12-1671

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BOBBY BLAND; DANIEL RAY CARTER, JR.;
DAVID W. DIXON; ROBERT W. MCCOY;
JOHN C. SANDHOFER; DEBRA H. WOODWARD,

Plaintiffs–Appellants,

v.

B.J. ROBERTS, individually and in his official capacity as
Sheriff of the City of Hampton, Virginia,

Defendant–Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA, NEWPORT NEWS DIVISION

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND ACLU OF VIRGINIA IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL SEEKING REVERSAL

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of Virginia is the ACLU's Virginia affiliate. The ACLU has been committed to protecting the freedoms guaranteed by the First Amendment since its founding in 1920, and has frequently appeared before the Supreme Court and this Court in cases involving free speech matters. Because the district court in this case applied an unduly restrictive view of constitutionally protected speech, the proper resolution of this case is a matter of significant concern to the ACLU and its members.

STATEMENT OF FACTS

Plaintiffs-Appellants were employees of the Sheriff's Department in the City of Hampton, Virginia. The Sheriff was running for reelection in November 2009. *Bland v. Roberts*, No. 04:11cv45, 2012 WL 1428198, at *1 (E.D. Va. Apr. 24, 2012) ("Op."). During his tenure, the Sheriff used his authority to bolster his reelection efforts, including using employees to manage his political activities,

[1] Pursuant to Rule 29(c)(5), counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

using prisoners to set up campaign events, and forcing employees to sell and buy tickets to campaign fundraisers. Op. at *1. During his bid for reelection, the Sheriff was informed that a number of his employees were supporting one of his opponents. *Id.* Those employees had informed other individuals of their support, attended a cookout that the Sheriff's opponent also attended, and posted comments on and "Liked" the opponent's Facebook page. *Id.* When the Sheriff was made aware of this information, he called a meeting in which he informed all employees that they should support him because he was on the "long train." *Id.*

After the Sheriff won reelection, he fired those employees who had supported his opponent. *Id.* The Sheriff attempted to justify his actions by claiming that he did not reappoint two of the plaintiffs – civilian employees – because he wanted to replace the civilian employees with sworn deputies. *Id.* The Sheriff claimed he fired the other four plaintiffs for unsatisfactory work performance or because he believed that their actions "hindered the harmony and efficiency of the Office." *Id.*

Plaintiffs thereafter filed suit in the Eastern District of Virginia against the Sheriff in his individual and official capacities, alleging that he violated their First Amendment rights to speech and association by firing them. *Id.* at *2. The Sheriff moved for summary judgment, and the district court granted his motion on April 24, 2012, holding that plaintiffs did not adequately allege that they had engaged in

protected speech because "Liking" a Facebook page is "insufficient speech" and not "substantive" enough to merit constitutional protection. *Id.* at *3-4. The court further concluded that a critical statement about the Sheriff's campaign material by one of the plaintiffs at an election booth did not involve a matter of public concern, but rather "matters of personal interest." *Id.* at *4-5. With respect to the association claim, the court held that plaintiffs failed to create a triable issue because they did not provide sufficient evidence that the Sheriff actually knew about their support for his political opponent. *Id.* at *5-6. Finally, the court held that the Sheriff was entitled to qualified immunity in his individual capacity and sovereign immunity in his official capacity. *Id.* at *6-10 Plaintiffs timely appealed the district court's decision to this Court.

SUMMARY OF ARGUMENT

"Liking" a political candidate on Facebook – just like holding a campaign sign – is constitutionally protected speech. It is verbal expression, as well as symbolic expression. Clicking the "Like" button announces to others that the user supports, approves, or enjoys the content being "Liked." Merely because "Liking" requires only a click of a button does not mean that it does not warrant First Amendment protection. Nor does the fact that many people today choose to convey their personal and political views online, via Facebook and other social media tools, affect the inquiry.

The statements by plaintiffs on Facebook and at the election booth are also protected by the First Amendment because they involved matters of immense public concern – the merits of a candidate for political office. That political speech implicates the very core of the First Amendment. Far from expressing personal grievances, plaintiffs were voicing their opinions about the virtues – or lack thereof – of an elected official. That some of the comments were made privately, rather than to a public audience, is irrelevant to the public concern analysis.

