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; 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; FACEBOOK, INC.

Amici Supporting Appellant.

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

REPLY BRIEF OF APPELLANTS

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A. Summary Judgment Standard.

The trial court was obligated to draw all permissible inferences from the underlying facts in the light most favorable to the Appellants. *Russell v. Microdyne Corp.*, 65 F.3d 1229 (4th Cir. 1995). In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000), the United States Supreme Court held that on summary judgment the trial court "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Reeves*, 530 U.S. at 138, citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 250-251 (1986). The court went on to state that the trial court must give credence to evidence favoring the non-movant, but only that evidence supporting the moving party that is essentially uncontradicted by sources of objective evidence or disinterested witnesses. *Id.*

The content of Sheriff Roberts' shift change speech clearly demonstrates his retaliatory animus and the source of it: his employees' political opposition to his candidacy. This is the rare retaliatory discharge case where the existence of the retaliatory animus is beyond ***any*** dispute. The only reasonable question, and it is reasonable only as to certain of the Appellants, is whether Sheriff Roberts directed his animus to them. Such questions, however, are to be resolved by juries, not judges. That Judge Jackson could find no evidence in this record that the

Appellants engaged in protected activity, that Sheriff Roberts held retaliatory animus and that it was directed to at least some or all of these Appellants is impossible to reconcile with applicable law and, at the very least, failed to afford the Appellants the benefit of all reasonable inferences.

B. The Appellants' Jobs were Purely Ministerial in Nature.

Sheriff Roberts cannot show, as is his clear obligation under *Branti v. Finkel*, 445 U.S. 507, 518 (1980), that political affiliation and political loyalty are appropriate and necessary job requirements for the effective performance of the Appellants' respective offices. Indeed, he has barely even attempted to do so having asserted only rather anemically that the uniformed deputies technically had the ability to arrest people and that Bland and Woodward were confidants. In this record, the following facts are clear and there is no evidence adduced by Sheriff Roberts or anyone else disputing any of them: 1) Carter, Dixon and McCoy were jailors, Sandhofer was a civil process server; 2) not one of them ever made any arrest and were unaware that they had any power to do so; 3) "[f]or the last sixteen years, there has been no known instance of anyone within the Hampton Sheriff's Office making an arrest;" and 4) in Sheriff Roberts' own words "[i]f you are to patrol and have immediate arrest powers, you have to go to the law enforcement academy" – he then confirmed that none of his employees attended this course. *Ex. 1*, Roberts Dep. 11-12, 18 (J.A. 290-291, 297); *Ex. 3*, Adams Dec. ¶5 (J.A.

516); *Ex. 6*, Carter Dec. ¶¶2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶¶2-3 (J.A. 579); *Ex. 8*, McCoy Dec. ¶¶2-3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶2 (J.A. 589); *see also* Adams Dec. (J.A. 515-516); Darling Dec. (J.A. 792-794); Mitchell Dec. (J.A. 795-796) and Wheeler Dec. (J.A. 1082-1083). It is equally clear that none of the Appellants had leadership responsibility, responsibility for keeping confidences, policy making responsibility or responsibility for speaking for the Sheriff when they were employed by the Hampton Sheriff's Office. *Ex. 6*, Carter Dec. ¶2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶2-3 (J.A. 579); *Ex. 8*, McCoy Dec. ¶2-3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶2-3 (J.A. 589-590); *Ex. 10*, Bland Dec. ¶2-4 (J.A. 595-596); *Ex. 11*, Woodward Dec. ¶2-4 (J.A. 598-599); *Ex. 12*, Corrections Job Description (J.A. 602-603); *Ex. 13*, Civil Process Job Description (J.A. 604-605); *Ex. 14*, Training Job Description (J.A. 606-607); and *Ex. 15*, Finance Job Description (J.A. 608-609). None of the Appellants was ever consulted about the Hampton Sheriff's Office Policy. *Id.* The jailor's position held by Carter, McCoy and Dixon was purely custodial in nature. *Ex. 6*, Carter Dec. ¶¶2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶¶2-3 (J.A. 579); *Ex. 8*, McCoy Dec. ¶¶2-3 (J.A. 584-585); *Ex. 12*, Corrections Job Description (J.A. 602-603). They worked exclusively in the Hampton jail. *Id.* The civil process position held by Sandhofer was routine and ministerial. *Ex. 9*, Sandhofer Dec. ¶¶2-3 (J.A. 589-590); *Ex. 13*, Civil Process Job Description (J.A. 604-605). The Appellants were not confidants of the Sheriff or

