferences do not rise above "mere speculation." *See Casey*, 823 F. Supp. 3d at 349 (explaining a party opposing summary judgment cannot create a factual dispute merely by "building one inference upon another"). Sgt. Pope was told about the call from the Governor's Mansion by the dispatcher and alerted Sgt. Donaldson of the call. Nothing in the record, however, indicates that his conversations with the dispatcher and Sgt. Donaldson entailed any discussion of the content of

Plaintiffs' message. The testimony uniformly shows these conversations were about potential safety concerns and the fact that the Plaintiffs did not have a pre-approved permit for their demonstration. Furthermore, there is no evidence that Sgt. Pope or any one he spoke with that evening harbored any hostility towards the views of the Patriot Picket whatsoever. *Cf. Swagler v. Sheridan*, 837 F. Supp. 2d 509, 526–27 (D. Md. 2011) (finding order for protestors to disperse was a content-based restriction where officers explained that several complaints from passing motorists about the content of the demonstrator's signs, which citizens described as "graphic," "gruesome," and "disgusting" were the impetus for their action). The content of Plaintiffs' speech simply did not play a role in Sgt. Pope's decision to move the demonstration, which was, therefore, a content-neutral restriction. *See Ward*, 452 U.S. at 647 ("Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'").

b. Ample Alternative Channels

It is also clear that the Jeff Hulbert had ample alternative channels to continue his First Amendment activities. For a restriction to leave open alternative channels, "the available alternatives need not 'be the speaker's first or best choice' or 'provide [ ] the same audience or impact for the speech.'" *Ross*, 746 F.3d at 559 (alteration in original) (quoting *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000)). Rather, the relevant standard is that the regulation "provides avenues for 'the more

general dissemination of a message.'" *Id.* (quoting *Green v. City of Raleigh*, 523 F.3d 293, 301 (4th Cir. 2008)). Regulations that merely limit an individual's activity to a portion of a forum usually are deemed to leave open ample alternative channels. *See, e.g.*, *id.* ("readily conclude[ing]" that a policy that "directs protestors to stand in designated areas located mere feet from their intended audience" leaves open alternative channels); *Kass v. City of N.Y.*, 864 F.3d 200, 209 (2d Cir. 2017) (finding officers' direction to enter a designated demonstration space instead of standing on the public sidewalk left open ample alternative channels); *Marcavage v. City of Chi.*, 659 F.3d 626, 631 (7th Cir. 2011) (finding asking demonstrators to move to an area adjacent to the sidewalk or across the street were permissible alternatives); *Cmt. for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1393 (D.C. Cir. 1990) ("[T]he [Supreme] Court has generally upheld regulations which merely limit expressive activity to a specific part of the regulated area . . . ."); *cf. Hill v. Colorado*, 530 U.S. 703, 730 (2000) (noting that "[s]igns, pictures, and voice itself can cross an 8-foot gap with ease," so requiring demonstrators to stay eight feet away from others entering healthcare facilities does not foreclose adequate means of communicating).

Here, Jeff Hulbert was standing in the middle of the public sidewalk, which is approximately fifteen-and one-half-feet wide and extends from the curb of the street to the grassy edge of Lawyers' Mall. *See* ECF 76-9; ECF 76-10 (depicting the sidewalk area). Sgt. Pope told the group they could continue demonstrating in the same manner, but needed to move all the way into the grassy area, or, at most, fifteen and one-half feet back from where they were

standing. Plaintiffs claim this prevented them from "being able to be seen or nearby anyone who may traverse the area" because it was nighttime and there were few light sources. ECF 83 at 29–30. The assertion that they could be seen and heard by no one is simply not credible. As depicted in the photos attached to Defendants' motion, Jeff Hulbert could have complied with Sgt. Pope's order and still stood directly next to the sidewalk, or "mere feet from their intended audience." *Ross*, 746 F.3d at 559. Concrete planters divide the sidewalk approximately in half. *See* ECF 76-9 through ECF 76-12 (showing there is about five and one-half feet of sidewalk on either side of the planters). However, the planters are only a few feet tall and would not block the group's large signs or voices from being seen or heard by people on the sidewalk or the street. *See* 2A_for_MD, *First Amendment Under Attack*, YouTube (Feb. 16, 2018) https://www.youtube.com/watch?v=oIu6SPpFG4A (showing Sgt. Pope, Jeff Hulbert, and other Patriot Picket members standing next to the concrete planters, which only come up about waist-high). A video of the incident shows one Patriot Picket member holding a sign in the sidewalk area behind the planters, which is clearly visible to the person recording the video from the other side. *Id.* at 1:17–1:20. Even though some members of their intended audience might have more difficulty seeing their signs or hearing their message, this does not render the available alternative channel inadequate, since providing the "same audience or impact" is not necessary for the restriction to be constitutional. *See Ross*, 746 F.3d at 559. Jeff Hulbert could have continued disseminating his message in the same manner just

steps away. Therefore, the Court concludes the requirement for ample, alternative channels is met.