Finally, defendant is not entitled to qualified immunity because he violated plaintiffs' clearly established First Amendment rights. With respect to the free speech claims, courts have long affirmed that speech regarding who should be elected to public office involves a matter of public concern. That this caselaw is allegedly complex or that the legal analysis is fact dependent does not shield defendants from liability in all circumstances. Because the application of the law to these circumstances is clear, any reasonable official would have known that it was impermissible to terminate plaintiffs for their statements.

Nor was the defendant entitled to qualified immunity on plaintiffs' association claims. An examination of the particular positions of plaintiffs and their actual job duties makes clear that none of the plaintiffs were "policymakers" and that their associational rights were therefore constitutionally protected.

ARGUMENT

I. PLAINTIFFS' SPEECH IS CONSTITUTIONALLY PROTECTED.

A. "Liking" Something On Facebook Is Protected By The First Amendment Both As Pure Speech And As Symbolic Expression.

The First Amendment protects expression, whether through actual words or through symbolic speech. By "Liking" the Facebook page of the Sheriff's political opponent, plaintiffs were expressing their political opinions. The district court failed to recognize that basic proposition. Instead, it premised its decision to the contrary on its belief that pressing a computer button to say that one "Likes" something is not "substantive" enough to be protected by the First Amendment. In the court's words:

> [M]erely 'liking' a Facebook page is insufficient speech to merit constitutional protection . . . It is not the kind of substantive statement that has previously warranted constitutional protection. The Court will not attempt to infer the actual content of [plaintiffs'] posts from one click of a button on [the opponent's] Facebook page.

Op. at *3-4.

That conclusion is erroneous. "Liking" something on Facebook expresses a clear message – one recognized by millions of Facebook users and non-Facebook users – and is both pure speech and symbolic expression that warrants constitutional protection. Although it requires only a click of a computer mouse, a Facebook "Like" publishes text that literally states that the user likes something.

"Liking" something also distributes the universally understood "thumbs up" symbol. A Facebook "Like" is, thus, a means of expressing support – whether for an individual, an organization, an event, a sports team, a restaurant, or a cause.

Clicking the "Like" button announces to others that the user supports, approves, or enjoys the content being "Liked." In this way, an individual who uses the "Like" button is making a substantive statement. That is especially the case when a user "Likes" a political candidate, as that is a clear sign of support for that candidate. Similarly, when a user "Likes" a movie, television show, or game, it shows that he or she enjoys that product. Or if a user "Likes" another user's comment or post, he or she is expressing approval of the information conveyed by that other user. Indeed, because "Liking" something conveys a message about a user's views or opinions, it can even be newsworthy in some circumstances. *See Fraley v. Facebook*, 830 F. Supp. 2d 785, 804-05 (N.D. Cal. 2011) (concluding that "Liking" things on Facebook is "newsworthy"). Contrary to the district court's assertion, no "content" need be inferred to understand the meaning of plaintiffs' use of the "Like" button; the meaning is apparent without any additional information.

"Liking" something also establishes a connection between the user and the "Liked" Facebook page. For example, the "Liked" page will appear in the user's profile section on "Likes and Interests," and updates from the "Liked" page are

sent to the user.[2] In other words, by clicking the "Like" button, a user instantaneously alerts anyone who views his or her page or profile that he or she is connected to and appreciates the "Liked" page, which further expresses a message about the user's opinions and thoughts.

Moreover, "Liking" a political candidate is akin to an endorsement of that person – speech at the core of the First Amendment. "Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995) (citing *Buckey v. Valeo*, 424 U.S. 1, 14-15 (1976)). The First Amendment thus "affords the broadest protection to such political expression." *Id.*; *see also Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 892 (2010) (political speech "is central to the meaning and purpose of the First Amendment"). By "Liking" the Facebook page of the Sheriff's opponent, plaintiffs were clearly expressing support for the opponent's candidacy.

Even if the Court concludes that "Liking" is not pure speech, it is surely constitutionally protected as symbolic expression. "The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word." *Texas v. Johnson*, 491

[2] *See The Like Button*, Facebook Developers, http://developers.facebook.com/docs/reference/plugins/like/ (explaining uses of the "Like" button).

