No. 21-1608

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SERGEANT BRIAN T. POPE,
Defendant-Appellant,

v.

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

Appeal from the United States District Court
for the District of Maryland, No. SAG-18-00461
Honorable Stephanie A. Gallagher

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT AND IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Per Fed. R. App. P. 26.1 and Fourth Circuit Local Rules 26.1 and 27(c), *amicus curiae* National Police Association advises that it is an Indiana § 501(c)(3) non-profit corporation that has no corporate parent and no stockholders.

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IDENTITY, INTEREST, AND AUTHORITY TO FILE OF *AMICUS CURIAE*[1]

Identity. The National Police Association is an Indiana § 501(c)(3) non-profit corporation founded to provide educational assistance to supporters of law enforcement, as well as support to individual law enforcement officers and the agencies they serve.

Interest. The National Police Association seeks to bring important issues in the law enforcement field to the forefront of public discussion in order to facilitate remedies and broaden public awareness.

Authority to File. The National Police Association attaches this *amicus curiae* brief to its Motion for Leave to File Brief of Amicus Curiae National Police Association in Support of Defendant-Appellant, and restates the reasons set forth in the referenced Motion as its basis for seeking leave to file the brief. The NPA seeks an exercise of this Court's inherent authority under Fed. R. App. 29(a)(6) to grant it leave to file the enclosed brief. The Motion contains the parties' responses to the NPA's consent requests.

[1] Under Fed. R. App. P. 29, *amicus curiae* states that no party or party's counsel for either side authored this brief in whole or in part. No person or entity other than *amicus curiae* and its members made a monetary contribution to the brief's preparation or submission.

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT

Lost in the qualified immunity debate that enveloped this case below is a key principle of First Amendment law: the First Amendment does not protect unlawful activity. In the underlying action, the Hulberts[2] were engaged in a protest that turned into a so-called "First Amendment audit," in the process violating a Maryland state regulation that involved the obstruction of sidewalks around the grounds of the Maryland state offices in Annapolis. The District Court's First Amendment analysis *should* have ended at that point, as it is clear the First Amendment offers no protection over one's own unlawful activities. For that reason, the District Court erred, and this Court should reverse the decision below.

I. INTRODUCTION.

For purposes of this brief, the NPA defers to the facts as construed by the District Court below.[3] *See* JA 737-43.

[2] The NPA will follow the parties' lead in using the names of the individuals involved instead of referring to their litigation designation.

[3] *See Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) ("Although an appellate court can, on interlocutory appeal, decide purely legal questions relating to qualified immunity, it may not reweigh the record evidence

A. THE DISPUTE BELOW AND THE PERTINENT FINDINGS OF FACT.

The crux of the dispute at the trial court turned on whether Sergeant Brian Pope's order to Jeff and Kevin Hulbert passed as a permissible "time, place, and manner" restriction on the Hulberts' protest, *see* JA 745-46, and more particularly, whether a significant government interest motivated Sergeant Pope's directive to move the protest off a sidewalk and onto a grassy area mere feet away from the original site. *See* JA 749-53.

The District Court concluded that fact questions clouded the "significant government interest" question, and denied summary judgment to Sergeant Pope on the Hulberts' tripartite First Amendment claims: (1) that Pope violated the Hulberts' right to speak and to assemble; (2) that Pope violated Kevin Hulbert's right to record the police; and (3) that Pope retaliated against the Hulberts because they exercised their First Amendment rights.[4] *See* JA 754, 757, and 760.

In his opening brief appealing the District Court's opinion, Sergeant Pope focused heavily on the "government interest" question and the "clearly established" prong of qualified immunity. *See* Appellant's Br., at 12-23, 27-43.

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to determine whether material facts preclude summary disposition.") (internal quotation marks omitted).

[4] Importantly, as discussed below, the District Court *granted* summary judgment to Sergeant Pope on the Hulberts' retaliation claim that was premised on additional charges added the day after the arrest. *See* JA 760-61.

The NPA wishes to highlight a point that neither the District Court nor Sergeant Pope spent a significant amount of time discussing, however: whether the Hulberts were engaged in lawful activity in the first place, such that, if not, the First Amendment would likewise not apply.