c. Significant Government Interest

The Defendants claim moving the demonstration to a nearby location "address[ed] the threats to sidewalk congestion and public safety." ECF 76-2 at 35. There is no doubt that the state has a significant interest "in maintaining the safety, order, and accessibility of its streets and sidewalks." *Ross*, 746 F.3d at 555 (quoting Green, 523 F.3d at 301); *Schneider v. State of N.J.*, 308 U.S. 147, 160 (1939) ("Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property . . . ."). However, the government must do more than "identify an interest that is significant in the abstract." *Ross*, 746 F.3d at 556. It must demonstrate that the harm or risk of harm the restriction seeks to address is "real, not merely conjectural," "substantial and real instead of merely symbolic." *Id.* (quoting *Satellite Broad. & Commc'ns Ass'n v. FCC*, 275 F.3d 337, 356 (4th Cir. 2001); then quoting *Marcavage v. City of N.Y.*, 689 F.3d 98, 105(2d Cir. 2012)). "If a regulation places even incidental burdens on speech without yielding some genuine benefit, it must be struck down." *Satellite Broad.*, 275 F.3d at 356. However, the government is not required to "present a panoply of empirical evidence to satisfy this standard." *Ross*, 746 F.3d at 556. The Fourth Circuit has emphasized, "particularly, where . . . the burden on speech is relatively small," such as when requiring demonstrators to move a number of feet, the

government may "advance its interests by arguments based on appeals to common sense and logic." *Id.*; *see Reynolds v. Middleton*, 779 F.3d 222, 229–30 (4th Cir. 2015) (finding "common sense and logic compel[led] the conclusion" that an ordinance prohibiting roadway solicitation served a significant government interest where "roadway solicitors had increased to a number sufficient to worry a law-enforcement officer with 40 years' experience and to prompt hundreds of citizen complaints").

The Fourth Circuit has held that police officers did not violate a leafleter's First Amendment rights by requiring him and all other demonstrators to confine their activities to certain designated portions of the public sidewalk surrounding a performance arena in downtown Baltimore while the Circus was in town. *Ross*, 746 F.3d at 555–60. The court found the undisputed evidence showed that "the sidewalks surrounding the Arena suffer from severe congestion during performances of the Circus and that, at least once . . . the presence of [Circus] protestors caused a significant safety hazard." *Id.* at 556. Therefore, the court concluded there was a "plausible threat to the orderly flow of pedestrian traffic and, concomitantly, public safety," that justified the government's intervention.

Other circuits have held similar restrictions materially advance the government's significant interests where the government presented actual evidence of demonstrators causing walkway obstructions, or where logical arguments clearly showed the potential for hazardous conditions to arise. For example, the Seventh Circuit upheld police officers' decision to require demonstrators to move off of walkways at busy tourist locations in

Chicago (Soldier Field, Navy Pier, Wrigley Field) during an annual cultural and athletic event where video evidence confirmed other pedestrians were repeatedly forced to walk around the protestors. *Marcavage*, 659 F.3d at 630–31. Likewise, the Second Circuit concluded confining Occupy Wall Street protestors to a barricaded area and not allowing passersby to engage with protestors while standing in the public sidewalk "in the heart of Manhattan, shortly before 5 p.m." was justified. *Kass*, 864 F.3d at 208; *see also, e.g.*, *Marcavage*, 689 F.3d at 105 (creating a "no-demonstration zone" outside the 2004 Republican National Convention in the middle of New York City, was justified by the government's "altogether extraordinary" security concerns).

Here, however, there are factual disputes requiring jury resolution as to whether a legitimate government interest was served by the police action. The circumstances of Jeff Hulbert's February 5, 2019 protest, taken in the light most favorable to plaintiffs, appear more ordinary and benign. The parties agree that the Hulbert brothers and approximately six other people were holding large signs somewhere in the middle of a fifteen- and one-half-foot walkway in front of Lawyers' Mall in downtown Annapolis. It was dark, and the Maryland legislative session was expected to convene within a few hours. There is no evidence that Jeff Hulbert and the rest of his group were actually impeding the flow of pedestrian or vehicular traffic prior to being told to move to Lawyers' Mall. Indeed, Sgt. Pope repeatedly testified at his deposition that he did not see the group blocking traffic or creating any unsafe conditions and that, prior to the arrival of multiple

police officers and police vehicles, people could "come and go freely" and there was "no disturbance or disruption of the normal business in the area." ECF 84-2 at 80–83 (stating there were no unsafe conditions when he first told Kevin Hulbert to have the group move to Lawyers' Mall); *id.* at 90–95 (observing no safety issues when he approached the entire group and told them to move a second time); *id.* at 114–17, 129–30 (describing the same conditions when he called for other officers to assist him); *see also* ECF 76-1 (acknowledging that "Sgt. Pope did not observe the presence of any immediate safety hazards").

Defendants argue that, contrary to both the Hulberts' and Sgt. Pope's description, some of the Patriot Picket members entered the roadway because their fellow protestors had already obstructed the sidewalks. ECF 76-1 at 6–7 n.6. They point to a video which shows one protestor holding a large sign and walking in the crosswalks at the intersection. *See*, Bryan P. Sears, *Breaking*, Facebook (Feb. 5, 2018), https://www.facebook.com /bpsears/posts/101552484942 47286. However, the video was taken after Jeff Hulbert was already placed under arrest and multiple police cars were at the scene. Despite acknowledging that on at least one other occasion, which occurred after this incident, members of their group had repeatedly crossed the street using the crosswalks during a demonstration, Jeff and Kevin Hulbert denied that any Patriot Picket members were using the crosswalks on the night in question. ECF 76-13 at 51 (explaining that because they had a small group "[t]here's no reason for us to be in the crosswalks . . . that night there would not have been a crosswalk

crossing plan"); ECF 76-15 at 37–40 (testifying that protestors had "no reason to go into the street" and that he didn't "recall that there was anyone using any part of the street for the demonstration"). Kevin Hulbert acknowledged that "after the police showed up to make the arrests, and there were cars parked at the location, patrol cars, and the police were crowding the sidewalks, [he thought] there were people who walked into the street, off the curb, to get around the police." ECF 76-15 at 39–40. This testimony is generally consistent with the video footage cited by the Defendants, see Sears, *supra* (depicting multiple police cars parked in the intersection and multiple officers standing on the sidewalk arresting the Defendants), and Sgt. Pope's testimony that the area became more congested once other police officers arrived. ECF 84-2 at 114–17. Nothing in the video or testimony before the Court suggests pedestrians' efforts to use the sidewalk were frustrated by the group prior to the arrests.