U.S. 397, 404 (1989). For that reason, the First Amendment protects "symbolic" speech as well as "pure" speech. *See, e.g.*, *id.* at 405-06 (burning of American flag is symbolic speech protected by the First Amendment); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 516-17 (1969) (wearing of armbands is "symbolic speech" that is akin to "pure speech" and protected by the First Amendment); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (saluting or refusing to salute the flag is protected); *Stromberg v. California*, 283 U.S. 359, 369-70 (1931) (conviction for symbolic display of red flag violates freedom of speech); *Schacht v. United States*, 398 U.S. 58 (1970) (wearing of military uniforms in a dramatic presentation criticizing American involvement in Vietnam is protected); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (sit-in by African-Americans in a "whites only" area to protest segregation is protected); *Nat'l Socialist Party of Am. v. Skokie*, 432 U.S. 43, 43 (1977) ("[m]arching, walking or parading" in uniforms displaying the swastika is protected). Because "[s]ymbolism is a primitive but effective way of communicating ideas," *Barnette*, 319 U.S. at 632, the First Amendment "looks beyond written or spoken words as mediums of expression." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp.*, 515 U.S. 557, 569 (1995).

"Conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Johnson*, 491 U.S.

at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)). In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, courts must ask whether "[a]n intent to convey a particularized message was present, and . . . [whether] the likelihood was great that the message would be understood by those who viewed it" *Spence*, 418 U.S. at 410-11.

There can be no dispute that plaintiffs' speech constitutes symbolic expression. First, by "Liking" the Sheriff's political opponent, plaintiffs revealed their view of his candidacy and expressed an opinion. Their clear intent was to convey the "particularized message" of political support for the opponent. Second, Facebook users understand the meaning of the button – so much so that every sixty seconds, there are over 300,000 "Likes" on Facebook.[3] The general public is also likely to understand the message, as it represents the digital version of a phrase used prolifically in the real world. Indeed, there would have been no difference between wearing a pin that says "I like Ike" and pressing a "Like" button on Dwight Eisenhower's Web page, had one existed. Moreover, the "Like" button has a "thumbs up" symbol – a universally recognized symbol.

That many people today choose to convey what they like or which political candidates they support by "Liking" a Web page rather than by writing the actual

[3] *One Minute on Facebook*, TIME, http://www.time.com/time/video/player/0,32068,711054024001_2037229,00.html.

words, "I like this Web page" or "I like this candidate," is immaterial. Whether someone presses a "Like" button to express those thoughts or presses the buttons on a keyboard to write out those words, the end result is the same: one is telling the world about one's personal beliefs, interests, and opinions. That is exactly what the First Amendment protects, however that information is conveyed.

B. First Amendment Protection Does Not Hinge On The Clarity Or Value Of The Speech.

The district court concluded that plaintiffs had not alleged "sufficient speech" to garner First Amendment protection in part because it believed that there was not a clear message expressed by plaintiffs' use of the "Like" button. The court thus refused "to attempt to infer the actual content of [plaintiffs'] posts from one click of a button on [the opponent's] Facebook page." Op. at *4. That conclusion is erroneous for two principal reasons. First, the First Amendment does not require that speech have a clear message to warrant protection. Second, "Liking" something on Facebook *does* have a clear meaning – specifically, the approval and support of the thing being "Liked."

First Amendment protection does not depend on how thoughtful, time-consuming, or "substantive" one's comments are. The Supreme Court has consistently rejected efforts to limit the First Amendment to speech that is "valuable." *See, e.g.*, *United States v. Alvarez*, 132 S. Ct. 2537, 2545-47 (2012) (rejecting argument that the limited value of false statements exempts them from

First Amendment protection); *Brown v. Entm't Merch. Ass'n.*, 131 S. Ct. 2729, 2733-34 (2011) (concluding that the government cannot decide that violent video games are not protected by the Constitution because it deems them "too harmful to be tolerated"); *United States v. Stevens*, 130 S. Ct. 1577, 1585-86 (2010) (rejecting attempt to create new category of unprotected speech by weighing the value of a particular category of speech against its social costs and then censoring it if it fails the "value" test). Indeed, the Court has made clear that even distasteful, sophomoric, and/or banal speech is entitled to the full protection of the First Amendment. *See, e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (holding that hateful speech at military funerals is protected by the First Amendment); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52-56 (1988) (rejecting "outrageousness" standard for First Amendment protection of parody of public figure); *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 271-72 (2d Cir. 2010) ("[The] First Amendment protects even dry information, devoid of advocacy, political relevance, or artistic expression." (internal quotation marks and alteration omitted)), *aff'd*, 131 S. Ct. 2653 (2011).