custodians of confidential information when they were employed by his office. *Ex. 6*, Carter Dec. ¶2-3 (J.A. 567-568); *Ex. 7*, Dixon Dec. ¶2-3 (J.A. p. 579); *Ex. 8*, McCoy Dec. ¶2-3 (J.A. 584-585); *Ex. 9*, Sandhofer Dec. ¶2-3 (J.A. 589-590); *Ex. 10*, Bland Dec. ¶2-4 (J.A. 595-596); *Ex. 11*, Woodward Dec. ¶2-4 (J.A. 598-599).

C. Sheriff Roberts has Failed to Demonstrate that these Jobs are of Such Character as to Justify Denying Incumbents Full First Amendment Protections.

As to the Appellants' political expression claims[1] a two phase assessment must be conducted. The first question is whether the employee spoke on a matter of "public concern." *Connick*, 461 U.S. at 147-48. No one has asserted that the Sheriff's election of November 2009 was not a matter of "public concern." The next question is whether Carter, Dixon, McCoy and Woodward "spoke" on the issue in such a way as to invoke First Amendment protections. If they did, the Court must then 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

[1] Carter, Dixon, McCoy and Woodward are asserting political expression claims in addition to political affiliation claims. Bland and Sandhofer are not asserting political expression claims. In his brief, Sheriff Roberts appears to assert that the Appellants have "conceded that the First Amendment retaliation claims are only being asserted by Plaintiffs Carter, Dixon, McCoy and Woodward." This is plainly a mistake by the Court. There is nothing anywhere in the record indicating that Sandhofer and Bland are not asserting First Amendment retaliation claims, rather they have conceded that they are not asserting political expression claims under *Pickering-Connick*. They are, however, asserting political affiliation claims under *Elrod* and *Branti*.

promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

The First Amendment affords the broadest protection to political expression of support for candidates for public office in order to "assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). It is critically important for public employees to be allowed to speak on matters of public concern in which they have particular knowledge so long as the public good is not harmed. Such employees often have unique and valuable information and should not be muzzled. They often know or have important information bearing upon whether their principals are effective in their positions, honest and whether they are discharging their obligations to the public. Muzzling the employees of an entire governmental agency is dangerous. If employees in purely ministerial positions, with no power, are to be muzzled, in addition to their superiors in the chain of command, information that is vital to the public and to the public's welfare can more easily be suppressed and hidden. This idea has always been central to First Amendment jurisprudence, especially in cases involving deputy sheriffs.

In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), this Court issued a sweeping decision in a case involving both political affiliation and expression. It held that all North Carolina deputy sheriffs, including law enforcement deputy

sheriffs with general and immediate powers of arrest, were excluded from that class of employee whose First Amendment protections were diminished because of the position held. The *Dodson* decision was stark in holding that all deputy sheriffs were entitled to the full range of First Amendment protection for both political affiliation and expression. *Dodson*, 727 F.2d at 1338, citing *Branti*, 445 U.S. at 519-520 n. 14.

The Fourth Circuit unquestionably retreated from *Dodson* in *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997). But the retreat was only partial. The *Jenkins* decision merely draws a bright line between sworn law enforcement employees who patrol in the community and have immediate and general powers of arrest and other deputies who have lesser powers. In an 8-5 *en banc* decision, the *Jenkins* court clearly limited its decision to law enforcement officers who "patrolled" and had "general powers of arrest." *Knight v. Vernon*, 214 F.3d 544, 550 (4th Cir. 2000). After the *Jenkins* decision, the Fourth Circuit explicitly noted that the responsibilities of a jailor are "routine and limited in comparison" to those of a law enforcement officer. *Id.* The *Knight* court stated "[w]e noted in *Jenkins* that a deputy is a sworn law enforcement officer. This means that a deputy has the general power of arrest, a power that may be exercised in North Carolina only by an officer who receives extensive training in the enforcement of criminal law." *Knight*, 214 F.3d at 550. The court also made note of the fact that Ms. Knight did

not "patrol" and was not "out in the county engaging in law enforcement activities on behalf of the sheriff" and that she was not "involved in communicating the sheriff's policies or positions to the public." *Knight*, 214 F.3d at 550. These exact same distinguishing facts apply to the Appellants. In fact, Sheriff Roberts has asked for and obtained a formal waiver from his accrediting agency for being evaluated for patrol duties. *Ex. 1*, Roberts Dep. 17-18 (J.A. 296-297).

