IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIAN T. POPE, *Defendant-Appellant* v. **CLAYTON HULBERT, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JEFFREY HULBERT, et al.**, *Plaintiffs-Appellees.*	Case No.: 21-1608

APPELLEE'S MOTION TO DISMISS APPEAL

Come now the *Plaintiffs-Appellees*, by and through counsel, and move to dismiss the appeal, stating as follows:

I. Introduction and Relevant Facts.

This is a police misconduct case bringing First and Fourth Amendment claims[1] on behalf of two men falsely arrested for being present on a public sidewalk. *See, e.g.*, J.A. 13-43 (Complaint); J.A. 737-770 (Summary Judgment Opinion). One of the arrestees was a picketer carrying a sign, one was simply filming with his cell phone, but neither were violating the law. *See Id.;* J.A. 554-

[1] After motions practice, the remaining claims are: Count I (First Amendment Freedom of Speech – Lawful Demonstration), Count II (First Amendment Freedom of Speech – Lawfully Filming Officers), Count III (First Amendment Freedom of Speech – Retaliation), and Count IV (Fourth Amendment – Unconstitutional Search and Seizure).

555 (Appellant Pope, the arresting officer, admits that both before and after the arrival of additional police officers, the Hulberts were not "disturbing the peace in any way."); J.A. 86-87 (Appellant Pope, the arresting officer, admits that, when he initially approached the Patriot Picket demonstration, he did not see "any condition . . . at that time that look[ed] unsafe"); J.A. 94-96, 533-34 (Appellant Pope, the arresting officer, admits that when he was within 20 feet of the Picketers, they were not affecting his ability to traverse the sidewalk or the traffic of vehicles but that pedestrians and cars could "go freely.").

The District Court's decision denying summary judgment on the question of qualified immunity explicitly cited numerous factual disputes:

> "there are factual disputes requiring jury resolution as to whether a legitimate government interest was served by the police action."
>
> "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."
>
> "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."
>
> "factual disputes preclude the Court from determining, at summary judgment, whether Sgt. Pope's orders were lawful or unlawful."
>
> "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."

J.A. 751, 753, 754, 759, 763.

This Court should dismiss Defendant-Appellant Brian T. Pope's interlocutory appeal because it lacks jurisdiction to review denials of qualified immunity on summary judgment where said denial is based upon the existence of factual disputes. *Johnson v. Jones*, 515 U.S. 304, 319, (1995).

II. It is Well Established That Appeals Premised on a Trial Court's Finding that an Evidentiary Dispute Bars Application of Qualified Immunity are Outside the Jurisdiction of this Court and Should Be Dismissed.

As a general principle, "denials of summary judgment are interlocutory orders not subject to appellate review." *Hicks v. Ferreyra*, 965 F.3d 302, 308–09 (4th Cir. 2020) (*citing Williams v. Strickland*, 917 F.3d 763, 767 (4th Cir. 2019)). While there is an exception to the general principle "for denials of summary judgment as to qualified immunity," this exception is strictly "limited to legal questions." *Id*. "Our jurisdiction extends only to the denial of qualified immunity 'to the extent it turns on an issue of law.'" *Id*. (*quoting Gould v. Davis*, 165 F.3d 265, 268 (4th Cir. 1998)).

This Court has summarized its jurisdiction to review denials of qualified immunity as consisting of a single, narrow question: "'*if we take the facts as the district court gives them to us*, and we view those facts in the light most favorable to the plaintiff,' are the defendant officers 'still entitled to qualified immunity?'" *Id*. (*quoting Strickland*, 917 F.3d at 768) (emphasis in original). Thus, "a

defendant, entitled to invoke a qualified immunity defense, may *not* appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 275 (4th Cir. 2011) (*quoting Johnson v. Jones*, 515 U.S. 304, 319, (1995)) (emphasis in original).

