RECORD NO. 12-1671

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

BOBBY BLAND, DANIEL RAY CARTER, JR.,
DAVID W. DIXON, ROBERT W. MCCOY,
JOHN C. SANDHOFER and 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.

AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA FOUNDATION
and FACEBOOK, INC.,

Amici Supporting Appellants.

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

RESPONSE BRIEF OF APPELLEE

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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(name of party/amicus)

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/s/ 5/30/12

(signature) (date)

11/17/2011
SCC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Other Authorities

JURISDICTIONAL STATEMENT

Sheriff Roberts agrees with appellants' jurisdictional statement.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly determined that Sheriff Roberts is entitled to qualified immunity?
2. Whether the District Court correctly determined that appellants failed to satisfy *McVey v. Stacy*?
3. Whether the District Court correctly determined that appellants are not entitled to the *Elrod-Branti* protections?
4. Whether the District Court correctly determined that, in the absence of material facts in dispute, Sheriff Roberts is entitled to judgment as a matter of law?

STATEMENT OF THE CASE

Appellants commenced this action by filing a Complaint against Sheriff Roberts on March 4, 2011 in the United States District Court for the Eastern District of Virginia. J.A. 7–18. Sheriff Roberts filed an Answer and Affirmative Defenses on April 19, 2011, J.A. 19-25, and, after the District Court granted leave to amend, filed an Amended Answer and Affirmative Defenses on December 6, 2011. J.A. 26–31.

On December 9, 2011, Sheriff Roberts filed a Motion for Summary Judgment, J.A. 32–34, with a supporting Memorandum of Law. J.A. 35-246. Appellants opposed the motion on December 23, 2011, J.A. 247-1114, "conced[ing] that the First Amendment retaliation claims are only being asserted by Plaintiffs Carter, Dixon, McCoy and Woodward." J.A. 1158. Sheriff Roberts replied to Appellants' opposition on December 29, 2011. J.A. 1115-1151.

By Memorandum Opinion and Order dated April 24, 2012, J.A. 1152– 1171, the Hon. Raymond A. Jackson granted Sheriff Roberts' Motion for Summary Judgment. Appellants filed their Notice of Appeal on May 22, 2012. J.A. 1172-73.

STATEMENT OF FACTS

1. Sheriff Roberts, first elected Sheriff of the City of Hampton in 1992, was reelected in November 2009, for a term commencing on January 1, 2010. J.A. 81.

2. Sheriff Roberts' opponent in the 2009 election, James Adams, worked for Sheriff Roberts for 16 years, resigning his position as Lt. Col., third in command, to oppose Sheriff Roberts. J.A. 79. Sheriff Roberts' appointees knew, worked along side of, and maintained personal friendships, with Adams. J.A. 81.

3. In the fall of 2009, Sheriff Roberts attended one meeting for each of the Sheriff's Office three shifts, to announce his reelection campaign, and to ask

for his appointees' support. J.A. 92. Plaintiffs disagree on what Sheriff Roberts said, admitting they "read between the lines" in interpreting his comments. J.A. 119 ("he said he was the best candidate … You know, you have to just read between the lines…."); J.A. 128-29 ('I believe [what he was] saying….").

4. Sheriff Roberts had no knowledge of who any of his appointees supported. J.A. 81. Sheriff Roberts did not ask his senior administrative staff, Colonel Bowden, Major Wells-Major, Major Richardson, or Capt. McGee, for that information nor did they provide that information to him or inform him of who volunteered for the campaign or sold golf tournament tickets. J.A. 82, 93, 105, 137. Sheriff Roberts did not charge his senior staff with "going out into the work force and making his positions known with respect to his reelection." J.A. 137.

5. Sheriff Roberts did not require any employee to volunteer for his campaign, or to buy or sell golf tournament tickets. Sheriff Roberts did not condition reappointment on participation in his campaign, reappointing a significant number of individuals who did not participate and who neither bought nor sold tickets. J.A. 11, 140, 142.

6. Major Richardson did not speak with employees to solicit their support for Sheriff Roberts' reelection. J.A. 146. As he did every year, Major Richardson asked Sheriff's Office workers to sell tickets to the Sheriff's annual golf tournament. J.A. 144. Major Richardson had "a roster, and I just give

everybody five tickets and ask them to go ahead and sell the tickets for me." J.A. 145. Major Richardson kept track of who took tickets and how much money each returned. He did not share that information with Sheriff Roberts or anyone else. J.A. 141. In 2009, many employees did not buy or sell tickets. J.A. 141.

7. Employees were not required or coerced into participating in the campaign. Bland admitted he was not coerced to buy tickets, nor was he told he had to buy tickets as a condition of employment. J.A. 123. Dixon returned golf tournament tickets unsold, and admitted the Sheriff reappointed employees who did not volunteer for the golf committee or help with the Sheriff's campaign. J.A. 149, 151. McCoy volunteered to help Sheriff Roberts' campaign during the 2009 election, and admitted that no one from the Sheriff's senior staff told him if he did not support the Sheriff he would be dismissed; only fellow deputies suggested that consequence. J.A. 165. Sandhofer, admitting his participation was not coerced, fundraised for the golf tournament and told Col. Bowden he would find places for Sheriff Roberts' signs. J.A. 170, 175. Woodward bought tickets for the golf tournament. J.A. 130-31. [1]

8. Adams admitted that, during his tenure "[m]ost of the time I didn't get tickets … I was not told I needed to buy or sell … I don't think anybody knew

[1] Appellants wholly ignore their deposition testimony wherein they admitted participating in the 2009 campaign, relying exclusively on their self-serving declarations to the contrary. See App's Br. at 20, ¶¶ 22-23.

whether I bought tickets or not, to be honest with you." J.A. 78. Bland's wife, who worked for Sheriff Roberts from 2006 through her voluntary resignation in June 2009, never worked for Sheriff Roberts' campaigns, voluntarily purchased golf tournament tickets, and was "not aware of any requirement for political loyalty for continued employment." J.A. 179-80.