In the Memorandum Opinion, the District Court made a point to highlight several facts:

> *One*, that the Hulberts' group planned to set up on the public sidewalk directly adjacent to Lawyers Mall (JA738);
>
> *Two*, that Sergeant Pope knew no group had a pre-approved demonstration scheduled on the evening of the incident (JA 738);
>
> *Three*, that Kevin Hulbert was situated in the middle of the sidewalk (JA 739);
>
> *Four*, at one point, Kevin Hulbert and others were demonstrating on the sidewalk (JA 740);
>
> *Five*, that Sergeant Pope, following the Hulberts' arrests, intended to write them a citation for blocking the sidewalk but did not because he couldn't find the right Maryland Code of Regulations ("COMAR") section (JA 740-41);
>
> *Six*, that the Maryland State Attorney's office authorized adding two new charges (JA 742); and

> *Seven*, that two additional charges were issued (JA 742).[5]

In light of Maryland's regulation of conduct around the Lawyers Mall area, discussed below, these factual findings are important.

B. MARYLAND'S REGULATORY REGIME AND THE HULBERTS' CONDUCT.

The State of Maryland has regulations that govern the accessibility of property under the jurisdiction of Maryland's Department of General Services. *See* COMAR 04.05.01.01 *et seq*. and COMAR 04.05.02.01 *et seq*. Lawyers Mall

[5] This takes some parsing, but in short, the original charge Sergeant Pope wrote was for disobeying a lawful order under Md. Code Ann., Crim. Law § 10-201. Of the two additional charges the District Court mentions later, only one is named, that being "Refusal or Failure to Leave Public Building or Grounds" under Md. Cod. Ann., Crim. Law § 6-409(b). *See* JA 741-42. The second additional charge is not named in the fact summary of the District Court's opinion, but a reference to the record submitted on summary judgment shows that the second additional charge given to each Hulbert was for "prevents or disturbs the general public from obtaining services provided on the property; or obstructs: walks" under COMAR 04.05.01.03. *See* JA 430-433. The Court can take judicial notice of the existence of indisputable facts when they are "generally known within the trial court's territorial jurisdiction" or they "can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned." *See* Fed. R. Evid. 201(b); *accord U.S. v. Zayyad*, 741 F.3d 452, 463-64 (4th Cir. 2014) (discussing what facts are susceptible to judicial notice). Here, the parties do not appear to have disputed that the second additional charge was issued for a violation of COMAR 04.05.01.03. *See Hulbert et al. v. Pope et al.*, Case No. 1:18-CV-461-SAG, Def.'s Memorandum in Support of Mot. for Summ. J, Doc. 76-1, at 18; *cf.* Pls.' Opposition to Def.'s Mot. for Summ. J, Doc. 83, at 12. The summary judgment exhibits in the record, at JA 430-433, reflect the same. As such, the Court can take judicial notice of the fact that the second additional charge was for a violation of COMAR 04.05.01.03.

and the surrounding areas are subject to these regulations. *See* COMAR 04.05.01.07(C). These regulations, in pertinent part, subject an individual to arrest and a misdemeanor if the individual "obstructs" "walks" in the subject area. *See* COMAR 04.05.01.03(A)(5)(b); COMAR 04.05.01.09. Based on the District Court's factual findings, discussed above, it is clear that the Hulberts and their protesting group, the Patriot Picket, were in violation of COMAR 04.05.01.03(A)(5)(b) (prohibiting obstruction of sidewalks in the regulated area). Indeed, as Sergeant Pope's opening brief points out, officials the following day determined that a charge for this conduct was appropriate. *See* Def.'s Br., at 25; *see also* JA 430-33.

C. THE FIRST AMENDMENT AUDITOR'S CONCEPT.

Thus it is clear, both by the District Court's factual findings *and* the State of Maryland's regulatory code, that the Hulberts were engaged in misdemeanant conduct by obstructing a sidewalk in front of Lawyers Mall on the date of the subject incident. This disregard for state or local municipal ordinances is a common thread in "First Amendment audits," a practice about which the NPA wishes to advise the Court. The ever-increasing danger that many "First Amendment audits" pose to law enforcement, the general public, and the so-called auditors themselves motivated the NPA to author this brief.