Nor does it matter whether the message is easily decipherable or if "Liking" something really means that you truly "like" it in the traditional sense of the word. As the Supreme Court has vividly explained, the First Amendment protects speech even if the speech does not convey a clear message, because otherwise, its

"protection … would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569. The lack of a "succinctly articulable message is not a condition of constitutional protection." *Id.* Therefore, even if there were not a clear message from plaintiffs' "Liking" of the Sheriff's opponent's Facebook page, the use of the button conveys some information about the thoughts and communicative actions of plaintiffs, rendering the speech protected by the First Amendment.

Regardless, as discussed earlier, "Liking" something on Facebook does express a clear message of support or approval. *See supra* at 5-7. In addition, when someone "Likes" something on Facebook, it sets off a series of actions, each of which carries a message to viewers. For example, when a user "Likes" something on Facebook, he or she appears as someone who "Likes" it on the "Liked" page, certain users are privately notified that the person "Likes" the item/page, the person's "Likes" may appear on his or her newsfeed or profile page, and the person may be subscribed to further content regarding the thing he or she "Likes." The clarity of this message is exemplified by the fact that Facebook uses this information to serve its customers, and advertisers also use the information to better market their products. *See Fraley*, 830 F. Supp. 2d at 792 (using "Likes" is profitable for both Facebook and advertisers because of the "marketing value of

friend endorsements"). As such, the message sent by using the "Like" function is clear and widely recognized.

C. Internet Speech Enjoys the Same First Amendment Protection as Traditional Forms of Speech.

That the speech at issue here occurred on Facebook—*i.e*,. on the Internet—does not affect the analysis. The Supreme Court has repeatedly rejected any attempt to "qualify[] the level of First Amendment scrutiny that should be applied" to the Internet. *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Ashcroft v. ACLU*, 542 U.S. 656 (2004). In other words, speech that occurs on the Internet is entitled to the same level of First Amendment protection as more traditional forms of speech. *Reno*, 521 U.S. at 870. "Liking" something on Facebook is just one of the countless forms of online communication and, thus, is entitled to the same First Amendment protection as traditional forms of speech.

"The Internet ... offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity." *Ashcroft*, 535 U.S. at 566 (alteration in original). This diversity has remained intact, in great part, due to the protection afforded by the First Amendment. "Liking" something on Facebook is just a new mode of communication on the Internet, and it is critical that this Court ensure that the Internet remains a forum for this diversity of discourse. *Reno*, 521 U.S. at 849.

The Internet has made it significantly easier to express thoughts and ideas publicly. The district court, however, dismissed the import of "Liking" by focusing on the fact that it arose "from one click of a button on [the opponent's] Facebook page." Op 6-7. The amount of effort necessary to engage in speech is not, however, dispositive as to whether that speech is protected by the First Amendment. Indeed, the court's conclusion ignores the fact that many actions over the Internet, and therefore much Internet speech, is done with "one click of a button." With "one click of a button," an Internet user can upload or view a video, donate money to a campaign, forward an email, sign a petition, send a pre-written letter to a politician, or do a myriad of other indisputably expressive activities. The ease of these actions does not negate their expressive nature. Indeed, under the district court's reasoning, affixing a bumper sticker to your car, pinning a campaign pin to your shirt, or placing a sign on your lawn would be devoid of meaning absent further information, and therefore not entitled to constitutional protection because of the minimal effort these actions require. All of these acts are, of course, constitutionally protected. *See, e.g., City of Ladue v. Gileo*, 512 U.S. 43, 56-8 (1994) (holding that city's ban on residential signs violates the First Amendment); *Aiello v. City of Wilmington*, 623 F.2d 845, 854 (3d Cir. 1980) (wearing of political buttons and use of bumper stickers is within the protected scope of the First Amendment.). Liking a political candidate on Facebook, like

other forms of Internet speech, is no different just because it only involves "one click" of a button. It is constitutionally protected. *See, e.g.*, *Reno*, 521 U.S. at 870; *Ashcroft*, 542 U.S. at 671; *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446 (2d Cir. 2001) (posting a hyperlink is speech); *T.V. v. Smith-Green Cmty. Sch. Corp.*, 807 F. Supp. 2d 767 (N.D. Ind. 2011) (posting of photos to Facebook is protected speech); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (uploading a video to YouTube is speech).

II. A PUBLIC EMPLOYEE'S COMMENT ABOUT A POLITICAL CANDIDATE INVOLVES A MATTER OF PUBLIC CONCERN AND IS THEREFORE SUBJECT TO THE *PICKERING* BALANCING TEST.