9. Col. Bowden and Major Wells-Major contacted those employees assigned to the two shifts scheduled to be off on Election Day, approximately 40-45 employees, for assistance at the polls. Col. Bowden did not discuss with Sheriff Roberts who volunteered. Agreeing to work the polls was not a precondition of reappointment; Sheriff Roberts reappointed many deputies who did not volunteer. J.A. 139-40.

10. Sheriff Roberts does not have a Facebook page and has never looked at Facebook, or Adams' Facebook page. Sheriff Roberts knew only that Carter's name was on Adams' page, learning that from Col. Bowden and Carter. Sheriff Roberts does not believe he learned about McCoy's being on Adams' page until after the election. J.A. 89-91. A picture of Carter's wife, who also worked at the Sheriff's office, was on Adams' Facebook page alongside Carter. J.A. 184. Sheriff Roberts reappointed Carter's wife. J.A. 84.

11. The cookout hosted by Deputy Ramona Larkins in September 2009 was a birthday party to which she invited her entire shift; it was not a campaign

event for Adams. J.A. 186. Many people from the Sheriff's Office attended. Adams did not campaign, "he was just there." J.A. 164. Sheriff Roberts learned about the party after it happened and that Adams attended, but did not know who else was there and did not look at pictures of the event. J.A. 93-94. Sheriff Roberts reappointed many deputies who attended the birthday party, including Deputies Ferguson, Blizzard, Rawles, and Larkins. J.A. 80.

12. Following his reelection, and pursuant to Va. Code § 15.2-1603, Sheriff Roberts reviewed all appointees for reappointment. In making reappointment decisions, Sheriff Roberts did not consider, or discuss with his administrative staff, whether any appointee had supported him or Adams. Sheriff Roberts met with and solicited input from members of his administrative staff, supervisors in the chain of command. Sheriff Roberts and his administrative staff discussed the overall operation of the office, staffing level, budget restraint shortfalls, and personnel issues. Sheriff Roberts made all reappointment decisions. J.A. 82, 104, 136.

13. In December 2009, Sheriff Roberts had 190 appointees, including 128 full-time sworn deputies and 31 full-time civilians, for a total of 159 full-time appointees, plus 3 unassigned active duty military, and 28 part-time appointees. J.A. 82.

14. Sheriff Roberts did not reappoint 12 out of 159 full-time employees, three civilians and nine deputies: the six appellants, Bobby Bland, Daniel Carter, Jr, David Dixon, Robert McCoy, John Sandhofer, and Debra Woodward; and six other employees, Kenneth Darling, Curtis Davis, Sammy Mitchell, James Sutherland, Desiree Weekes, and Tameka Wiggins. J.A. 82.

15. Pursuant to Va. Code § 15.2-1609, the Virginia Compensation Board fixes the number of full-time deputies allotted to each sheriff in Virginia based on the ratio of deputies to inmate population. J.A. 97, 103. Because of the declining population in the Hampton City Jail, Sheriff Roberts anticipated a reduction in the number of full-time deputy positions. J.A. 83.

16. Sheriff Roberts decided to replace civilian appointees with sworn deputies, to maintain the number of sworn deputies available, if needed, to work in the jail. Sheriff Roberts elected to fill three civilian positions, held by Bland, Woodward and Kenneth Darling, with sworn deputies, as these three counted against Sheriff Roberts' deputy allotment. J.A. 83, 97-98. Since December 2009, because of additional reductions from the Compensation Board, Sheriff Roberts has filled five other civilian positions with sworn deputies. In the last two years, Sheriff Roberts has lost eight funded deputy positions. J.A. 97.

17. Sheriff Roberts chose not to reappoint nine deputies, including the remaining four appellants, after reviewing personnel files, soliciting input from

supervisors, and considering the need for harmony and efficiency in the workplace. Sheriff Roberts considered each of the nine deputies whom he did not reappoint disruptive or their performance to be unsatisfactory, and believed that their presence hindered the harmony and efficiency of the Sheriff's Office. J.A. 83.

18. Sheriff Roberts did not reappoint Sgt. Curtis Davis because of his problems being a supervisor, coming to work, and following direction. J.A. 88. Sheriff Roberts did not reappoint Lt. Sammy Mitchell "because he had numerous problems in the training area and also running his shift… We found that his shift was lacking the supervision that was necessary." J.A. 87. Sheriff Roberts did not reappoint Deputy James Sutherland because he had violated policy by bringing shoes in for an inmate. J.A. 109. Sheriff Roberts did not reappoint Deputy Desiree Weekes because she "very rarely came to work" and "left the shift… in some binds," had been demoted from Sgt. because she could not perform those duties, and there were allegations of problems in the jail, including a purported romantic involvement with an inmate. J.A. 109-110. Sheriff Roberts did not reappoint Deputy Tameka Wiggins because she "had missed an enormous amount of work time" and exhibited "the lack of ability to get to work," and it was determined that she … would not be a good deputy to continue" with the department. J.A. 86.

19. All deputy sheriffs appointed by Sheriff Roberts are sworn deputies, and trained by the Dept. of Criminal Justice Services ("DCJS"). J.A. 84. They

have arrest powers, as set forth in Hampton Sheriff's Office Policy and Procedures No. 602, Arrest Procedures for Adults and Juveniles. J.A. 84, 187-206. The appellant deputies' training records reflect extensive law enforcement training and each sought and received approval for "Extra Duty Employment," security work, during which each wore his Sheriff's Office uniform, and was armed. J.A. 84, 207-31, 232-42.