First Amendment "auditors" are "individuals who film government employees in the course of their duties in the hopes of catching them violating someone's constitutional rights." Elizabeth M. Jaffe, "Caution Social Media Cyberbullies: Identifying New Harms and Liabilities," 66 Wayne L. Rev. 381, 395 (2021). While the underlying conduct itself—recording law enforcement—is a First Amendment-protected activity in many federal circuits, the behavior has become a trend among online provocateurs and is increasingly placing law enforcement, innocent bystanders, and the auditors themselves in danger. *Id*.

This is because video-sharing platforms incentivize "auditors" to harass law enforcement to produce increasingly dramatic video footage, which in turn garners views on websites like YouTube, which translates to money. *See* Jerry Oppenheimer, "First Amendment Auditors Aim to Cancel Cops via YouTube," New York Post (July 24, 2021) (https://nypost.com/2021/07/24/first-amendment-auditors-aim-to-cancel-cops-via-youtube/) (last accessed February 28, 2022). Though many of these "audits" are not inherently unlawful, their most dramatic examples are just so. "Auditors" violate state and local law to score video footage, wasting valuable law enforcement resources and creating hazardous, unnecessary confrontations between law enforcement and the public.

Moreover, once posted, these videos generate thousands of comments from fans "eager to spew negative and hate-filled commentary." *Jaffe*, *supra*, at 396. These "auditors," seeking to agitate, often wrap themselves in the language of the First Amendment while filming, whether or not the Amendment applies to their conduct. Couple that with the fact that, as noted above, many First Amendment "audits" are geared solely toward social-media-driven financial ends, and the result is a downward spiral where ever-increasing financial compensation rewards ever-increasing abrasive behavior towards law enforcement.

D. THE INTEREST OF *AMICUS CURIAE*.

Given this state of affairs, *Amicus* National Police Association authors this brief to emphasize that whatever reach of the First Amendment's protections,[6] it is limited to protections over lawfully conducted activities. The point is not to suggest that any right to film law enforcement should be taken away (should the Court agree with Plaintiffs-Appellees that it exists in this Circuit); but instead, that there are legitimate limits on the exercise of that right that should be enforced

[6] The NPA leaves the constitutionality of the Hulberts' disputed First Amendment expression—recording the police—as well as the dispute over the clearly established prong of the qualified immunity analysis, to the parties' briefs. The NPA's principal argument stands regardless of whether the Court recognizes in the Fourth Circuit a First Amendment right to record law enforcement.

when the conduct leading to the right-exercising behavior violates a duly-enacted federal, state, or local law.

Here, the Plaintiffs-Appellees violated Maryland law governing the obstruction of public sidewalks in their protesting and recording activities. For that reason, the Court should reverse the District Court's decision below; the First Amendment did not protect the Hulberts' conduct, which means *Officer Pope did not commit a First Amendment violation at all*. The Court should reverse the District Court's decision and remand the case with instructions to enter judgment in Officer Pope's favor.

II. LAW AND ARGUMENT.

A. THE FIRST AMENDMENT DOES NOT PROTECT AGAINST UNLAWFUL ACTIVITY.

It is clear that the First Amendment protects the right to protest. *See Citizens Against Rent Control Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981) ("the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process"); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("There is a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open"). Moreover, a number of federal circuits have recognized that the First Amendment protects the right to film or record law

enforcement; whether the same exists in the Fourth Circuit is a question for the parties' briefs, to which the NPA defers.

That said, it is also clear that the First Amendment *does not* protect violence. *See N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982). "Certainly violence has no sanctuary in the First Amendment, and the use of weapons, gunpowder, and gasoline may not constitutionally masquerade under the guise of advocacy." *Id.* (citing *Samuels v. Mackell*, 401 U.S. 66, 75 (1971)) (Douglas, J., concurring). Yet it is not just violence that falls outside the First Amendment's ambit, but also "unlawful conduct." *Claiborne Hardware*, 458 U.S. at 927; *see also Thorne v. Bailey*, 846 F.2d 241, 244 (4th Cir. 1988) ("The Petition Clause does not provide blanket immunity for unlawful conduct").[7]

Claiborne Hardware presented the Supreme Court with a unique problem. There, a state court had concluded that an entire boycott was unlawful because some, but not all, defendants were engaged in using "force, violence, or threats," and thus it imposed liability on the lawful and unlawful alike. 458 U.S. at 895

[7] To the extent the Hulberts argue that "petty criminal statutes may not be used to violate … constitutional rights," *see Adderley v. State of Florida*, 385 U.S. 39, 44 (1966), it is also true that "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *Id.* Maryland indisputably retains the ability to pass legislation and administrative regulations governing how the property around its government buildings can be used.