Still, Defendants argue that even though the demonstration was not immediately unsafe, an emerging threat to safety justified Sgt. Pope's actions. Specifically, Defendants argue that because "[p]edestrians had been hit by cars at this intersection within the prior year, safety issues were reasonably anticipated in the area." ECF 76-1 at 33 (citation omitted). They also note that there have been dozens of unrelated complaints to the police about cars not stopping for pedestrians. ECF 176-7 at 109. However, unlike in *Ross*, where there was a clear link between a past incident with a circus protestor and the plaintiff's conduct, there is no evidence that the circumstances surrounding these vehicle accidents or complaints had anything in

common with the Patriot Picket's February 5 demonstration. There is nothing suggesting the safety threats had occurred in conjunction with any kind of First Amendment activity, and the accidents appear to have occurred during daylight hours in June, not, as here, when the Maryland Legislature was in session. *See* ECF 76-20 (reporting that pedestrians "were struck by passing vehicles on June 6, 2017 at 3:08 pm and June 21, 2017 at 6:48 pm"). Moreover, as discussed, there is a factual dispute as to whether any of the Patriot Picket members were in the street or crosswalks prior to Sgt. Pope ordering the group to move.

The Court appreciates that the government's burden is not particularly high in establishing that some safety concern was materially served in moving the demonstration a few feet off the sidewalk. However, taking the evidence in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether any real, non-conjectural safety issue was aided by Sgt. Pope's actions, or whether the police involvement caused the situation to become more disruptive and potentially hazardous. Thus, although the restriction on Jeff Hulbert's speech was content neutral and left ample alternative channels for his expression, summary judgment is inappropriate as to whether a significant government interest was served and whether Jeff Hulbert's First Amendment rights were violated.[6]

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[6] The parties apparently dispute how narrow tailoring should be defined in this case. *Compare* ECF 76-1 (citing the standard applied in *Ross v. Early*, 746 F.3d 546, 557 (4th Cir. 2014), which requires the challenged restriction not "burden[] *substantially more* speech than is necessary" to further the

Moreover, the right to peacefully protest on the public sidewalk was clearly established at the time of the incident. *See, e.g.*, *Grace*, 461 U.S. at 180 (striking down law that prohibited carrying flags and banners on the public sidewalk outside the Supreme Court where such activities did not "obstruct[] the sidewalks or access to the Building, threaten[] injury to any person or property, or in any way interfere[] with the orderly administration of the building or other parts of the grounds").[7] Therefore, Sgt. Pope is not entitled to qualified immunity, and this Court will deny Sgt. Pope's motion for summary judgment on Count I.

2. Filming

Plaintiffs' second First Amendment claim is that Kevin Hulbert was unlawfully prevented from filming the police. The majority of circuits have found the First Amendment protects a citizen's right to record police performing their duties in public. *See, e.g.*, *Fields v. City of Phila.*, 862 F.3d 353, 355–

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government's interests (emphasis added)); *with* ECF 83 at 22–23 (arguing the Court should apply the somewhat more stringent test espoused in *Madsen v. Women's Health Center Inc.*, 512 U.S. 753, 765 (1994), requiring the challenged restriction to "burden *no more* speech than necessary" to serve the government's interests (emphasis added)). Because the Court has determined the Government has not established the government interest prong of the intermediate scrutiny test, the Court need not address the narrow tailoring prong.

[7] Defendants do not argue that Plaintiffs' right to protest, if violated, was not clearly established. Their qualified immunity argument is premised only on the first prong of the qualified immunity inquiry, that Plaintiffs' constitutional rights were not actually violated.

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"); *cf. Chestnut v. Wallace*, 947 F.3d 1085, 1090 (8th Cir. 2020) (recognizing the "right to watch police-citizen interactions" as a prerequisite to the right to "record[] police activity"). Neither the Fourth Circuit nor the Maryland Court of Appeals has addressed this issue. However, this Court agrees with the majority of other circuits and with other district court judges in this circuit who have found the First Amendment encompasses such filming protections, subject to reasonable time, place, and manner restrictions. *See Dyer v. Smith*, No. 3:19-cv-921, 2021 WL 694811, at *8 (E.D. Va. Feb. 23, 2021) (Gibney, J.); *J.A. v. Miranda*, No. PX 16-3953, 2017 WL 3840026, at *6 (D. Md. Sept. 1, 2017) (Xinis, J.);

Garcia v. Montgomery Cnty., Md., 145 F. Supp. 3d 492, 507–08 (D. Md. 2015) (Chaung, J.); *Szymecki v. City of Norfolk*, No. 2:08-cv-142, 2008 WL 11441862, at *4 (E.D. Va. 2008) (Morgan, J.). Plaintiffs assert Sgt. Pope unlawfully interfered with this right by arresting Kevin Hulbert while he was filming the Patriot Picket demonstration and his brother's arrest. Defendants counter that Keven Hulbert's right to record was not violated because Sgt. Pope did not arrest him for filming, but because he did not leave the sidewalk as ordered.