Bobby Bland

20. Bland was the Finance Officer/Procurement and Accounts Payable. Bland was privy to Sheriff Roberts' confidential financial information, including inmate canteen funds, departmental budgets, bank accounts, and audits. Also responsible for accounts payable and receivables, Bland represented Sheriff Roberts to outside vendors. J.A. 83; J.A. 233-34.

21. Bland believes Sheriff Roberts did not reappoint him because "he maybe thought I was … going to oppose him … maybe he thought I was going to go with the opposition." J.A. 113-14.

22. Bland only discussed the election with his co-worker Woodward, admitting that he "would never talk to anyone else about [his] political views … [because it] would get out." J.A. 116-18. Even Bland's wife, Eva Bland, did not know whom he supported. J.A. 181. Bland never said anything derogatory about

Sheriff Roberts before or during the campaign, and had no conversations with administrators about his views. J.A. 115-16, 118.

23. Bland voluntarily contributed to Sheriff Roberts' campaign, purchasing raffle tickets for the golf tournament and helping to set up electronic equipment the night of the election. Bland admitted he was not coerced to buy tickets or told he had to buy tickets as a condition of employment. Bland did not actively support Adams' candidacy, contribute money to his campaign, or go to any campaign functions. J.A. 115, 119-23.

David Dixon

24. Sheriff Roberts did not reappoint Deputy Dixon because of his violation of the Standards of Conduct in insulting and using profanity toward a co-worker. When Dixon exited the election booth, in referring to Sheriff Roberts' campaign literature, he told co-worker Frances Pope, "you can take this f---ing s---, stuff, and throw it in the trash can." J.A. 99. Sheriff Roberts also considered Dixon's rocky tenure, during which the Sheriff had transferred Dixon multiple times between the jail and civil process, because of Dixon's own admission that he could not handle working as a supervisor in the jail. J.A. 106.

25. Dixon only told a few close friends whom he "could trust not to disclose that you were supporting someone else," about his support for Adams.

J.A. 148. "[A]round the office, I tried to keep it as quiet as I could, yes sir." J.A. 150.

26. Dixon claims that he had an Adams bumper sticker on his car and "assumed" that Sheriff Roberts saw it. J.A. 148. Dixon did not talk to Sheriff Roberts or his senior staff about his support for Adams, maintaining, "I'm pretty sure he knew I was supporting Adams," simply because he and Adams were close friends. J.A. 152-53.

27. Dixon returned golf tournament tickets unsold, and admitted that Sheriff Roberts reappointed employees who did not volunteer for the golf committee or help with the Sheriff's campaign. J.A. 149, 151.

Robert McCoy

28. Sheriff Roberts did not reappoint Deputy McCoy because of his long-standing difficulties in getting along with other employees. "[H]e had some difficulties in almost every area we had worked… heated arguments with deputies when he was in civil. We switched him up and brought him back to corrections. I just felt that at that particular time that it would be better for us to sever ties with Wayne." J.A. 102, 107.

29. McCoy only told people about his support for Adams whom he was confident would not disclose it. J.A. 157-58. McCoy admitted to having no evidence that Sheriff Roberts terminated him because he supported Adams; he just

"assumed" Sheriff Roberts knew. "I feel that possibly maybe some of the – couple of the people that – that I talked to may have informed him that I was not – not supporting him, I was supporting Adams." J.A. 159, 163. McCoy admitted he was good friends with Adams and went on his Facebook page to wish him good luck. J.A. 156. He has no evidence that Sheriff Roberts looked at Facebook. J.A. 159, 161-62.

30. McCoy volunteered to help Sheriff Roberts' campaign during the 2009 election, and admitted that no one from the Sheriff's senior staff told him if he did not support the Sheriff he would be dismissed; only fellow deputies suggested that. J.A. 165. McCoy did not contribute money to Adams or campaign for him; he just voted for him. J.A. 155.

John Sandhofer

31. Sheriff Roberts did not reappoint Deputy Sandhofer, assigned to Civil Process, because Sandhofer did not "integrate[] well with [the Sheriff's] staff." This was Sandhofer's first law enforcement job, he had been there for a short while, and the Sheriff did not consider it a good fit. "[I]t didn't appear that he liked what he was doing." Sandhofer's supervisors believed that, "he did not follow all the directions if he thought he needed to do something different." J.A. 100, 108.

32. Sandhofer "attempted to try and keep it [support of Adams] secret as possible," and never told Sheriff Roberts or his administration that he was not going to support the Sheriff. Sandhofer has no information that anyone told the Sheriff whom he supported. J.A. 172-74, 177.

33. Sandhofer claims that Sheriff Roberts knew he supported Adams because his girlfriend had an Adams bumper sticker on her car and Sandhofer rode in the car with her. J.A. 171-72. Further, Sandhofer's girlfriend told him the Sheriff walked past her at the polls, turned, and stared. J.A. 167. Based on that "connection … I know that the sheriff knew that I didn't support him." J.A. 172.

34. During the 2009 campaign, Sandhofer did fundraising for the golf tournament and told Col. Bowden he would find places for Sheriff Roberts' signs. He admits his participation was not coerced. J.A. 170, 175. He declined to work the polls, saying that his family came first. J.A. 168-69.

35. Sandhofer admitted that Ramona Larkins' cookout was not a political event for Adams, but was attended by friends and family. J.A. 176.