D. Sheriff Roberts was Aware of Appellants' Protected Expressions of Support for Adams and Their Political Affiliation with Him.

Sheriff Roberts' contention, which has been adopted as fact in the District Court's opinion, that he had no knowledge of any of the Appellants' protected expressions or affiliations is impossible to understand and directly contradicted by simple facts in the record. It is undisputed that Sheriff Roberts held four shift change meetings at which he threatened his employees about indicating their support for Adams on Facebook and other social media. *Ex. 22*, Coronado Dec. ¶6 (J.A. 798); *Ex. 20*, Darling Dec. ¶7 (J.A. 793); *Ex. 21*, Mitchell Dec. ¶4 (J.A. 796); *Ex. 6*, Carter Dec. ¶16-18 (J.A. 571-572); *Ex. 7*, Dixon Dec. ¶14 (J.A. 582); *Ex. 8*, McCoy Dec. ¶14 (J.A. 587); *Ex. 9*, Sandhofer Dec. ¶15 (J.A. 592); *Ex. 28*, Wheeler Dec. ¶5 (J.A. 1083). There is overwhelming evidence in the Record that Sheriff Roberts held retaliatory animus against any employee who openly supported Adams. At the very least, the existence of this as a disputed material fact is beyond any reasonable question. Eight witnesses, four parties and four

non-parties, have testified that Sheriff Roberts threatened employees at the shift change meetings with termination if they supported Adams on Facebook. It would be reasonable for any jury to infer that this same retaliatory animus existed toward any employee who supported Adams, whether they did so openly, on Facebook, or in some other way.

The Facebook expressions of support, i.e., the "liking"[2] of Adams' campaign page by Carter and McCoy, the "buzz" it caused in the Sheriff's office, and the Sheriff's reaction to it provides a material level of support to all Appellants' claims. The record testimony also makes clear that both Carter and McCoy were on Facebook supporting Adams. There can be no doubt that Carter's and McCoy's presence on Adams' campaign Facebook page was understood by the Sheriff and his senior staff as evidence of their support for Adams. *Id.*, *see also Ex. 2*, Bowden Dep. 43 (J.A. 482); *Ex. 16*, McGee Dep. 71-72, 85-86 (J.A. 680-681, 694-695); *Ex. 21*, Mitchell Dec. ¶4 (J.A. 496); *Ex. 22*, Coronado Dec. ¶6 (J.A. 498); *Ex. 20*, Darling Dec. ¶7 (J.A. 793).

[2] The issue of whether a "like" as rendered in the context of this case constitutes protected speech under the First Amendment is addressed in Appellants' opening brief and in the amicus briefs of Facebook and the ACLU. Sheriff Roberts does not address this issue in his Response Brief except to note his approval of the trial court's opinion on this point.

Colonel Bowden, among others, testified as follows in her deposition:

> Q. Okay. Do you remember there coming a time when it was learned that Danny Carter was on Facebook ***supporting*** Jim Adams? (emphasis added) A: Yes.
>
> *Ex. 2*, Bowden Dep. at 43 (J.A 482-483) (emphasis added).

She learned about McCoy being on Adams' Facebook page at the same time. *Id.*

Captain Robert McGee ran the Court Services/Civil Process Division within the Hampton Sheriff's Office. His testimony regarding Jim Adams' Facebook page is illuminating:

> Q: Did there ever come a time in 2009 when you learned that Danny Carter was on Jim Adams' Facebook page basically ***supporting*** Jim Adams for Sheriff? (emphasis added)
>
> A. Yes.
>
> Q. How did you learn about that?
>
> A. It was told to me by one of the supervisors in the division [Sgt. Ford]
>
> . . .
>
> Q. Did you have – ever have any discussions with anyone else about the fact that either Danny Carter or Wayne McCoy[3] were on Jim Adams' campaign Facebook page?
>
> A. I believe it was Lt. Harding.

[3] Robert McCoy is known to many by his middle name, Wayne.