Public employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest" *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). The First Amendment thus protects the speech of public employees when they speak on matters of public concern. *Id.* Indeed, the public interest in "having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment" – is "great." *Id.* at 573.

The district court erroneously held that one plaintiff's speech at an election booth was not on a matter of public concern. Op. at *4-5. Further, although the district court did not reach the issue, it is clear that the "Liking" of the Sheriff's opponent's Web page was also a matter of public concern. First, the statements by

plaintiffs on Facebook and at the election booth were not personal grievances, but rather statements about their preferences for political candidates, which is quintessentially a matter of public concern. Second, speech does not have to be made publicly to be considered a matter of public concern; private speech is eligible for the *Pickering* balancing test even if only expressed to one other person.

A. Expressing Approval Or Disapproval Of A Political Candidate Is Speech On A Matter Of Public Concern.

The Supreme Court has long made clear that public employees are protected by the First Amendment when they speak about matters of public concern. *Pickering*, 391 U.S. at 568. Those First Amendment rights can be overcome only if the free speech interests are outweighed by the government's interest, as employer, in the orderly operation of the public workplace and the efficient delivery of public services by public employees. *Id.* A matter of public concern is something that is the "subject of legitimate news interest … subject of general interest and of value and concern to the public." *City of San Diego v. Roe*, 543 U.S. 77, 83-84 (2004). "To deserve First Amendment protection, it is sufficient that the speech concern matters in which even a relatively small segment of the general public might be interested." *Roe v. City of S.F.*, 109 F.3d 578, 585 (9th Cir. 1997); *Dishnow v. Sch. Dist.*, 77 F.3d 194, 197 (7th Cir. 1996)

The speech at issue here involves matters of public concern. At an election booth, one of the plaintiffs allegedly told someone handing out campaign material

for the Sheriff that "you can take this f---ing s---, and throw it in the trash can." Op. at *4. The district court erroneously concluded that "there [was] no evidence that [this] statement touches on a matter of political concern to the community as a whole." Op. at *5. The court reasoned that the statement was the "airing [of] a personal grievance" and was not "address[ed] . . . to any audience." *Id.* In so doing, the court distorted the public concern analysis. The statement addressed a matter of public concern – specifically, a citizen's views about the merits of a candidate for political office.

Far from "airing a personal grievance," the plaintiff was vocalizing his opinion about the merits of Sheriff Roberts. The Sheriff used his authority to bolster his reelection efforts, including using employees to manage his political activities. Op. at *1. One such employee was handing out campaign material at the voting location when the plaintiff spoke with him. Op. at *4. Assuming his co-worker supported the Sheriff, plaintiff chose to make his opposition known. *Id.* His comment made clear that he believed the campaign material – and its subject – was worthless; it belonged in the garbage. That is not "a matter personal to himself, such as whether he was being paid enough or given deserved promotions" *Eberhardt v. O'Malley*, 17 F.3d 1023, 1026 (7th Cir. 1994). Simply because a statement reflects an individual's personal opinion does not mean that it is only a personal grievance. To the contrary, comments on matters of public concern are

often in furtherance of personal views. *Pickering*, 391 U.S. at 568; *Rankin v. McPherson*, 483 U.S. 387 (1987).

Indeed, this Court has repeatedly held that the subject matter of plaintiffs' speech – the merits of a candidate for political office – is a matter of public concern. *See*, *e.g.*, *Conley v. Elkton*, 190 Fed.Appx. 246, 252 (4th Cir. 2006) (comment by deputy to bystander concerning whom he should vote for Sheriff was matter of public concern); *Orga v. Williams*, No. 92-2315, 1993 WL 225269, at *3 (4th Cir. June 25, 1993) (speech regarding who was most qualified to be Sheriff is "undoubtedly" protected). This case is no different. The campaign for the Sheriff's office was the subject of a highly contentious and very public debate that dominated the community for a period of time. Appellant Br. at 10-16. That is the essence of a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146 (1980) (characterizing issues of "public concern" as subjects "relating to any matter of political, social, or other concern to the community"). When society "leaves . . . questions to popular vote," they are surely "matter[s] of legitimate public concern." *Pickering*, 391 U.S. at 571.

Likewise, as explained *supra* at 7, the "Liking" of the opponent's Web page was an unmistakable expression of support for the candidate, a paradigmatic example of speech on a subject of public concern.