Debra Woodward

36. Woodward was Training Coordinator. She was privy to confidential personnel information, including employment applications, criminal background checks, and all internal and DCJS training records. Woodward represented Sheriff

Roberts in interactions with the public, including applicants, new hires, DCJS, and outside trainers brought into the jail. J.A. 83-4, 245-46.

37. Sheriff Roberts had asked Woodward from time to time if she wanted to become a deputy, but she repeatedly declined. J.A. 96.

38. Woodward kept her support for Adams "secret" and did not actively support Sheriff Roberts as in past elections, remaining "neutral." J.A. 126-7. Woodward "believes" someone told Sheriff Roberts that she was supporting Adams, because she was not participating in the campaign, and because she and Adams were friends. J.A. 132-33.

39. Woodward bought tickets for the golf tournament and never said anything negative about Sheriff Roberts to his senior staff. J.A. 131, 134.

Daniel Carter, Jr.

40. Sheriff Roberts reappointed Carter's wife, also a sworn deputy. J.A. 84.

41. Sheriff Roberts failed to reappoint Deputy Carter because of his inability to separate himself from his wife while they were working. J.A. 101. Carter inappropriately inserted himself into a disciplinary action involving his wife's failure to secure a jail door, provoking a public argument with Sheriff Roberts over the manner in which his wife was disciplined. J.A. 95. Sheriff Roberts "had to make a determination if – could I keep both of them, the wife and

him. And I thought he – that was the first time any deputy had raised the level of our conversation the way he did, and I just didn't feel that it would be to my best interests and my officer's best interests to keep him or keep both of them." J.A. 101.

42. Carter had disciplinary actions taken against him for errors leading to the improper release of several inmates. J.A. 183.

SUMMARY OF ARGUMENT

Appellants allege that Sheriff Roberts violated their First Amendment rights to free speech and political association when he failed to reappoint them following his November 2009 reelection. Finding no evidence that Sheriff Roberts knew whom appellants supported or made his decisions on that basis, the District Court correctly entered summary judgment in favor of Sheriff Roberts, concluding that appellants failed to engage in protected speech, that political loyalty attached to their positions and that Sheriff Roberts was entitled to qualified immunity.

Assuming *arguendo* that appellants engaged in protected speech, the District Court correctly found no causal nexus between appellants' alleged support for Sheriff Roberts' opponent and Sheriff Roberts' reappointment decisions. Appellants' "claims appear riddled with speculation," and given appellants' admitted "attempt[s] "to keep their alleged support for Adams secret … there is

little or no evidence that rises to the level of a genuine dispute about whether the Sheriff actually knew about the Plaintiffs' support of Adams." J.A. 1163-64.

With regard to qualified immunity, appellants' First Amendment rights "were not clearly established in the context of this case," given "the convoluted arena of the law in which the Sheriffs [sic] and his discharged employees have opposed one another." J.A. 1164-5. As to free expression, appellants admittedly kept their views secret and merely "believed" that Sheriff Roberts knew whom they supported. As to the Facebook issue, in December 2009, "liking" a Facebook page, a novel issue for the courts, was not clearly protected expression, nor was directing a profane comment to a co-worker. Further, even assuming that appellants engaged in protected expression, it was not clearly established at the time Sheriff Roberts made his reappointment decisions that appellants' interest outweighed Sheriff Roberts' interest in providing effective and efficient law enforcement services to the public.

As to political association, this Court's opinions do not clearly establish that political affiliation is an inappropriate requirement for sworn deputy sheriffs, with arrest powers, extensive law enforcement training and who represented Sheriff Roberts in uniform, and armed, to the public. Nor do the Court's opinions clearly establish that political affiliation was inappropriate for Sheriff's employees who were privy to confidential financial or personnel information, represented Sheriff

Roberts to various public constituencies and performed multiple tasks necessary to further Sheriff Roberts' policies and his administration of the Hampton Sheriff's Office.

STANDARD OF REVIEW

This Court reviews the granting of summary judgment *de novo*. *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 213 (4th Cir. 2007), cert. denied, 55 U.S. 1102 (2008) (citing *Laber v. Harvey*, 438 F.3d 404, 415 (4th Cir. 2006) (en banc)). "There must be sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson* v. *Liberty Lobby, Inc*., 477 U.S. 242, 249-50 (1986); *Holland*, 487 F. 2d at 213.

The judgment of the District Court should be affirmed if the result is correct, even if the court relied upon a wrong ground or gave a wrong reason. *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

ARGUMENT

I. The District Court Correctly Rejected Appellants' First Amendment Retaliation Claim

In order to prove that an adverse employment action violated their First Amendment right to freedom of speech, plaintiffs must satisfy the three-prong test set forth in *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998).

> First, the public employee must have spoken as a citizen, not as an employee, on a matter of public concern. Second, the employee's interest in the expression at issue must have outweighed the employer's "interest in providing effective and efficient services to the public." Third, there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action.

Ridpath v. Board of Governors of Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006) (quoting *McVey*, 157 F.3d at 277-78) (internal citations omitted).

Here, the District Court correctly determined that appellants did not engage in protected speech and, in any event, failed to establish a sufficient causal nexus between their alleged speech and Sheriff Roberts' failure to reappoint them.

As the District Court found, Carter, Dixon, McCoy and Woodward premised their retaliation claims on what they "believe" Sheriff Roberts knew, absent concrete evidence supporting their claims. This Court has upheld the dismissal of a First Amendment speech claim in that circumstance. In *Smith v. Frye*, 488 F.3d 263 (4th Cir.), cert. denied, 552 U.S. 1039 (2007), the plaintiff, a magistrate judge's clerk, alleged that she was fired because her employer "believed" she supported her son's candidacy for clerk rather than the incumbent. "[T]he district court concluded that because [the plaintiff] does not allege she said or did anything in support of her son's candidacy (i.e. she does not allege she exercised First Amendment rights) that her claim failed as a matter of law." *Id*. at 762. "In [her] own words, which we accept as true, Judge Frye dismissed her not because of what

her views or affiliation *were* but because of, again using [her] own word, what he 'believed' they might have been." *Id*. at 762, no. 2 (emphasis in original).