> Q. And what conversations – what did you say to Lt. Harding?
>
> A. She was there, I believe, when Sgt. Ford had told me. We were together.
>
> Q. What did Lt. Harding have to say about it?
>
> A. Everyone was basically shocked that ***they*** would put a photo up on the website.
>
> Q. Why was everyone shocked about that?
>
> A. Basically, that ***they appeared not to be supporting the Sheriff.***
>
> *Ex. 16*, McGee Dep. 71-72 (J.A. 680-681) (emphasis added)

The District Court judge held that there was no evidence that McCoy was ever on Facebook supporting Adams' campaign. This is obviously not correct. First, McCoy's declaration states he did support Adams' campaign on Facebook. *Ex. 8*, McCoy Dec. ¶10 (J.A. 586). Second, when McGee testified "***they*** appeared not to be supporting the Sheriff" he was explicitly referring to Carter's ***and*** McCoy's Facebook posts. Third, Carter saw McCoy's post in support of Adams on Facebook as did other Appellants. *Ex. 6*, Carter Dec. ¶16 (J.A. 571). Col. Bowden informed Sheriff Roberts of Carter ***and*** McCoy having posted supporting statements on Jim Adams' campaign Facebook page in the fall of 2009, prior to election day, but she does not remember the exact time. *Ex. 2*, Bowden Dep., 43-45 (J.A. 482-484); *see also* Defendant's Memorandum in Support of Summary

Judgment, ¶10, 5 (J.A. 39). These postings were reported to Bowden by Major Belinda Wells-Major. *Ex. 2*, Bowden Dep. 43-44 (J.A. 482-483). Col. Bowden acknowledges that she monitored Adams' campaign Facebook page during the campaign. *Ex. 2*, Bowden Dep. 45-46 (J.A. 484-485).

Major Richardson's inquiry into the August 2009 cookout, and statements regarding same, reveal the senior leadership's attitudes toward political opposition. In late August, 2009, Danny Carter co-hosted a cookout at Buckroe Beach in Hampton with Ramona Jones (formerly Ramona Larkin), another deputy within the Hampton Sheriff's Office. *Ex. 6*, Carter Dec. ¶8-11 (J.A. 569-570). *Ex. 17*, Larkin Dec. ¶5 (J.A. 702). The cookout occurred just before the Labor Day weekend and the traditional "kick off" of the final stretch of the 2009 election cycle. Carter invited Jim Adams to the cookout. *Id.* Upon Jones' return to work the Monday after the cookout, she was approached by her supervisor, Lt. Crystal Cooke, who stated to her "I heard Jim Adams was at your cookout" or words to that effect. *Ex. 17*, Jones Dec. ¶3 (J.A. 701). Jones acknowledged to Cooke that Adams had been present and that he had been invited by Carter. *Id.* Shortly after Jones' conversation with Lt. Cooke, Jones was approached by Major (then Captain) Kenneth Richardson. *Ex. 17*, Jones Dec. ¶4 (J.A. 702). Richardson inquired as to who attended the cookout, and Jones confirmed that Jim Adams was

there. *Id.* Major Richardson stated to Jones that the cookout had the "appearance of a campaign event" and stated specifically that "it does not look good". *Id.*

Major Richardson informed Jones that she needed to explain to the Sheriff that Carter had invited Adams, not her. *Ex. 17*, Jones Dec. ¶5 (J.A. 702). Three of the six Appellants in this action, Deputies Carter, McCoy and Sandhofer, attended the cookout at which Adams was present in late August, 2009. *Ex. 6*, Carter Dec. ¶8-12 (J.A. 569-571); *Ex. 8*, McCoy Dec. ¶9 (J.A. 585); *Ex. 9*, Sandhofer Dec. ¶9 (J.A. 591). Pictures of the event showing Sandhofer and McCoy in attendance were posted on Facebook in late summer or early fall, 2009 (J.A. 703-704). *Ex. 8*, McCoy Dec. ¶9 (J.A. 585-586); *Ex. 9*, Sandhofer Dec. ¶9 (J.A. 591), *Ex. A* to Sandhofer Dec. (J.A. 593-594). Sheriff Roberts clearly learned of the cookout and Adams' attendance shortly after it occurred. *Ex. 1*, Roberts Dep. 114-115 (J.A. 393-394). The Sheriff learned this from Col. Bowden. *Id.*

It is clear from the admissions of Major Richardson, Captain McGee, the Sheriff and Col. Bowden, that news of Carter and McCoy being on Facebook and Jim Adams attending the cookout discussed above was not only made known to the Sheriff and Hampton Sheriff's Office senior staff, but caused a great deal of discussion among them. *Ex. 1*, Roberts Dep. 103-104, 114-115 (J.A. 382-383, 393-394); *Ex. 2*, Bowden Dep. 43-44 (J.A. 482-483); *Ex. 16*, McGee Dep. 71-72 (J.A. 680-681); *Ex. 17*, Larkin Dec. ¶¶4-5 (J.A. 702).