The Court agrees with Defendants that the evidence shows Sgt. Pope arrested Kevin Hulbert because he did not comply with repeated orders to move to Lawyers' Mall, not because he was filming. It is undisputed that Sgt. Pope told Kevin Hulbert multiple times to move off of the sidewalk and that Kevin Hulbert refused to do so. In fact, video of the incident shows Sgt. Pope attempting to command Kevin Hulbert to move to Lawyers' Mall again immediately before placing him under arrest. *See* 2A_for_MD, *First Amendment Under Attack*, *supra*, at 1:45 (showing Sgt. Pope telling Kevin Hulbert, "Sir, I gave you, Sir, inside Lawyers' Mall or you're going to jail," and then placing him under arrest). Additionally, there is no evidence that Sgt. Pope ever told Kevin Hulbert that he could not film. Multiple other people were filming the interaction and were not arrested or otherwise prevented from recording the event. This Court therefore is not persuaded that a reasonable jury could find Kevin Hulbert was arrested because he was filming the police.

However, undoubtedly, Kevin Hulbert's arrest prevented him from further exercising his First Amendment right to film officers and demonstrators.

As discussed in the previous section, viewing the facts in the light most favorable to the non-movant Plaintiffs, the Court cannot say that Sgt. Pope's order to move the demonstration (and the filming of the demonstration) to Lawyers' Mall conformed with the First Amendment. Thus, Defendants' position—that Kevin Hulbert was arrested for not moving to Lawyers' Mall—even if true, does not conclusively show that Sgt. Pope did not violate Kevin Hulbert's right to film. As explained *supra* in connection with Count I, 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. This is true even though it is clear that the restriction was not content-based or intended to silence Plaintiffs' viewpoints.

Alternatively, the Defendants argue they are entitled to qualified immunity because the right to record is not clearly established in the Fourth Circuit or in Maryland. In an unpublished opinion issued over a decade ago, the Fourth Circuit held that as of 2007, the "First Amendment right to record police activities on public property was not clearly established in this circuit." *Szymecki v. Houk*, 353 F. App'x 852, 853 (4th Cir. 2009). Although the Fourth Circuit and the Maryland Court of Appeals still have yet to rule on this issue, since *Szymecki*, five more circuits addressing this issue have agreed the First Amendment includes a right to record police interaction and other public events. *See Fields*, 862 F.3d at 355–56; *Turner*, 848 F.3d at 689–90; *Gericke*, 753 F.3d at 8; *ACLU*, 679 F.3d at 595–96; *Chestnut*, 947 F.3d at 1090; *see also Dyer*, 2021 WL 694811, at *8 n.11 (noting that "[w]ith the

exception of the Tenth Circuit, courts in every circuit have held that there is a general First Amendment right to film police activities in public, subject to reasonable time, manner, and place restrictions" (citation omitted)). In a recent case considering the contours of a qualified immunity defense, the Fourth Circuit explained that "[i]n the absence of 'directly on-point, binding authority,' courts may also consider whether 'the right was clearly established based on general constitutional principles or a consensus of persuasive authority.'" *Ray v. Roane*, 948 F.3d 222, 229 (4th Cir. 2020) (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 543 (4th Cir. 2017)). In *Ray*, the court concluded that "[t]he consensus of our sister circuits leaves no doubt that [the plaintiff's right] was clearly established," and therefore the officer defendant was not entitled to qualified immunity. *Id.* at 230.

This case presents a similar issue, where every circuit considering the question has found the First Amendment right to record police exists. Indeed, even Sgt. Pope agreed at his deposition that "the public has a First Amendment right to film police officers in the conduct of their . . . official duties in public." ECF 76-4 at 54. Therefore, the Court agrees with Plaintiffs that the right to record police officers and other matters of public concern in a safe manner that does not interfere with the police's ability to carry out their duties was clearly established at the time of the incident. *See Dyer*, 2021 WL 694811, at *8 ("Although neither the Supreme Court nor the Fourth Circuit has recognized a right to record government officials performing their duties, both the general constitutional rule and a consensus of cases clearly establish this right."). Thus, Sgt. Pope

is not entitled to qualified immunity on Count II, and summary judgment will be denied.[8]

3. Retaliation

Finally, Plaintiffs claim they were retaliated against for exercising their First Amendment rights when they were arrested on February 5, 2018, and when the additional charges were issued on February 6. The First Amendment protects "not only the affirmative right to speak, but also 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). To prove a retaliation claim, the plaintiff must show (1) "that [plaintiff's] speech was protected"; (2) "defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech"; and (3) "a casual relationship exists between [plaintiff's] speech and the defendant's retaliatory action." *Tobey v. Jones*, 706 F.3d 379, 387 (4th Cir. 2013) (quoting *Suarez*, 202 F.3d at 685–86). The first two elements are undisputedly met: Plaintiffs were voicing their

[8] It is worth noting that Defendants' only justification for impeding Kevin Hulbert's right to record is that Sgt. Pope was enforcing a reasonable time, place, and manner restriction on the picketers to maintain public safety and access to the streets and sidewalks. They specifically do not distinguish Kevin Hulbert's activities from the activities of the other demonstrators and present no evidence that his filming created some different or greater threat to public safety and pedestrian traffic than picketers like Jeff Hulbert who were holding signs. Defendants make no claim, nor is there evidence in the record, that Kevin Hulbert's filming otherwise impeded the officers' execution of their duties or their ability, for example, to safely and effectively arrest Jeff Hulbert.

political views through a demonstration and talking with the media and were arrested and issued criminal charges. Defendants, however, contend that Plaintiffs' retaliation claim fails because there is no evidence of a causal relationship between the Hulberts' speech and either their arrest or the issuing of charges.