As for appellants individually, Woodward admitted she remained "neutral" and kept her support for Adams "secret." J.A. 126-27. Contrary to her claim, the evidence does not support Woodward's purported "openly protest[ing]" a petition supporting Sheriff Roberts. App's Br. at 3. As the District Court noted, Woodward did not mention this purported "protest" during her deposition, raising it for the first time in a declaration opposing summary judgment. Further, Woodward's declaration does not inform on what Sheriff Roberts knew; she stated only what she "believed" her colleagues might have thought her action meant. There is no evidence Sheriff Roberts knew about Woodward's alleged "protest."

As for Dixon, it is undisputed that he only told those he could "trust not to disclose" about his purported support for Adams and "believe[d]" Sheriff Roberts saw a bumper sticker, although he had no evidence of such. The District Court correctly determined that Dixon's statement to Francis Pope when he exited the election booth, "you can take this f---ing s---, and throw it in the trash can, with or without profanity, did not constitute protected speech. Contrary to appellants' characterization, Dixon did not "verbally indicate his support of Adams" by this comment. App's Br. at 3. Rather, his comment, "devoid of any public concern," J.A. 1162, amounted to a "personal grievance," *Stroman v. Colleton Cnty. Sch.*

Dist., 981 F.2d 152, 156 (4th Cir. 1992), "not fairly considered as relating to any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

McCoy "just assumed [Sheriff Roberts] knew" he was supporting Adams. McCoy claims to have posted a message on Adams' Facebook page that he later took down and which he only "believed" Sheriff Roberts saw. McCoy offered no evidence that Sheriff Roberts looked at Facebook or saw his posting. J.A. 159, 161-62. The District Court found that McCoy offered no evidence of the content of his message and that his "barebones assertion that he made some statement at some time is insufficient" evidence. J.A. 1158.

As for Carter, Sheriff Roberts believes that the District Court was correct in determining that Carter did not engage in protected speech by clicking the "like" button and posting his and his wife's picture on Adams' Facebook page. However, the District Court did not have to decide the issue of whether Carter's action was constitutionally protected speech, because appellants' claims fail for lack of causation, and because Sheriff Roberts is entitled to qualified immunity.

The District Court found no evidence that Sheriff Roberts knew which candidate appellants supported. On that basis, they cannot satisfy *McVey's* requirement that "there must have been a sufficient causal nexus between the protected speech and the retaliatory employment action." *Ridpath*, 447 F.3d at

316. In a First Amendment discharge case, the "initial burden lies with the plaintiff, who must show that his protected expression was a substantial or motivating factor in the employer's decision to terminate him. If the plaintiff successfully makes that showing, the defendant may avoid liability if he can show, by a preponderance of the evidence, that the decision to terminate the plaintiff would have been made even in the absence of the protected expression, more simply, the protected speech was not the but for cause of the termination." *Wagner v. Wheeler*, 13 F.3d 86, 90 (4th Cir. 1993) (internal quotations and citations omitted).

This Court characterizes the causation requirement in First Amendment retaliation cases as "rigorous" because the protected speech must have been the "but for" cause of the adverse employment action. *Ridpath*, 447 F.3d at 318 (citing *Huang v. Bd. of Governors*, 902 F.2d 1134, 1140 (4th Cir. 1990)). Appellants' evidence falls far short of meeting their burden.

Ignoring undisputed facts, appellants speculate that Sheriff Roberts' administrative staff reported to him each employee's activities and that Sheriff Roberts made his reappointment decisions based solely on those alleged reports. The record reveals that Sheriff Roberts did not know who supported him or Adams, who sold golf tickets, who participated in the campaign or who assisted at the polls. There is no evidence that Sheriff Roberts knew who attended Ramona

Larkins' cookout. Appellants who participated in Sheriff Roberts' campaign admit their participation was voluntary and that Sheriff Roberts reappointed a substantial number of employees who did not participate in the campaign or who attended the cookout.

Further, appellants ignore their "but for" causation burden and Sheriff Roberts' reasons for failing to reappoint them. Sheriff Roberts replaced Woodward and Bland with sworn deputies. Dixon breached standards of conduct and had a "rocky tenure" during which the Sheriff shifted his position multiple times because of his inability to supervise. Carter inappropriately inserted himself in his wife's disciplinary matter, verbally confronting the Sheriff, and Sheriff Roberts did not believe he could keep both on staff. Sheriff Roberts did not reappoint McCoy because of his long-standing difficulties in getting along with other employees or Sandhofer because he did not seem suited for law enforcement.

Appellants offer no evidence that Sheriff Roberts would have reappointed them "but for" their supporting Adams. As the District Court succinctly concluded, "[t]he Plaintiffs would have the Court match their guesswork with its own and credit the Sheriff with knowledge of beliefs which the Plaintiffs never actively expressed. The Plaintiffs' claims appear riddled with speculation, and the Court simply will not engage in such conjecture." J.A. 1162-63.

II. The District Court Correctly Rejected Appellant's First Amendment Political Association Claim

Typically, a public employee may not be terminated for his political affiliation. *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion); *Branti v. Finkel*, 445 U.S. 507 (1980). "[T]he First Amendment forbids government officials to discharge or threaten to discharge public employees for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position involved." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64-65 (1990).