The salient facts pertaining to each Appellant are summarized, seriatim, below. It is critical to note that each Appellant had impeccable performance records and work histories. *Ex. 1*, Roberts Dep. 84-100 (J.A. 363-379).[4] This is uncontradicted by the documentary record and is only anemically disputed by the self-serving verbal statements of the Sheriff himself – no one else. Excellent work histories are classic and affirmative evidence of pretext.

BOBBY BLAND

Senior officers within the Hampton Sheriff's Office came to Bland during the 2009 campaign season and asked that he perform various tasks in support of the Sheriff. *Ex. 10*, Bland Dec. ¶8 (J.A. 596). In all years prior to 2009, Bland had provided very active support to the Sheriff in his various re-election and campaign fund-raising efforts. *Ex. 10*, Bland Dec. ¶7 (J.A. 596). In prior years, Bland had taken an active role in putting out yard signs, working the polls on election day, handing out literature, selling tickets to fund-raising events, attending fund-raising events and performing virtually every element of campaign support service typically needed in any political campaign. *Ex. 10*, Bland Dec. ¶7 (J.A. 596).

In 2009, Major Belinda Wells-Major approached Bland and asked him to provide various types of support that he had provided in the past. *Ex. 10*, Bland Dec. ¶8 (J.A. 596). Bland declined to do so. *Id.* Moreover, it was well known to

[4] This is also clearly and specifically asserted in each Appellant's Declaration, *infra*.

Sheriff Roberts that Bland was extremely close to Deborah Davis, the Director of Administration within the Hampton Sheriff's Office. *Ex. 10*, Bland Dec. ¶2 (J.A. 595); *Ex. 24*, Davis Dec. ¶8 (J.A. 891). In fact, Bland had worked very closely with Davis throughout virtually his entire tenure with the Hampton Sheriff's Office. *Id.* Davis left the Hampton Sheriff's Office in 2008. *Id.*, *see also Ex. 24*, Davis Dec. ¶2 (J.A. 890). Davis became Jim Adams' campaign treasurer in early 2009. *Id.* It was also well known to Sheriff Roberts and his senior officers that Bland was a close friend of Jim Adams. *Id.* Sheriff Roberts himself noted Bland's involvement in his past campaigns and lack of involvement in the 2009 campaign. *Ex. 1*, Roberts Dep. pp. 135-136 (J.A. 414-415).

Bland always received either outstanding or above-average performance evaluations. None of Bland's supervisors ever reported any performance deficiencies prior to his termination. A juror could reasonably infer on the totality of all facts that Bland engaged in protected affiliation, that the Sheriff knew it and fired him in retaliation for it.

DAVID DIXON

It is not disputed that Dixon was a sworn deputy. Dixon was not a law enforcement officer and had very limited powers. Dixon's statements to Francis Pope at the polls that she could throw Sheriff Roberts' literature away clearly indicated his support for Adams and/or his opposition to Roberts. No one on the

Sheriff's staff, including the Sheriff himself, ever bothered to ask Dixon what he had said to Francis Pope. In fact, there is no evidence in this record that Dixon used any inappropriate language with Francis Pope other than the bald assertion made by the Sheriff himself. There is no declaration from Francis Pope or from any other witness that Dixon actually used any inappropriate language. In addition to making this statement at the polls, Dixon had a bumper sticker on his car supporting Adams throughout the campaign. J.A. 148.