The public's interest in hearing speech about these issues from the plaintiffs-deputies is also plain. *See, e.g.*, *Waters v. Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."); *Sanjour v. EPA*, 56 F.3d 85, 94 (D.C. Cir. 1995) ("[G]overnment employees are in a position to offer the public unique insights into the workings of government generally and their areas of specialization in particular.").

The Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006), is not to the contrary. In that case, the Court ruled that government employees do not have First Amendment rights – even on matters of public concern – when they speak in their official capacity, pursuant to their job duties. That is not the case here. Plaintiffs' comments were made on their own time, on a non-work Website and outside an election booth where a plaintiff had just exercised his right as a private citizen to vote. The subject of the comments was not related to their official duties as sheriff's deputies. Rather, it was their personal opinions as citizens about the worth of one of the candidates for Sheriff.

Even if the Court finds that the subject of plaintiffs' comments do relate to his work, *Garcetti* makes clear that public employees still retain their First Amendment rights when speaking about issues related to their employment, as long as they are speaking as private citizens. *Id.* at 421; s*ee, e.g.*, *Pickering*, 391

U.S. at 564-565 (letter to local newspaper from teacher about school board policies is protected speech). Because plaintiffs were clearly speaking as private citizens concerning their right to vote for a candidate as private citizens, the speech is protected by the First Amendment.[4]

B. Speech Does Not Have To Be Public In Order To Be Considered A Matter Of Public Concern.

That the election booth comment was not made to a public audience is not dispositive of the public concern analysis. The Supreme Court rejected that very argument in *Givhan v. W. Line Consol. School Dist.*, 439 U.S. 410 (1979), finding that "[t]his Court's decisions in *Pickering*, *Perry*, and *Mt. Healthy* do not support the conclusion that a public employee forfeits his protection . . . if he decides to express his views privately rather than publicly." *Id.* at 414. In *Givhan*, a public school teacher was fired for comments made to a co-worker criticizing a school desegregation order. The Court held that these comments addressed a matter of public concern and were therefore subject to First Amendment protection. Merely because the comments were not made publicly did not change this analysis.

[4] The First Amendment forbids the government from punishing individuals simply for using language that officials regard as offensive. *Stevens*, 130 S.Ct. at 1585-86; *Cohen v. California*, 403 U.S. 15, 25-26 (1971). Because this principle is well established, the district court correctly concluded that the "use of profanity . . . [was] immaterial to the Court for the purposes of determining if his speech is protected." Op. at *4. Regardless, whether the plaintiff used profanity is a fact in dispute and therefore cannot be relied upon in the summary judgment analysis.

Similarly, in *Rankin*, 483 U.S. 378 (1978), a deputy constable working in the constable's office was fired for her comment to a co-worker on the recent assassination attempt on President Reagan. The statement was made in a private conversation about Reagan's policies. *Id.* at 381. Despite its private nature. the Supreme Court concluded that the statement "plainly dealt with a matter of public concern." *Id.* at 386. Moreover, "[t]he inappropriate or controversial character of a statement [was] irrelevant to the question whether it [dealt] with a matter of public concern." *Id.* at 387 (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

As in *Givhan* and *Rankin*, the comments at the election booth here were made to a single person rather than an audience. Just as in those cases, the plaintiff's comment – made on personal time outside of the office to a co-worker – dealt with matters of public concern.

C. The *Pickering* Balancing Test Favors The Plaintiffs.

Because plaintiffs' Facebook speech and the election booth comments at issue here involved matters of public concern, the district court should have applied the *Pickering* balancing test. Given the significant public interest in receiving speech about political candidates, it is highly unlikely that defendant would be able to sustain his burden of demonstrating that his interests as employer outweigh the plaintiffs' and the public's First Amendment rights. *See, e.g.*,

Connick, 461 U.S. at 152 (holding that the more tightly the First Amendment embraces the speech, the more vigorous a showing of disruption must be made; "[w]e caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern."). That is especially true here because there has been no legitimate claim that plaintiffs' speech caused any disruption to the Sheriff's office or its ability to operate efficiently. *See Pickering*, 391 U.S. at 568; *Cutts v. Peed*, 17 F. App'x 132, 136 (4th Cir. 2001) (per curiam) (an employer wishing to defend against allegations of impermissible retaliation must present evidence that the speech *actually* interfered with the functioning of his office, and may not merely assert "speculative and unsubstantiated" charges of disruptions); *McKinley v. City of Eloy*, 705 F.2d 1110, 1115 (9th Cir. 1983) (mere allegations of interference with a working relationship cannot "serve as a pretext for stifling legitimate speech or penalizing public employees for expressing unpopular views").