This Court employs a two-part formulation of the *Elrod-Branti* analysis to determine if party affiliation is a lawful requirement. First, the court must "'examin[e] whether the position at issue, no matter how policy-influencing or confidential it may be, relates to partisan or political interests … or concerns.'" *Stott v. Haworth*, 916 F.2d 134, 140 (4th Cir. 1990) (citing *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241, 42 (1st Cir. 1986)). If so, the court then "'examine[s] the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement.'" *Id*. at 142.

Finally, even if the position in question is the type to which the *Elrod-Branti* protections extend, the plaintiff must demonstrate a direct causal connection

between his political association and termination. See *Knight v. Vernon*, 214 F.3d 544, 550 (4th Cir. 2000) (holding that while political allegiance was not an appropriate requirement for the position of jailer, if the plaintiff was fired "for inadequate job performance or for some other non-political reason, nothing we say here would invalidate her discharge").

Here, the District Court correctly rejected appellants' failure to state a cognizable First Amendment political association claim.

1. Deputies Carter, Dixon, Sandhofer, and McCoy

In *Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th Cir. 1997), cert. denied, 522 U.S. 1090 (1998), the Court held "that newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity. Either basis serves as proxy for loyalty to the sheriff." In *Jenkins*, the plaintiff, a deputy sheriff, was "a sworn law enforcement officer" who had "the general power of arrest." *Knight*, 214 F.3d at 550. Analyzing the deputy's function, and noting that "the office of the deputy sheriff is that of a policymaker, and that deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable," the Court determined that a deputy "may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations." *Jenkins*, 119 F.3d at 1163-1164.

In *Knight* the Court revisiting *Jenkins*, stating, "[t]he central message of *Jenkins* is that the specific duties of the public employee's position govern whether political allegiance to her employer is an appropriate job requirement." 214 F.3d at 549. The *Knight* plaintiff was an unsworn jailer, occupying the "'lowest level' position,'" whose responsibilities were "routine and limited in comparison to those of a deputy sheriff." She "worked mostly at the jail performing ministerial duties," including filing out paperwork, feeding and cooking, distributing medicine, monitoring personal hygiene, and checking on the inmates. Her "contact with the public was limited to overseeing visitors to the jail and occasionally transporting inmates to prisons or medical facilities." *Id*. at 549 - 550. Based on her limited function, the Fourth Circuit held that the jailer's political allegiance was not an appropriate requirement for her position, entitling her to First Amendment protection.

Here, *Jenkins* and *Knight* dictate that political allegiance was an appropriate requirement for appellants Carter, Dixon, Sandhofer, and McCoy. It is indisputable that each was a sworn deputy sheriff with arrest powers under Virginia law, Va. Code § 19.2-81(A) (2), and as detailed in the Hampton Sheriff's Office Policy and Procedures No. 602. J.A. 187-206. Their training records reflect extensive law enforcement training. J.A. 207–31. Further, each of these deputies sought and received approval for "Extra Duty Employment," security

work outside of the Sheriff's Office. For this security work, each deputy wore his Sheriff's Office uniform and was armed. J.A. 84, 232-42. They were not mere jailers, as the plaintiff in *Knight*.

2. Appellants Bland and Woodward

Woodward's position as Training Coordinator and Bland's as Finance Officer/Procurement and Accounts Payable, were not protected positions under *Elrod-Branti*. These positions "'relate[] to partisan or political interests … or concerns.'" *Stott v. Haworth*, 916 F.2d at 140. "[T]he ultimate question under *Branti* is whether local directors make policy *about matters to which political ideology is relevant*…." *Fields v. Prater*, 566 F.3d 381, 387 (4th Cir. 2009) (emphasis in original). In other words, there must be "a rational connection between shared ideology and job performance." *Stott*, 916 F.2d at 142 (quoting *Savage v. Gorski*, 850 F.2d 64, 68 (2d Cir. 1988)).

Bland and Woodward implemented Sheriff Roberts' policies and goals, had discretion, and necessarily provided Sheriff Roberts with truthful information upon which he made decisions and set policy. See *Jenkins*, 119 F.3d at 1162. Sheriff Roberts depended on Bland to demonstrate fiscal responsibility, by providing accurate financial information necessary for budgets and audits, and managing appropriately inmate canteen funds, and accounts payable and receivable. J.A. 83. Sheriff Roberts depended on Woodward to ensure that all appointees' training

obligations were satisfied and that the application and hiring process for prospective employees ran smoothly. J.A. 83-4. All of these tasks were necessary to further Sheriff Roberts' policies and his administration of the Sheriff's Office.

Bland and Woodward were also "privy to confidential information" and had public contact. Bland had access to considerable financial information, including inmate canteen funds, departmental budgets, bank accounts, and audits. Also responsible for accounts payable and receivables, Bland represented Sheriff Roberts to outside vendors. Bland was involved "with the preparation of the annual operating budget and the annual jail cost audit," "coordinate[d] all financial aspects of the inmate Work Release Program," "maintain[ed] vendor files," "monitor[ed] the status of all pending purchase orders and requisitions," and reconciled four Sheriff's Office bank accounts on a monthly basis. J.A. 243-44.

Woodward had access to personnel files, training records, and to information about applicants and potential new hires. J.A. 245-46. She was privy to confidential personnel information, employment applications, criminal background checks, and all internal and Dept. of Criminal Justice Services' training records. Woodward represented Sheriff Roberts in interactions with the public, including applicants, new hires, and outside trainers brought into the jail. "I was responsible for all of the deputies' and civilian staff's training. I scheduled all the training, coordinated it. I had to keep track of all of the training records of each employee

to make sure that they received all of their annual training to meet all of the accreditation. And, also, I was a liaison to the Hampton Roads criminal justice – or the training academy when – and I would schedule deputies to go for their training at the academy to be recertified and other – you know, other duties as assigned." J.A. 125-26.