To establish causation, the "claimant must show that 'but for' the protected expression the [government official] would not have taken the alleged retaliatory action." *Tobey*, 706 F.3d at 390 (alteration in original). In the retaliatory arrest or prosecution context, a claim ordinarily fails if probable cause justified the officer's actions. *See Nieves v. Barlett*, 139 S. Ct. 1715, 1725 (4th Cir. 2019). Once a plaintiff shows an absence of probable cause, he "must show that the retaliation was a substantial or motivating factor behind the arrest." *Nieves*, 139 S. Ct. at 1725. Then, "if that showing is made, the defendant can prevail only by showing that the [arrest] would have been initiated without respect to retaliation." *Id.* (quoting *Lozman v. Riviera Beach*, 138 S. Ct. 1945, 1952–53 (2018)).

First, regarding the arrest on February 5, 2019, Defendants claim there is no causal connection between Plaintiffs' speech and the arrest because the arrest was based on probable cause that the Hulberts disobeyed Sgt. Pope's lawful orders. However, as this Court has explained, factual disputes preclude the Court from determining, at summary judgment, whether Sgt. Pope's orders were lawful or unlawful. Where an officer's order is unconstitutional, "the failure to obey a lawful order statute cannot serve as the basis for probable cause." *Swagler*, 837 F. Supp. 2d at 531; *see also Johnson v.*

Prince George's Cnty., No. DKC 10-0582, 2012 WL 6086875, at *3 n.3 (D. Md. Dec. 5, 2012) ("It is well-established in Maryland that the offense of failure to obey an order 'is contingent on the order being both reasonable and lawful.'" (citation omitted)). Therefore, this argument is unavailing at this juncture. Additionally, Defendants argue that even if there is no probable cause, Plaintiffs' retaliation claim fails because there "is no evidence that the arrests were motivated by their message." ECF 76-1 at 41. This contention, however, is immaterial to the claim. Even if Sgt. Pope was not motivated by animus of Plaintiffs' particular message, a jury could believe that he was motivated by their conduct, which consisted entirely—at least upon viewing the facts most favorably to Plaintiffs—of protected First Amendment activity. There 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. Therefore, Sgt. Pope is not entitled to summary judgment for Plaintiffs' retaliation claim as to their initial arrest.

Plaintiffs' retaliation claim based on the additional charges they received on February 6, however, meets a different result. The undisputed evidence shows that Sgt. Pope discussed how to issue other charges to the Hulberts with Sgt. Donaldson shortly after the Hulberts were released from custody, and that these additional charges are ones that are traditionally issued to protestors based on long-standing guidance from the State's Attorney's office. Additionally, Sgt. Pope's testimony indicates that he, individually, intended to issue additional citations to the Hulberts before they were released and only failed to do so because he could not locate

the code provision to write-up the citations properly and knew he could add the charges later. These initial charging decisions could not have been affected by the Hulberts' subsequent media interactions. The Court acknowledges that a reasonable jury could infer that the Hulberts' discussions with the media the next day, which were critical of the Capitol Police, could have generated some animus in either Sgt. Pope or Col. Wilson. However, because the undisputed evidence shows the Capitol Police would have issued the additional charges even if the Hulberts had not further exercised their First Amendment rights, a retaliation claim based upon the issuing of the additional charges fails as a matter of law. Summary judgment will be granted on Count III as to Col. Wilson in its entirety and granted as to Sgt. Pope with respect to the additional charges but denied as to the initial arrest.

4. Supervisory Liability for Plaintiffs' First Amendment Claims

Plaintiffs also allege that Col. Wilson is liable for Counts I and II under a supervisory liability theory. A supervisor may be liable for a subordinate's conduct under § 1983 if a plaintiff can show that (1) "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) "the supervisor's response to that knowledge was so inadequate as to show' deliberate indifference to or tacit authorization of the alleged offense practices,'" and (3) "that there was an 'affirmative causal link'

between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff." *Randall v. Prince George's Cnty., Md.*, 302 F.3d 188, 206 (4th Cir. 2002) (quoting *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994)). This liability "is not premised upon *respondeat superior*," so a claimant "must show more than mere supervision." *Campbell v. Florian*, 972 F.3d 385, 398 (4th Cir. 2020). The Fourth Circuit has described this as a "heavy burden," particularly because "ordinarily, the plaintiff 'cannot satisfy [this] burden of proof by pointing to a single incident or isolated incidents.'" *Shaw*, 13 F.3d at 799; *Campbell*, 972 F.3d at 398 (quoting *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984)).

There is no evidence that Sgt. Pope's decision to remove protestors from the sidewalk was any more than an isolated incident. In fact, Plaintiffs argue throughout their opposition that ordinarily their group and other protestors are allowed to demonstrate on the sidewalk and that this incident was unusual. Still, Plaintiffs aver that Col. Wilson may be liable because a reasonable juror could infer that he issued an order that the picketers be relocated. ECF 83 at 44. This inference, however, is unsupported by the evidence. Sgt. Pope testified that he was told by Sgt. Donaldson that Col. Wilson said it would be okay to move the demonstration to Lawyers' Mall even though they did not have a permit. Sgt. Pope may have been under the impression that this was what his supervisors wanted him to do, but there is no evidence that Col Wilson actually directed anyone to do it. Both Col. Wilson's and Sgt. Pope's testimony indicates that Col. Wilson merely told his subordinates to evaluate

the situation and, if it was necessary, to move the protestors to a safer location, Lawyer's Mall, even though they did not have a permit. ECF 84-4 at 22 ("I told [Donaldson] to go up himself or send somebody up to look and evaluate the situation, if there was unsafe conditions, tell people to make it safe, tell people to move where it would be a safe location."); ECF 76-4 at 74 (agreeing that "it was reported to [him] by Sergeant Donaldson that Chief Wilson had said to allow this group to go to Lawyers' Mall"). Col. Wilson was not contacted again about the situation until after the Hulberts were already arrested. ECF 76-7 at 66.