The principle that denials of qualified immunity premised on evidentiary disputes are not appealable is well-settled. This Court has applied this principle consistently, dismissing appeals where a district court denies qualified immunity based on outstanding issues of material fact.[2] *Hicks v. Ferreyra*, 965 F.3d 302, 308–09 (4th Cir. 2020) (dismissing portion of appeal challenging district court's ruling on qualified immunity due to lack of jurisdiction); *Rhoades v. Forsyth*, 834 F. App'x 793, 796 (4th Cir. 2020) (dismissing appeal for lack of jurisdiction where the appellant did not "raise[] a single legal question appropriate for appellate review"); *Bullard v. Alman*, 709 F. App'x 197 (4th Cir. 2018) (dismissing appeal for lack of jurisdiction where "the district court denied qualified immunity to Alman at the summary judgment stage, finding that there were genuine issues of material fact as to whether he deployed force against Bullard that was constitutionally excessive and acted with deliberate indifference to Bullard's

[2] Appellees recognize that the unpublished opinions included herein are not binding authority but include these decisions nonetheless for persuasive purposes.

serious medical needs."); *Pair v. Burroughs*, 695 F. App'x 62, 64 (4th Cir. 2017) (dismissing appeal where "the district court specifically found that the amount of force used was a disputed issue of fact."); *Newkirk v. Enzor*, 674 F. App'x 276, 281 (4th Cir. 2017) (finding that the court has no jurisdiction to consider appeal where "the version of facts ultimately accepted by the fact finder" determined the defendant's "entitlement to qualified immunity."); *Hollabaugh v. Cartledge*, 682 F. App'x 203, 204 (4th Cir. 2017) (dismissing appeal for lack of jurisdiction where "the qualified immunity determination in this matter ultimately turns on presently unresolved questions of fact."); *Whitlock v. Greenlee*, 583 F. App'x 177, 178 (4th Cir. 2014) (dismissing appeal for lack of jurisdiction where "the qualified immunity determination in this case turns on unresolved questions of fact."); *Sipes v. Cooper*, 581 F. App'x 300, 301 (4th Cir. 2014) (dismissing appeal for lack of jurisdiction where "the qualified immunity determination in this matter ultimately turns on presently unresolved questions of fact rather than on an evaluation of the legal significance of undisputed facts."); *Kane v. Lewis*, 483 F. App'x 816, 823 (4th Cir. 2012) (dismissing cross-appeal for lack of jurisdiction where "the district court denied the officers' motion for summary judgment based on qualified immunity […] 'because a dispute of material fact exists as to whether the officers knocked and announced.'"); *Witt v. W. Virginia State Police, Troop 2*, 633 F.3d 272, 278 (4th Cir. 2011) (dismissing appeal for lack of jurisdiction where "the

pretrial record sets forth a 'genuine' issue of fact for trial."); *Walters v. Prince George's Cty., Md.*, 438 F. App'x 208, 209 (4th Cir. 2011) (dismissing appeal for lack of jurisdiction where "in denying Appellants' motion for summary judgment, the district court concluded that genuine issues of material fact existed regarding Walters' treatment."); *Ramsey v. Brown*, 418 F. App'x 238, 239 (4th Cir. 2011) (dismissing appeal for lack of jurisdiction where "the respective versions of facts offered by the parties below were so divergent that judgment as a matter of law is precluded" with regard to qualified immunity); *Landrum v. Bowens*, 373 F. App'x 370, 371 (4th Cir. 2010) (dismissing appeal for lack of jurisdiction where "the district court concluded that a genuine issue of material fact existed regarding Landrum's treatment, and resolution of those issues of fact would determine whether Landrum's Eighth Amendment right had been violated.").

As it is well-settled law that an officer has no right to appeal where the officer was denied qualified immunity due to unresolved questions of fact, and because this Court has consistently dismissed such appeals due to lack of jurisdiction, the instant appeal should similarly be dismissed.

CONCLUSION

For the foregoing reasons, the Plaintiffs-Appellees respectfully request that this Honorable Court dismiss this appeal.

Respectfully submitted,

HANSEL LAW, P.C.

/s/

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and contains 1312 words, excluding the parts of the motion exempted from the word count by Fed. R. App. P. 32(f). The foregoing motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) and was prepared with proportionately spaced type and typeface of 14-point Times New Roman.

/s/

Cary J. Hansel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of February, 2022, the foregoing motion was filed with the Court's CM/ECF system which shall effect service on all parties so entitled.

/s/

Cary J. Hansel

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ORDER

UPON CONSIDERATION of the Plaintiffs-Appellees' Motion to Dismiss and any opposition thereto, it is this _____ day of _____, 2022, hereby

ORDERED, that the Plaintiffs-Appellees' Motion to Dismiss is hereby **GRANTED**; and it is further

ORDERED, that this appeal is dismissed, costs to be paid by the Appellant.

_____
Judge, United States Court of Appeals for the Fourth Circuit