(citation omitted). Given the presence of some First Amendment protected activity, the Supreme Court found the state court's remedy overbroad. *Id*. Still, it was clear that some of the underlying conduct was indeed outside the First Amendment's scope.

To fashion a solution, the Supreme Court identified a key difference in the types of conduct. Those engaged in lawful First Amendment expressions incurred the Amendment's protection, while those who engaged in unlawful activities did not—even if the unlawful activities included classic First Amendment expressions like speech, association, and the like. *Id*. at 925. The only way that lawful actors (meaning, engaged in peaceful expression) could be classified otherwise would be if they "authorized, directed, or ratified tortious activity." *Id*. at 927. On the other hand, those engaged in illegal activity "may be held responsible for the injuries that they caused; a judgment tailored to the consequences of their unlawful conduct may be sustained" even if First Amendment expression weaved into their unlawful conduct. *Id*. at 926.

Though *Claiborne Hardware* spoke in terms of violent versus nonviolent conduct when discussing the distinction between lawful, protected activity and unlawful, unprotected activity, that was because the tortious conduct at issue was *only* violent conduct. *See Doe v. McKesson*, 945 F.3d 818, 830 (5th Cir. 2019)

(the mention of violence in *Claiborne Hardware* was merely an application of "black-letter tort law," as "the only tortious conduct…was violent"), *vacated on other grounds by McKesson v. Doe*, 141 S. Ct. 48, 50-52 (2020). In other words, the *Claiborne Hardware* Court "did not invent a violence/nonviolence distinction" in allowing damages for violent conduct but barring damages for non-violent conduct. *Doe*, 945 F.3d at 830. Those were just the types of conduct at play in that particular boycott. The true distinction was between lawful and unlawful conduct.

Thus, *Claiborne Hardware* stands for the dual propositions that (1) unlawful acts are not protected by the First Amendment and (2) those engaged in unlawful acts are liable for the consequences of their own unlawful actions. So if, as here, persons engage in unlawful activity, like obstructing a sidewalk[8] outside the Maryland General Assembly, they lose First Amendment protection. *See, e.g.*, *Doe v. McKesson*, 947 F.3d 874, 878 (5th Cir. 2020) (Ho, J., concurring)

[8] To the extent the Hulberts contend that the section of the COMAR governing sidewalk obstructions runs contrary to *United States v. Grace*, 461 U.S. 171 (1983), such an argument fails by comparison. As the District Court noted, *Grace* struck down a law that flatly prohibited the display of banners and the like on a public sidewalk outside the United States Supreme Court building. *See* JA 754; see also *Grace*, 461 U.S. at 180. It had nothing to do with sidewalk access. The regulation at issue, COMAR 04.05.01.03(A)(5)(b), subjects an individual to arrest if the individual "obstructs… walks." The regulation plainly applies only to sidewalk-obstructionists, unlike the *Grace* regulation which barred any banner-carrying on a sidewalk regardless of its impassive nature.

("Citizens may protest. But by protesting, the citizen does not suddenly gain immunity to violate traffic rules or other laws that the rest of us are required to follow. The First Amendment protects protest, not trespass"). As the Supreme Court put it, in response to a claim that protestors had a constitutional right to protest on state property over the state's objection because the area was both "reasonable" and "particularly appropriate":

> "Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law [has been] vigorously and forthrightly rejected[.]"

Adderley, 385 U.S. at 48 (citing *Cox v. State of Louisiana*, 379 U.S. 536, 48-49(1965)). That is the end of the First Amendment constitutional analysis.