III. DEFENDANT IS NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE HE VIOLATED PLAINTIFFS' CLEARLY ESTABLISHED FIRST AMENDMENT RIGHTS.

A. The Allegedly Complex And Fact Intensive Nature of the *Pickering* Inquiry Does Not Mean Defendant Is Entitled to Qualified Immunity on Plaintiffs' Free Speech Claims.

Officials are not entitled to qualified immunity if "it appears that (1) they violated a statutory or constitutional right of the plaintiff, and (2) the right was

'clearly established' at the time of the acts complained of . . . ." *McVey v. Stacy*, 157 F.3d 271, 276 (4th Cir. 1998). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (internal quotation marks omitted). Contrary to the district court's assertions, Op. at *7-9, there is no need for earlier decisions on materially similar facts. *Hope*, 536 U.S. at 741. "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question . . . ." *Id.* (internal quotation marks omitted).

The district court erroneously concluded that plaintiffs' claims do not "sufficiently establish . . . a deprivation of their constitutional rights" and that defendant is therefore entitled to qualified immunity. Op. at *7. As discussed *supra*, plaintiffs' comments on Facebook and at the election booth were entitled to First Amendment protection. At the very least, the speech is entitled to be subject to *Pickering* balancing.

Assuming *arguendo* that the Sheriff violated plaintiffs' constitutional rights, the district court concluded that qualified immunity was nevertheless appropriate for two related reasons. First, in its mind, those rights were not clearly established because of the "complex" caselaw on this question. Op. at *7. The court went on

to explain that because of the "complexity of the legal questions involved in this case," there could be no way for a government official to know that he was violating the law. *Id.* at *7-9. Second, the court asserted that the Sheriff should be shielded from liability on the ground that it is allegedly rare for plaintiffs in *Pickering* cases to overcome a qualified immunity defense because of the fact-intensive nature of such cases. *Id.* In other words, according to the district court, because the *Pickering* balance is fact-dependent and difficult for courts to resolve, it would be even more difficult for a "Sheriff attempting to ensure that his actions do not impede upon the constitutional rights of his employees." *Id.* at *9.

Neither of these factors means that qualified immunity is automatically appropriate here. Indeed, several courts have come to the opposite conclusion. *See, e.g.*, *Gustafson v. Jones*, 117 F.3d 1015, 1021 (7th Cir. 1997) (simply because balancing tests produce "gray area[s]," does "not mean . . . that legal certainty never exists when the law demands the consideration of a number of different factors"); *Navab-Safavi v. Glassman*, 637 F.3d 311, 318 (D.C. Cir. 2011) (holding that "where the interests underlying the *Pickering* balancing" are "fact-dependent" a claim of qualified immunity will not be automatically upheld until there has been "some evidentiary development" to support it).

Regardless, this is the quintessential case in which the *Pickering* plaintiff overcomes qualified immunity because the application of the law to this case is

clear. As explained above, courts have repeatedly affirmed that speech regarding who should be elected to public office is speech on a matter of public concern. Moreover, there has been no showing of any actual or reasonably likely harm to the Sheriff's office that outweighs plaintiffs' free speech rights. In these circumstances, any reasonable official would have known that it was impermissible to terminate plaintiffs for their Facebook comments or statements at the election booth. *Pickering*, 391 U.S. at 568-69. When there is an "elementary violation" of the First Amendment, the "absence of a reported case with similar facts demonstrates nothing more than widespread compliance with well-recognized constitutional principles." *Eberhardt*, 17 F.3d at 1028 (Posner, J.) (public employee unconstitutionally discharged for writing a novel).