One of the most salient facts indicating that Sheriff Roberts' termination of Dixon was a political act is Sheriff Roberts' acknowledgment that Dixon was never even asked if the Pope event happened, let alone what happened or why. *Ex. 1*, Roberts Dep. pp. 126-127 (J.A. 405-406). In years prior to 2009, Dixon had performed many services in support of Sheriff Roberts' re-election efforts, including handing out literature, placing yard signs, working the polls, attending campaign events, selling tickets to campaign events, etc. *Ex. 7*, Dixon Dec. ¶11 (J.A. 581). He did none of these things in 2009. *Id.* Sheriff Roberts himself remembers Dixon supporting his campaigns in the past, but did not note any support from Dixon in 2009. *Ex. 1*, Roberts Dep. pp. 135-136, 137 (J.A. 414-415, 416).

Dixon further testified in his deposition that he had an Adams bumper sticker on his car throughout the 2009 campaign and drove his car to work every

day. (J.A. 148). Given the political nature of the Hampton Sheriff's office a juror could reasonably infer that Dixon's supervisors, or any one of them or the Sheriff himself, either saw or learned of the sticker. This is an office where majors inquire of deputies, on the clock, about who attended cookouts, where the Sheriff's senior officers reported Facebook "likes" all the way up the chain of command, where the Sheriff himself angrily threatened his employees in shift change meetings about supporting his opponent. It is difficult to believe that Dixon's bumper sticker was not noticed in the Sheriff's parking lot and reported up the chain of command. Dixon always received either outstanding or above-average performance evaluations. None of Dixon's supervisors ever reported any performance deficiencies prior to his termination. A juror could reasonably infer on the totality of all facts that Dixon engaged in both protected expression and affiliation, that the Sheriff knew it and fired him in retaliation for it.

ROBERT McCOY

McCoy was not a law enforcement officer and had very limited powers. Facts related to McCoy are discussed at length, *supra*, and that discussion is incorporated here. It is clear that Sheriff Roberts knew about Deputy McCoy's posting of affirmative support for Jim Adams on the Adams campaign Facebook page and attendance at the cookout with Adams. *Ex. 1*, Roberts Dep. pp. 103-104, 106 (J.A. 382-383, 385). Sheriff Roberts knew of the cookout attended by Adams.

Ex. 1, Roberts Dep. p. 114-115 (J.A. 393-394). Roberts learned of the cookout and Adams' attendance from Col. Karen Bowden. *Id*., p. 115 (J.A. 394). Major Richardson knew that McCoy attended the cookout. *Ex. 19*, Richardson Dep. pp. 80-82 (J.A. 784-786). Col. Karen Bowden testified in her deposition that she learned of Deputy McCoy being on Jim Adams' campaign Facebook page, supporting his campaign, at the same time she learned of Danny Carter's online support for Adams. *Ex. 2*, Bowden Dep. pp. 43-44 (J.A. 482-483). Bowden testified that when she learned of their support, "I may have told the Sheriff." *Id.*, p. 44 (J.A. 483). McCoy always received either outstanding or above-average performance evaluations. *Ex. 8*, McCoy Dec. ¶5 (J.A. 585). None of his supervisors told him of any performance deficiencies prior to his termination. *Id.* A juror could reasonably infer on the totality of all facts that McCoy engaged in both protected expression and affiliation, that the Sheriff knew it and fired him in retaliation for it.

JOHN SANDHOFER

Sandhofer was not a law enforcement officer and had very limited powers. Captain McGee was Sandhofer's second level supervisor. *Ex. 16*, McGee Dep. p. 11 (J.A. 620). Captain McGee was genuinely baffled when Sandhofer was fired. *Id*. at 63-69 (J.A. 672-678). None of Sandhofer's supervisors had any information or belief that he was performing poorly. *Id*.

Sandhofer was well-known to Sheriff Roberts because he was hired from a prominent downtown Hampton marketing organization. *Ex. 9*, Sandhofer Dec. ¶8 (J.A. 590). Sheriff Roberts used Sandhofer for significant marketing efforts and fund raising in 2008. *Id.*, ¶8 (J.A. 590). In early 2009, Sandhofer was approached by Col. Bowden and asked to obtain prominent sign locations among downtown Hampton businesses. Bowden asked Sandhofer to do this because she knew that his experience as Executive Director of Hampton Eventmakers had made Sandhofer well known to downtown Hampton businesses. *Id.* ¶8 (J.A. 590). Sandhofer did not comply with Col. Bowden's request. *Id.* Sandhofer attended the cookout event which was attended by Adams in late August of 2009. *Id.*, ¶9 (J.A. 591). Photographs of this event surfaced on Facebook shortly thereafter. *Id.*, ¶9 (J.A. 591); *see also Ex. 18* (photographs of event) (J.A. 703-704). Captain McGee acknowledges photographs of the cookout surfacing in the late summer of 2009. *Ex. 16*, McGee Dep. pp. 73-75 (J.A. 682-684). It is obvious that Major Richardson viewed this as a political event. *Ex. 17*, Larkin Dec. ¶¶4-5 (J.A. 702). A juror could reasonably infer on the totality of all facts that Sandhofer engaged in protected affiliation, that the Sheriff knew it and fired him in retaliation for it.