Upon examination of their job responsibilities, Bland and Woodward cannot state a cognizable political association claim. Party affiliation is an appropriate consideration for the positions they held.

3. Even if Entitled to *Elrod-Branti* Protection, Appellants Cannot Establish Causation

Assuming *arguendo* that appellants are entitled to the *Elrod-Branti* protections, they have not established that their lack of participation in Sheriff Roberts' campaign, or, conversely, their alleged support of Adams, were factors in Sheriff Roberts' decisions. This Court made it clear in *Knight v. Vernon* that even if an employee is entitled to *Elrod-Branti* protections, an adverse employment decision remains valid if based on "inadequate job performance or … some other non-political reason." 214 F.3d at 550. Sheriff Roberts' reasons for failing to reappoint each appellant are clear and unrelated to his or her political affiliation.

In rejecting appellants' political association claims, the District Court concluded that, "[s]imilar to their retaliation claims, the Plaintiffs have offered little evidence which the Court views as more than mere speculation about their

"association" with Adams['] campaign. As previously mentioned, the Plaintiffs frequently explained in their deposition testimony how they attempted to keep their alleged support for Adams secret. … Still, the Plaintiffs may argue that there was a perception within the Sheriff's Office that they supported Adams. … [T]he Court maintains that there is insufficient evidence as a matter of law to support even a claim based on perceptions …." J.A. 1164.

III. The District Court Correctly Determined Sheriff Roberts' Entitlement to Qualified Immunity

The District Court properly granted Sheriff Roberts qualified immunity and entered summary judgment in his favor. [2] "The purpose of qualified immunity is

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[2] As a threshold matter, the District Court correctly rejected appellants' shallow dismissal of qualified immunity, which they repeat on appeal, premised on Sheriff Roberts' response to a deposition question that "he understood firing employees for their speech or political affiliations was not a right he possessed." J.A. 1165.

> Simply because an employer knows his employees have the right to oppose him politically does not create the inference that an objectively reasonable elected official in his position would fully understand the contours of his employees' rights. nor does it mean that he should understand the complexity of the legal questions involved in this case … Plaintiff's counsel's questioning of the Sheriff barely touches the convoluted arena of the law in which the Sheriffs [sic] and his discharged employees have opposed one another. When the Sheriff answered "no" to the question of whether he could fire an employee for political opposition, what his answer actually shows is that he fails to understand the complexity of this area of the law because there are certain instances where a government employer can demand the loyalty of his employees.

J.A. 1166.

to remove most civil liability actions, except those where the official clearly broke the law, from the legal process well in advance of the submission of facts to a jury." *Slattery v. Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) (citing *Mitchell v. Forsythe*, 472 U.S. 511, 526 (1985)). As the District Court concluded, "given the knowledge which an objective Sheriff would have had at the time, coupled with the lack of clarity under which courts have decided these issues, the Plaintiffs' rights cannot be said to be clearly established. The Court cannot find that the Sheriff 'transgressed bright lines." J.A. 1168 (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992) ("Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.")).

Officials who perform discretionary functions are not liable for damages under § 1983 where their conduct does not contravene "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects public officials from lawsuits where they have taken reasonably discretionary acts in carrying out their duties, and balances "[t]he public interest in deterrence of unlawful conduct and compensation of victims … with independence and without fear of consequences." *Id.* at 819.

The initial consideration in a qualified immunity analysis is whether "[t]aken in the light most favorable to the party asserting the injury … the facts alleged

show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201(2001). As addressed above in Sections I and II, the District Court correctly determined that "neither Plaintiffs' retaliation claim nor their association claim sufficiently establishes a deprivation of their constitutional rights." J.A. 1165. The District Court thus properly concluded that, "[t]his finding ends the inquiry. [Sheriff Roberts] is entitled to qualified immunity." J.A. 1165.

Assuming *arguendo* the infringement of a constitutional right, "the next sequential step is to ask whether the right was clearly established … in light of the specific context of the case." *Id.* "[W]hether an individual official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citation omitted). It must be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier, 533 U.S.* at 202; *Pike v. Osborne*, 301 F.3d 182, 185 (4th Cir. 2002).

Applying this part of the analysis, and assuming for argument's sake that appellants could establish a constitutional violation, the District Court correctly found that, "[b]ased on the facts that an objectively reasonable officer would have

had at the time, the Court cannot conclude that the rights were 'clearly established" such that an objectively reasonable person would know them." J.A. 1168.

A. Retaliation

It was not clearly established in December 2009 that Sheriff Roberts' failure to reappoint appellants violated their First Amendment right to free expression. This Court holds that,

> In determining whether a retaliatory employment decision violates the First Amendment, we balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting efficiency of the public services it performs through its employees." … We have recognized that in these cases "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a "particularized balancing" that is subtle, yet difficult to apply, and not yet well defined."

Pike v. Osborne, 301 F.3d at 185 (internal citations omitted).

In *Pike*, two former dispatchers claimed the sheriff terminated them in retaliation for supporting his opponent. The sheriff claimed he did not rehire them because of confidentiality concerns. The Court had before it "thin and circumstantial" evidence that the plaintiffs were the most vocal supporters of the incumbent, and the only two terminated. The Court granted the sheriff qualified immunity, finding that, "[g]iven this 'difficult-to-apply balancing test, we cannot conclude that in this case a First Amendment violation was so clearly established

that a reasonable official in Sheriff Osborne's position would know, without having to engage in guesswork, that the plaintiffs' interest in commenting on an issue of public concern outweighed the sheriff's interest in maintaining a loyal and efficient sheriff's department." *Id*. at 185.