B. Because None of The Plaintiffs Were Policymakers, Their Associational Rights Were Protected by the First Amendment.

The district court granted qualified immunity on plaintiffs' association claims on the ground that "even if the Sheriff fired the plaintiffs for political reasons," it was clearly established that the Sheriff could do so because they "represented him to the public or had access to confidential information." Op. at *8. That conclusion misinterprets and misapplies the caselaw concerning public employees' associational rights. Contrary to the district court's belief, there is only a narrow exception to the general rule conferring First Amendment protection for public employees' political affiliation where an employee holds a "policymaking"

position. *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

In *Elrod*, the Court declared patronage dismissals unconstitutional because the practice limited political belief and association, and therefore violated the First and Fourteenth Amendments. However, the Court created a narrow "policymaker" exception to give effect to the democratic process. 427 U.S. at 367. The Court held that patronage dismissals of those holding "policymaking" positions were permissible, but explained that there was "[n]o clear line . . . between policymaking and nonpolicymaking positions." *Id.* at 367. Rather, the Court found the "nature of the responsibilities" decisive. *Id.* "In determining whether an employee occupies a policymaking position, consideration would also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368.

Then, in *Branti*, the Court modified the test: "[T]he ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. Whether the employee receives confidential information is relevant only if the confidential information relates to partisan political interests, not to general job duties. *Id.* at 519.

This Court has similarly focused on the duties of a particular position rather than on a blanket rule regarding who is a policymaker. Although holding that political allegiance to the Sheriff was a lawful job requirement for the deputies in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997), this Court limited its holding to "those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff." *Id.* at 1165. The Court did so "to caution sheriffs that courts examine the *job duties of the position*, and not merely the title, of those dismissed." *Id.* at 1165 (emphasis added). The central message of *Jenkins*, therefore, is that "the specific duties of the public employee's position govern whether political allegiance to [the] employer is an appropriate job requirement." *Knight v. Vernon*, 214 F.3d 544, 549 (4th Cir. 2000). Thus, in *Knight*, the Court held that a Sheriff's department employee was not a policymaker and was protected by the *Elrod-Branti* rule. *Id.* at 550. After examining the specific duties of the employee in *Knight*, the Court concluded that her responsibilities were primarily as a jailor and, as such, she was not "communicating the sheriff's policies or positions to the public." *Id.* In dealing with the assertion from the defendant that Knight likely took the same oath as a deputy sheriff law enforcement officer, the Court stated: "[E]ven if Ms. Knight did take such as oath, it would not change our decision. As we emphasized in *Jenkins*, we 'examine the job duties of the position' and Ms. Knight's duties as a jailor were essentially custodial." *Id.* at 551 (citation omitted).

Under this Court's reasoning, none of the plaintiffs were policymakers. Like the plaintiff in *Knight*, three of the plaintiffs (Dixon, Carter, and McCoy) were employed as jailors at the time of their terminations. J.A. p. 567; J.A. p. 579; J.A. p. 584. Another (Sandhofer) was employed as a civil process server at the time of his termination, but spent most of his time in the office as a jailor. J.A. p. 589. The two other plaintiffs (Bland and Woodward) were employed in non-uniformed, non-sworn administrative positions. J.A. p. 598. None of the plaintiffs, thus, had any policymaking responsibilities or access to confidential information related to partisan political concerns. *Knight*, 214 F.3d at 550-51. Looking at the specific duties of each of the plaintiffs, rather than merely their title, as dictated by *Jenkins* and *Knight*, plaintiffs were engaged in administrative and custodial duties and were therefore not policymakers.

To the extent the district court used the *Elrod-Branti* line of cases to bolster its conclusion that qualified immunity was appropriate on plaintiffs' speech claims, it did so erroneously. It is binding First Amendment law that irrespective of an employee's position, a public employer cannot terminate him or her for *speech* on a matter of public concern unrelated to his or her job duties when the speech has not harmed the employer sufficiently to outweigh the First Amendment interests at stake. *Rankin*, 483 U.S. at 390 (stating that "the responsibilities of the employee within the agency" are only one part of the *Pickering* balance). Here, unlike in

Jenkins, plaintiffs were not actively campaigning for either political candidate. They expressed their opinions on the value of both candidates to friends and co-workers as private citizens. This speech was outside of the office and caused no disruption to the Sheriff's office. *See Catletti v. Rampe*, 334 F.3d 225, 231 (2d Cir. 2003) (denying qualified immunity because "[e]ven if Catletti is considered a policymaker, however, defendants' claim fails because they have presented no evidence of . . . potential disruption").

Given this clearly established law, any reasonable official would have known that terminating plaintiffs based on their political associations violated their First Amendment rights.

CONCLUSION

For the reasons stated herein, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a) because it contains 6931 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

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August 6, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of August, 2012, the foregoing Amici Curiae Brief for American Civil Liberties Union was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system.

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