The Hulberts may very well respond and suggest that the Supreme Court has already foreclosed NPA's proposition in cases like *Cox v. Louisiana* or *Edwards v. South Carolina*, 372 U.S 229 (1963). Though there are undoubtedly similarities between the circumstances, both *Cox* and *Edwards* rested on different facts. In the relevant part of *Cox*, the Supreme Court overturned a protestor's conviction for obstructing public passages because there was evidence that Louisiana authorities did not apply the governing statute (barring obstruction of public sidewalks) in a uniform, consistent, and nondiscriminatory manner, such

that the conviction violated the protestor's First Amendment rights. *See* 379 U.S. at 556-57 ("From all the evidence before us it appears that the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion"). Here, on the other hand, the District Court found that "the undisputed evidence shows that Sgt. Pope discussed how to issue the 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."[9] *See* JA 760. In other words, there is no factual basis to compare the application of the COMAR in this case to the Louisiana law struck down in *Cox*.

A comparison to *Edwards* meets the same fate. There the Supreme Court overturned convictions issued to a group of protestors for breaching the peace following a protest on the sidewalk outside the South Carolina State House grounds because, more or less, the importance of the protestors' First Amendment

[9] Recall that the "other charges" referenced herein include the COMAR violation that is the subject of this brief. *See* Footnote 5, *supra*, at 3. The District Court notes that the Hulberts "argue throughout their opposition that ordinarily their group and other protestors are allowed to demonstrate on the sidewalk and that this incident was unusual," *see* JA 761, but this is a far cry a finding that this assertion was undisputed or could be considered so in deciding this case. As it stands, the only undisputed fact about the application of the COMAR regulation is that it is one "traditionally issued to protestors." *See* JA 760.

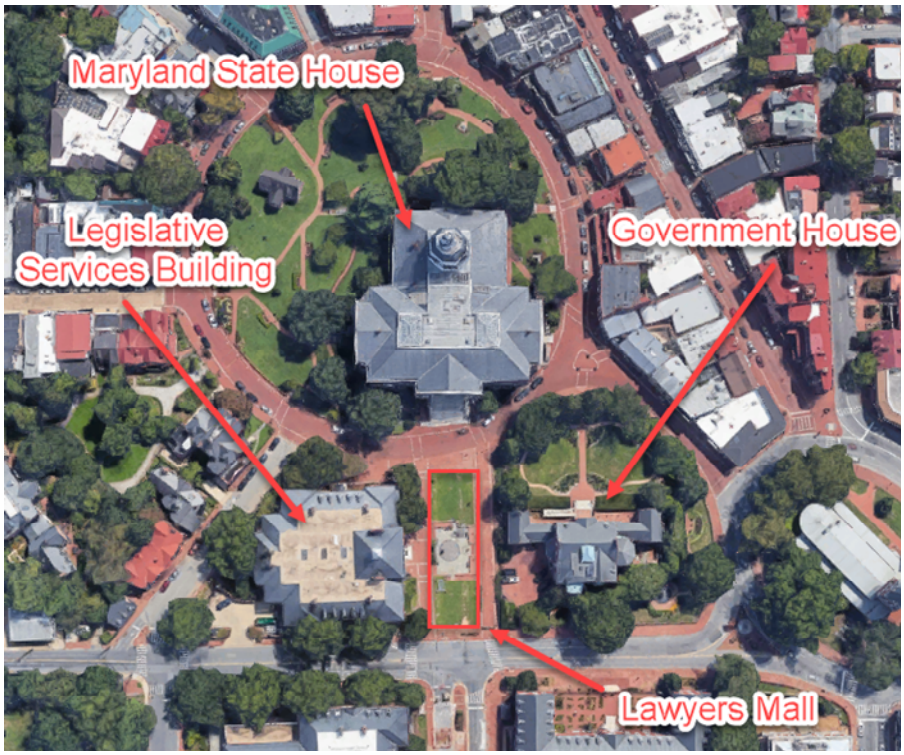
expression outweighed the violative nature of their conduct, which the Supreme Court found minimal at best. *See* 372 U.S. at 235-36. That, plus the fact that the offense as described by South Carolina was "so generalized" as to be "not susceptible of exact definition," *id*. at 237, made the convictions tantamount to censorship of a particular viewpoint. *Id*.

The law at issue in *Edwards* was *not* the sort of land-use regulation at stake in this case, and had it been, the outcome of the case could have changed. Indeed, the Supreme Court noted that they were not "review[ing] … criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed." *Id*. at 236. It "would be a different case[]" if such a law were at issue, say "if, for example, the petitioners had been convicted upon evidence that they had violated a law regulating traffic, or had disobeyed a law reasonably limiting the periods during which the State House grounds were open to the public[.]" *Id*. Or, perhaps, laws regulating the use of sidewalks and land around a state government building, especially when there were ample open, and directly adjacent, areas available for outdoor assemblies. *See, e.g.*, *Hague v. Committee for Indus. Organization*, 307 U.S. 496, 514-15 (1939) (Roberts, J.).