As discussed above, in *Smith v. Frye*, 488 F.3d 263, this Court affirmed the district court's dismissal of a First Amendment retaliation claim where the plaintiff had not spoken or expressed herself, but rather "believed" that her employer knew whom she supported. *Id*. at 762.

Pursuant to this Courts' decisions in *Pike* and *Frye*, and with scant evidence of expression or causality, given appellants' admitting that they kept their views secret, a reasonable official in Sheriff Roberts' position could not have known that appellants engaged in protected speech and that their speech outweighed his interests.

While four appellants raised retaliation claims, neither Woodward's nor McCoy's allegations approach protected speech; hence, the appeal focuses on Carter's Facebook issue and Dixon's statement to a co-worker. Whether "liking" something on Facebook constitutes protected speech is a novel issue, hence the attention from the *amicus curia* parties and the difference of opinion between the District Court and Facebook and the ACLU. Even the First Amendment cases involving Facebook that the District Court relied upon were decided post-2009 and

focused on substantive posts, not an employee's simply "liking" a political opponent's page. See *Mattingly v. Milligan*, No. 4:11CV00215, 2011 WL 5184283 (E.D.Ark. Nov. 1, 2011); *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS-ECS, 2011 WL 4601022 (N.D.Ga. Aug. 29, 2011). At the time Sheriff Roberts made his reappointment decisions, it was not clearly established that hitting the "like" button on Facebook constituted protected expression.

Likewise, it was not clearly established at the time that Dixon's statement to Francis Pope was protected, i.e., that a reasonable official could interpret it as anything more than "a personal grievance" directed at one co-worker. *See Connick v. Myers*, 461 U.S. at 146 ("When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their officers, without intrusive oversight by the judiciary in the name of the First Amendment.").

Finally, even assuming appellants engaged in protected expression, it was not clearly established that their interest outweighed Sheriff Roberts' interest "in providing effective and efficient services to the public.'" *Ridpath*, 447 F.3d at 316. It is axiomatic that there is a need for governments to maintain "discipline [,] esprit de corps, and uniformity" in the law enforcement context. *Kelly v. Johnson*, 425 U.S. 238, 246 (1976). "Order and morale are critical to successful police work; a

police department is a paramilitary organization, with a need to secure discipline, mutual respect, trust and particular efficiency among the ranks due to its status as a quasi-military entity different from other public employees." *Hansen v. Soldenwagner*, 19 F.3d 573, 577 (11th Cir. 1994) (internal quotation marks and citation omitted). "The need for harmony in the workplace is substantially heightened in public safety positions." *Harris v. Wood*, 888 F. Supp. 747 (W.D.Va. 1995) (citing *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994)). This is particularly true of Virginia sheriffs, who are liable for the acts of their deputies, the safety of their deputies, and the safety of the public. See Va. Code § 15.1-41, et. seq. A reasonable official could have concluded that Sheriff Roberts' interests were primary.

The novelty of the issues presented, coupled with limitations on the First Amendment rights of those in law enforcement, undermines appellants' argument that their right to free expression in this circumstance was clearly established.

B. Political Association

As to appellants Carter, Dixon, McCoy and Sandhofer, given the Court's decisions in *Jenkins*, 119 F.3d 1156, and *Knight*, 214 F.3d 544, it was not clearly established in December 2009 that political allegiance was an inappropriate requirement for sworn deputy sheriffs with arrest powers and law enforcement training, who publicly represented the Sheriff armed and in uniform. Thus, a

reasonable official could have concluded that under existing law political affiliation was an appropriate requirement for the deputy sheriff positions in the Hampton Sheriff's Office. As this Court stated in *Fields v. Prater*, "[b]ecause application of the principles of *Branti* and *Jenkins* to new situations invariably requires particularized inquiries into specific positions in the context of specific systems, it is not always easy to say that there is a clearly drawn line between those positions for which consideration of political affiliation is allowed and those for which it is not." 566 F.3d at 389.

As to appellants Woodward and Bland, the law was not clearly established in December 2009 that political allegiance was an inappropriate requirement for employees who were privy to confidential information and represented Sheriff Roberts to the public. "[A] public employee, who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee." *McVey v. Stacy*, 157 F.3d at 278. As discussed above, given Bland's and Woodward's job descriptions and their undisputed access to sensitive financial or personnel records, and interface with the public, each had a "confidential" and "public contact" role. No case directly on point put Sheriff Roberts on notice that their "specific positions in the context of [the Hampton

Sheriff's Dept.'s] specific system[]," did not allow for "consideration of political affiliation." *Fields v. Prater*, 566 F.3d at 389. A reasonable official in Sheriff Roberts' position could have concluded that political affiliation was a lawful consideration for Bland's and Woodward's positions.

As the District Court aptly stated, "[i]n a case where the Plaintffs have asked the Court itself to engage in extensive guesswork, an objectively reasonable official in the Sheriff's position cannot be expected to engage in that same calculus. A balancing which has been difficult for multiple courts to engage is difficult more so for a Sheriff attempting to ensure that his actions do not impede upon the constitutional rights of his employees." J.A. 1168-69. Sheriff Roberts is entitled to qualified immunity.

CONCLUSION

For all of the foregoing reasons, appellee B.J. Roberts asks this Court to affirm the judgment of the District Court.

REQUEST FOR ORAL ARGUMENT

Appellee B.J. Roberts respectfully requests oral argument.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the 14th day of September, 2012, I have filed the required copies of the foregoing Response Brief of Appellee with the Clerk, United States Court of Appeals for the Fourth Circuit via hand-delivery and electronically using the Court's CM/ECF system which will send notification of such filing to the following:

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