Thus, Plaintiffs have not established that Col. Wilson was deliberately indifferent to any potential First Amendment violation. Although he was notified of the demonstration, he gave his subordinates appropriate guidance: to evaluate the situation and only interfere with the protest if there was a genuine safety issue. Additionally, he specifically told his subordinates, if necessary, to allow the protest to continue in a nearby area, which, as the Court has discussed, would be a permissible alternative under the First Amendment if a genuine safety concern existed. Therefore, Col. Wilson cannot be held liable under either Counts I or II, and summary judgment in his favor is warranted.

B. Plaintiffs' Fourth Amendment Claims

Next, the Court addresses Plaintiffs' Fourth Amendment claims. Counts IV and V of Plaintiffs' complaint allege Sgt. Pope violated their Fourth Amendment Rights to be free from (1) unreasonable search and seizure and (2) excessive force.

Defendants contend that the Hulberts' Fourth Amendment rights were not violated and that Sgt. Pope is entitled to qualified immunity.

1. Unreasonable Search and Seizure

The Fourth Amendment protects an individual from being arrested and searched without a warrant or probable cause. U.S. Const. amend. IV; *Brown v. Gilmore*, 278 F.2d 362, 367 (4th Cir. 2002). Probable cause requires "enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; evidence sufficient to convict is not required." *Brown*, 278 F.3d at 368–69 (citing *Wong Sun v. United States*, 371 U.S. 471, 479 (1963)). Defendants argue that the Hulberts' arrest and search incident to arrest did not violate their Fourth Amendment rights because Sgt. Pope had probable cause that they committed a criminal offense, violating his orders to move off the public sidewalk. However, in Maryland, "where the order is neither reasonable nor lawful, 'the failure to obey a lawful order statute cannot serve as the basis for probable cause.'" *Johnson*, 2012 WL 6086875, at *3 n.3 (citation omitted). As discussed in the previous section, factual disputes prevent the Court from ruling as a matter of law on the lawfulness and reasonableness of Sgt. Pope's orders. Therefore, summary judgment will also be denied as to Plaintiffs' unreasonable search and seizure claim, Count IV.

2. Excessive Force

Additionally, the Fourth Amendment prohibits officers from using excessive force in making an arrest. *Graham v. Connor*, 490 U.S. 386, 387 (1989); *E.W. by and through T.W. v. Dolgos*, 884 F.3d 172, 179 (4th Cir. 2018); *Jones v. Buchanan*, 325 F.3d 520, 527–28 (4th Cir. 2003). The Court analyzes whether the amount of force used was reasonable by assessing the totality of the circumstances including "the severity of the underlying offense," "whether the suspect poses an immediate threat to the safety of the officer or others," and "whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *E.W.*, 884 F.3d at 180–82.

Plaintiffs argue that in this case "*where no force is authorized, any force is excessive.*" ECF 83 at 40.[9] The Fourth Circuit has rejected this argument and explained that although "lack of probable cause for the arrest" is relevant to the overall reasonableness inquiry, "we consider the crime that is alleged to have been committed in connection with our overall analysis of *all* of the circumstances surrounding the use of force." *See Hupp v. Cook*, 931 F.3d 307, 322 (4th Cir. 2019) (denying claim that "because [plaintiff] was unlawfully arrested, the use of *any* force was necessarily unconstitutional"); *see also Cortez v. McCauley*, 478 F.3d 1108, 1126 (10th Cir.

[9] The cases Plaintiffs cite to support this proposition involve claims of unjustified seizures and a heightened use of force that warranted distinct excessive force claims, including jumping on an arrestee and crushing his nose, lacerating his face, and bruising his ribs, *Jones v. Buchanan*, 325 F.3d 520 (4th Cir. 2003), and repeatedly using pepper spray at close range, *Park v. Shiflett*, 250 F.3d 843 (4th Cir. 2001).

2007) ("[I]n a case where police effect an arrest without probable cause . . . but use no more force than would have been reasonably necessary if the arrest . . . [was] warranted, the plaintiff has a claim for unlawful arrest . . . but not an additional claim for excessive force."); *Jackson v. Sauls*, 206 F.3d 1156, 1171 (11th Cir. 2000) ("[A] claim that any force in an illegal stop or arrest is excessive is subsumed in the illegal stop or arrest claim and is not a discrete excessive force claim."). Therefore, other circumstances which make the seizure unreasonable must be shown for Plaintiffs' distinct excessive force claim to arise.

Plaintiffs also allege that the way they were handcuffed and transported to the police station amounted to excessive force. The Fourth Circuit has held that "a standard procedure such as handcuffing would rarely constitute excessive force." *Id.* at 179 (quoting *Brown v. Gilmore*, 278 F.3d 362, 369 (4th Cir. 2002)). Although the Court has clarified that there is no "*per se* rule" that handcuffing cannot be excessive force, a valid excessive force handcuffing claim is "the rare exception" given "the universal acceptance of handcuffing as an appropriate safety measure incident to arrest." *Id.* at 193 (Shedd, J., concurring) (surveying case law that demonstrated "the prevailing federal rule appears to be that an arrestee may pursue a Fourth Amendment excessive force claim based on the use of handcuffs only in very limited circumstances, such as when the handcuffing causes physical injury").