In sum, neither *Cox* nor *Edwards* dealt with an analogous situation such that the Hulberts could reasonably say those cases foreclosed the NPA's argument. It remains that absent First Amendment protection, there is no basis to interrupt the ordinary workings of state law.

B. THE HULBERTS WERE ENGAGED IN UNLAWFUL ACTIVITY.

Here, the Hulberts' activities at issue are not their speech, their advocacy, or their filming of their arrests, but rather their unlawful activity—obstructing a sidewalk directly off of Lawyers Mall. The Maryland regulation at issue makes this unlawful. *See* COMAR 04.05.01.03(A)(5)(b). This point is driven home by the fact that Maryland maintains specific regulations for how demonstrations and rallies are to be conducted in the Lawyers Mall area. *See* COMAR 04.05.02.02 *et seq*. Namely, that demonstrations and rallies can be conducted "at Lawyers Mall in front of the State House between the Legislative Services Building and Government House." *Id*. at 04.05.02.02(B). The diagram on the following page shows the areas at issue.



These very regulations demonstrate that engaging in a demonstration outside the prescribed area, one which obstructs a sidewalk, falls outside the permissible range of conduct in this tightly circumscribed area.[10]

[10] To the extent the Hulberts argue that this reading of these regulations would make every person standing on a sidewalk in the Lawyers Mall a misdemeanant, that is simply not true. The use of the words "obstruct" and "walks," coupled with the fact that specific plots of land are set aside for demonstrations, show the regulations apply to groups who place themselves on a sidewalk with no intention of departing in the short term—such as protestors. Transient groups or individuals, such as tourists or local employees, clearly are not engaged in any "obstructive" conduct.

This fact also undermines the District Court's statement that "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." *See* JA 760. To the contrary, a group occupying the sidewalk and giving no intention they will

Moreover, the fact that the charges were later dismissed is immaterial. Charges are dismissed for many reasons aside from the accused's guilt or innocence. See, e.g., *Cordova v. City of Albuquerque*, 816 F.3d 645, 654 (10th Cir. 2016) (Regarding a *nolle prosequi*, "this action by the prosecution is ambiguous, in that we cannot know the reasons for dropping the charges"); *M.G. v. Young*, 826 F.3d 1259, 1263 (10th Cir. 2016) (in explaining the elements of a malicious-prosecution claim, "the plaintiff must demonstrate that the criminal proceedings were dismissed for reasons indicative of innocence, and not because of an agreement of compromise, an extension of clemency, or technical grounds having little or no relation to the accused's guilt").

In short, the Hulberts were in violation of the applicable Maryland regulations. As discussed in Section I, such a violation ends the First Amendment analysis *right there*. Under *Claiborne Hardware*, the Hulberts have no First Amendment claim.[11]

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depart is the *precise* type of group subject to the Maryland regulations at issue, and, indeed, Sergeant Pope intended to issue a charge to that effect.

[11] Indeed, the existence of the Maryland regulations also undermines the District Court's conclusion that Sergeant Pope was not issuing a lawful order, as his order for the Hulberts to move indisputably dovetailed with rules governing the various aspects of Lawyers Mall and the surrounding area. The NPA will leave this branch of the "time, place, and manner" analysis to the parties' briefs.

C. PROTECTING LAW ENFORCEMENT FROM RUNAWAY FIRST AMENDMENT AUDITS SAFEGUARDS THE PUBLIC AND THE FIRST AMENDMENT ITSELF.

This conclusion might seem onerous, but consider that many such expressions of First Amendment activity do not occur on such highly regulated patches of land, meaning the exercise of First Amendment rights usually won't compete with such statutory restrictions. It just so happens that the area the Hulberts selected is subject to a complex, and heretofore constitutional, set of regulations unique to the grounds of the Maryland state government offices. But this illustrates the broader policy point baked into this brief: whether it is abiding by a state government's land-use rules, or following a state's criminal laws, for the First Amendment to apply, the *law* should be followed. Unfortunately for law enforcement and the general public, First Amendment audits of the kind the Hulberts sought to employ often run afoul of this principle, under the misguided belief in an immunity-based expression of First Amendment principles.

Consider the plight of two officers in Tucson, Arizona, in the spring of 2020. According to local media, a man approached two officers, one male and one female, as they guarded the perimeter of a crime scene. When one officer asked the man to step backwards, the man launched into a nearly 20-minute livestreamed tirade in which he shouted "the B-word, the C-word, the F-word,

and other obscenities" at the officers. *See* Carol Ann Alaimo, "Tucson Creates New Ordinance to Deter Aggressive 'First Amendment Auditors,'" Tucson.com, April 27, 2020, https://tucson.com/news/local/tucson-creates-new-ordinance-to-deter-aggressive-first-amendment-auditors/article_be17ffeb-7de9-56c2-a1e0-a9292dfe1757.html (last accessed February 28, 2022).

In some instances, the confrontations turn violent. Consider also the case of Zhoie Perez, a YouTube personality known by her alias "Furry Potato." Ms. Perez evidently decided to conduct a livestream "audit" of a security guard at the Etz Jacob Congregation and Ohel Chana High School in Los Angeles, California. *See* Kayla Epstein & Avi Selk, "What Is 'Auditing,' and Why Did a YouTuber Get Shot for Doing It?," Washington Post, (Feb. 15, 2019), https://www.washingtonpost.com/technology/2019/02/15/what-is-auditing-why-did-youtuber-get-shot-doing-it/, (last accessed February 28, 2022). Ms. Perez was evidently unaware of the shooting at the Pittsburgh-area Tree of Life – Or L'Simcha Congregation synagogue the year prior, which was apparently the reason a security guard was placed outside the Etz Jacob Congregation and was likewise on heightened alert for suspicious activity. *Id*.

These examples are a few of many which demonstrate that the so-called First Amendment audit is posing an increasing threat to the peaceful operation of

good government and, more importantly, the safety of the general public. On top of that, curiously, the expansion of these audits can actually have a boomerang effect of hampering legitimate First Amendment conduct because they drive municipalities and other law-making bodies to react by passing, in some cases, overly restrictive laws to insulate law enforcement and other government officials from the audits themselves. Indeed, as indicated by the headline, the Tucson case referenced above led to the passage of a city ordinance that was immediately criticized for restricting the citizenry's ability to engage in expressive conduct. *See* Stephanie Casanova, "Amid Backlash, Tucson City Council Will Review Ordinance on Recording Police," Tucson.com, June 9, 2020, https://tucson.com/news/local/amid-backlash-tucson-may-reconsider-rule-on-recording-police/article_de099d1c-937b-58eb-a3c3-caf6f9fc80ad.html (last accessed February 28, 2022). That is a result no one desires.

As Professor Jaffe explained in her recent article, which examines larger trends in social media harassment but devotes a specific section to the growing problem of First-Amendment-audit-confrontations, the goal is *not* to limit First Amendment rights. *See* Jaffe, *supra*, at 387. It is, however, to enforce existing First Amendment limitations such that the rights of the citizenry are appropriately respected while the ability of law enforcement to carry out their obligations is

unfettered by needless harassment. The case presented by the Hulberts' protest and filming presents an excellent example of such a limitation, and the Court should recognize as much in ruling on this appeal.

III. CONCLUSION.

The Court should reverse the District Court's decision and remand the case with instructions to enter judgment in Sergeant Pope's favor.

Date: March 1, 2022

Respectfully submitted,

s/ Jeffrey C. Hendrickson

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit using the appellate CM/ECF system on **March 1, 2022**. Listed counsel in this appeal are registered CM/EF users who will be served by the appellate CM/ECF system. *See* Fed. R. App. P. 25(b).

Date: March 1, 2022

s/ Jeffrey C. Hendrickson
Jeffrey C. Hendrickson

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS, TYPE-FACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I certify:

1. This *amicus curiae* brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains **4,649** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f); and

2. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced type-face using **Microsoft Office 2016 in fourteen-point-five-point Times New Roman font**.

Date: March 1, 2022

s/ Jeffrey C. Hendrickson
Jeffrey C. Hendrickson

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Jeffrey C. Hendrickson