The first time the Fourth Circuit identified a case of handcuffing that rose to the level of a Fourth Amendment excessive force violation was in *E.W. by and through T.W. v. Dolgos*, which was decided after

the Hulberts' arrest. 278 F.3d at 180–85. In that case, a school resource officer handcuffed a compliant ten-year-old child, who was surrounded by multiple adults in a closed room, for hitting another child three days beforehand. *Id.* at 185–86. However, the court concluded that the officer was entitled to qualified immunity because the student's right had not been clearly established at the time of his arrest. *Id.* at 186–87. In the present case, the arrest of two adult males occurred at night on the street in front of a group of other protestors. Although Plaintiffs complained the handcuffs were "painfully tight," they did not suffer significant physical injury. *See* ECF 84-1 at 45; ECF 84 at 94–95 (claiming he sustained "wrist abrasions and muscle cramps" but never sought any medical treatment or discussed any physical or mental injuries with a health care provider). The evidence presented, including videos of the arrests, do not bear the hallmarks of an "obvious case"[10] of excessive force or any similarity to the situation the Fourth Circuit addressed in *E.W.* This Court therefore concludes that Sgt. Pope is entitled to qualified immunity on Plaintiffs'

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[10] By comparison, an example of an "obvious case" of excessive force is found in *Turmon v. Jordan*, 405 F.3d 202 (4th Cir. 2005), which involved an officer pointing a gun in the face of an arrestee who was wholly compliant with all of his commands and causing injury which required six-months of rehabilitation. There, the Fourth Circuit explained, "it was obvious the officer 'could not point his gun at an individual's face,' pull the individual out of his hotel room, and 'handcuff him when there was no reasonable suspicion that any crime had been committed, no indication that the individual posed a threat to the officer, and no indication that the individual was attempting to resist or evade detention.'" *E.W.*, 884 F.3d at 186 (quoting *Turmon*, 405 F.3d at 208).

excessive force claim, because any constitutional right that was potentially violated by placing the Hulberts in handcuffs was not clearly established at the time of the arrest. *See Pearson*, 555 U.S. at 236 (holding courts have the discretion to determine a right was not clearly established before definitively deciding whether a constitutional violation occurred). Summary judgment will be granted for Sgt. Pope on Count V.[11]

C. Plaintiffs' State Law Claims

Finally, the Court turns to Plaintiffs' state law claims. Counts VI, VII, and VIII claim violations of the Maryland Declaration of Rights, which mirror Plaintiffs' First and Fourth Amendment claims. Counts IX and X allege false arrest and false imprisonment. Defendants argue that the Maryland Tort Claims Act ("MTCA") bars these claims. Under the MTCA, Defendants are immune from liability for acts or omissions within the scope of their public duties that are "made without malice or gross negligence." Md. Code Ann., State Gov't § 12-105; Cts. & Jud. Proc., § 5-522(b). This immunity applies to state constitutional torts and intentional torts. *Lee v. Cline*, 384 Md. 245, 266 (2004); *E.W.*, 884 F.3d at 187. Malice requires an "evil or wrongful motive, intent to injure, knowing and deliberate wrongdoing,

[11] Plaintiffs also asks the Court to rule that the doctrine of qualified immunity is unconstitutional. As the Supreme Court and the Fourth Circuit have continued to recognize the validity of the qualified immunity defense, as recently as within the past month, the Court declines to adopt Plaintiffs' argument. *E.g.*, *Halcomb v. Ravenell*, No. 19-6843, 2021 WL1182911 (4th Cir. Mar. 30, 2021).

ill-will or fraud." *Barbre v. Pope*, 402 Md. 157, 182 (2007); *Sherrill v. Cunningham*, No. JKB-18-476, 2019 WL 6067286, at *9 (D. Md. Nov. 15, 2019) ("[M]alice is established by proof that the defendant-officer 'intentionally performed an act . . . with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff.'" (citation omitted)). Gross negligence is "an intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another," and "implies a thoughtless disregard of the consequences without the exertion of any effort to avoid them." *Cooper v. Rodriguez*, 443 Md. 680, 708 (2015) (quoting *Barbre*, 402 Md. at 187). Ordinarily, malice or gross negligence is found when state actors exhibit ill-will or discriminatory motive towards the plaintiff. *See, e.g.*, *Barbre*, 402 Md. at 190 (finding gross negligence of an officer who ordered the unarmed plaintiff to raise his hands and, after he complied, "approached with his gun drawn and shot him in the neck"); *Lee*, 384 Md. at 269–70 (holding a jury could find malice where an officer unnecessarily extended a routine traffic stop for forty minutes and referred to the plaintiff as an uncooperative "suspect" because he was an African-American male driving a luxury car). Although, as Plaintiffs' point out, the question of malice or gross negligence typically is a factual determination for the jury, it "can be determined as a matter of law when the facts clearly show that no reasonable jury could find that the defendant's actions amounted to gross negligence." *E.W.*, 884 F.3d at 187 (citing *Cooper*, 443 Md. at 680). The Court finds that this is such a case.

Considering all facts and reasonable inferences in Plaintiffs' favor, there is simply no evidence for a jury to find Defendants acted with the kind of reckless disregard or intentional wrongdoing required to show malice or gross negligence. Sgt. Pope, who had been working in Annapolis for only about a month, sought guidance from his supervisor, Sgt. Donaldson, before addressing the Hulberts. Although he recognized no apparent immediate threat to public safety, based on his discussion with dispatch and with Sgt. Donaldson, Sgt. Pope believed there was a potential safety concern caused by the Hulberts' demonstration on the sidewalk next to the roadway. He did not order the Hulberts to cease their demonstration, but asked them to move off the sidewalk, away from the street. Although a jury could find that this decision was an overreach of his power that needlessly infringed on Plaintiffs' rights, there is no evidence that the decision was made "without the exertion of any effort to avoid" inflicting injury or a "thoughtless disregard of the consequences" of moving the demonstrators approximately fifteen feet. *See E.W.*, 884 F.3d at 187 (quoting *Cooper*, 443 Md. at 118). Similarly, Sgt. Pope only arrested the Hulberts after giving them multiple opportunities to comply with his orders and allowed the other members of their group to continue their activities inside Lawyers' Mall. Although a jury may determine the orders and subsequent arrest were not reasonable or lawful, gross negligence requires "more than simple negligence" or an uncaring approach. *Cooper*, 334 Md. at 708; *see E.W.*, 884 F.3d at 188 (holding an officer was not grossly negligent, though his actions towards a ten-year-old arrestee were "callous" an amounted to an excessive

use of force). Likewise, as the Court has already explained in its discussion of the supervisory liability and retaliation claims, Col. Wilson gave appropriate guidance to his subordinates that showed respect for their First Amendment rights. He recommended the issuing of additional charges after noting apparent deficiencies in the initial charging documents executed by Sgt. Pope, based on longstanding guidance from the state's attorney's office.

Plaintiffs attempt to establish malice or gross negligence by arguing that it was not a safety concern but a call from the Governor's Mansion by someone who didn't want the Hulberts to exercise their First Amendment rights that motivated Defendants' actions. ECF 83 at 43–44. Although it is not disputed that the phone call initiated a chain of events which led to the Hulberts' arrest, that alone does not establish Defendants acted with the intent to deprive the Hulberts of their rights. As the Court has previously explained, the evidence produced shows that Defendants had no knowledge of the contents of the phone call from the Governor's Mansion prior to initiating the arrest and that their discussions with dispatch and Sgt. Donaldson were about safety and whether the protestors had or needed a permit. There is no evidence or reason to believe Defendants acted out of animus towards the Plaintiffs or their message. Defendants are therefore entitled to immunity for Plaintiffs' state law claims under the MTCA, and summary judgment will be granted as to Counts VI through X.

D. Punitive Damages

Defendants also seek summary judgment on Plaintiffs' claims for punitive damages. Punitive damages are only permitted in § 1983 claims "for conduct that involves 'reckless or callous indifference to the federally protected rights of others,' as well as for conduct motivated by evil intent." *Morris v. Bland*, 666 F. App'x 233, 240 (4th Cir. 2016) (quoting *Cooper v. Dyke*, 814 F.2d 941, 948 (4th Cir. 1987)). This standard is substantially similar to the "malice or gross negligence" standard required under the MTCA for an officer to be liable for state law claims. As discussed in the previous section, there is no evidence that Sgt. Pope acted with such indifference or ill intent. Therefore, Defendants' motion for summary judgment will be granted as to Plaintiffs' claims for punitive damages.

E. MSI's Standing

Finally, Defendants ask that judgment be entered against MSI because it does not have standing to pursue these claims on behalf of itself or its members. However, "once it is established that at least one party has standing to bring the claim no further inquiry is required as to another party's standing to bring that claim." *Md. Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 209 (4th Cir. 2020); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981) (declining to determine the standing of additional plaintiffs at summary judgment where it was clear that other plaintiffs had standing to pursue each claim); *Bostic v. Schaefer*, 760 F.3d 352, 370 (4th Cir. 2014) ("[T]he Supreme Court has made

it clear that 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006))). Because Jeff and Kevin Hulbert clearly have standing to pursue the claims that survive this motion, the Court will not opine on whether MSI also has standing in the case.

IV. CONCLUSION

For the reasons set forth above, Defendants' Motion for Summary Judgment will be GRANTED as to all claims against Col. Wilson. Defendants' motion will also be GRANTED entirely as to Counts V through X and as to all claims for punitive damages, and will be GRANTED IN PART as to the claims in Count III relating to the charges filed on the day after the arrest. The motion will be DENIED as to the remaining claims alleged against Sgt. Pope in Counts I through IV. A separate Order follows.

Dated: April 22, 2021

/s/
Stephanie A. Gallagher
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JEFF HULBERT, *et al.*,
Plaintiffs,

v. Civil Case No. SAG-18-00461

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

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is, this 22nd day of April, 2021, hereby **ORDERED** that Defendants' Motion for Summary Judgment ("the motion"), ECF 76, is **GRANTED** as to all claims against Col. Wilson and **GRANTED** entirely as to Counts V, VI, VII, VIII, IX, and X. It is further ordered that the motion is **GRANTED** as to all claims for punitive damages and **GRANTED IN PART** as to the claims in Count III relating to the charges filed on the day after the arrest. Finally, it is further ordered that the motion is **DENIED** as to the remaining claims against Sgt. Pope in Counts I, II, III, and IV.

Dated: April 22, 2021 /s/

/s/
Stephanie A. Gallagher
United States District Judge

FILED: July 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-1608
(1: 18-cv-00461-SAG)

CLAYTON R. HULBERT, as personal representative of the Estate of Jeffrey W. Hulbert; KEVIN HULBERT; MARYLAND SHALL ISSUE, INC., for itself and its members

Plaintiffs - Appellees

v.

BRIAN T. POPE, Sgt.

Defendant - Appellant

and

MICHAEL WILSON, Colonel

Defendant

NATIONAL POLICE ASSOCIATION

Amicus Supporting Appellant

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court
/s/ Patricia S. Connor, Clerk