DEBRA WOODWARD

Woodward had no access to confidential information in her job as training coordinator. *Ex. 11*, Woodward Dec. ¶3 (J.A. 598-599). While Woodward did

have limited contact with the public it was in a ministerial, clerical capacity. *Ex. 11*, Woodward Dec. ¶3 (J.A. 598-599); *Ex. 24*, Davis Dec. ¶3 (J.A. 890).

It is unknown to the Appellants whether Sheriff Roberts filled Woodward's position with a sworn deputy. This fact is immaterial as Woodward denies that Sheriff Roberts offered her the opportunity to become a uniformed deputy before she was terminated. *Ex. 11*, Woodward Dec. ¶2 (J.A. 598).

In early 2009 when campaign petitions were being circulated in order to place candidates' names on the ballot for the November election, Lt. George Perkins within the Hampton Sheriff's Office was circulating such a petition on behalf of the Sheriff. *Ex. 11*, Woodward Dec. ¶7 (J.A. 600). Woodward believed this to be unlawful and protested Perkins' activity to Perkins and to Sgt. John Meyers and Sgt. Sharon Mays. *Ex. 11*, Woodward Dec. ¶7 (J.A. 600). It is clear that other senior officers within the Hampton Sheriff's Office learned of Woodward's protesting Perkins' activity. *Id.* As of November, 2009, Woodward had been employed by the Hampton Sheriff's Office for 11 years in administrative staff positions. *Ex. 11*, Woodward Dec. ¶1 (J.A. 598).

In years prior to 2009, Woodward had always provided significant support to the Sheriff by working his political events, fund raising events, manning the polls on election day, placing yard signs, handing out literature, etc. While she purchased golf tournament tickets in 2009 because she felt coerced to do so, she

performed no other support roles for the Sheriff that year. It was well known in the Hampton Sheriff's Office that Woodward was close to Jim Adams. *Id.*, *see also Ex. 3*, Adams Dec. ¶6 (J.A. 516). Woodward always received either outstanding or above-average performance evaluations. None of Woodward's supervisors ever reported any performance deficiencies prior to her termination. A juror could reasonably infer on the totality of all facts that Woodward engaged in both protected expression and affiliation, that the Sheriff knew it and fired her in retaliation for it.

DANNY CARTER

Carter was not a law enforcement officer and had very limited powers. Facts related to Carter are discussed at length, *supra*, and that discussion is incorporated here. Sheriff Roberts clearly testified in his deposition that the reason he terminated Carter was because of the conversation he and Carter had immediately following Sheriff Roberts' "long train"/"short train" speech exhorting employees not to get on Facebook and threatening them with termination. *Ex. 1*, Roberts Dep. pp. 115-116 (J.A. 394-395). Sheriff Roberts' explanation of that conversation as being related to Carter's wife is inherently not believable. Every witness in this record who attended those meetings said that the subject matter involved employees on Facebook and Sheriff Roberts threatening to fire anyone who openly opposed him. *Ex. 22*, Coronado Dec. ¶6 (J.A. 798); *Ex. 20*, Darling

Dec. ¶7 (J.A. 793-794); *Ex. 21*, Mitchell Dec. ¶4 (J.A. 796); *Ex. 6*, Carter Dec. ¶17 (J.A. 571-572); *Ex. 7*, Dixon Dec. ¶14 (J.A. 582); *Ex. 8*, McCoy Dec. ¶14 (J.A. 585-587); *Ex. 9*, Sandhofer Dec. ¶15 (J.A. 592). The idea that this conversation had to do with a dispute about Carter's wife is entirely contrived. *Id*. This brazen falsehood places every one of Sheriff Roberts' contentions in this entire case in doubt.

While Carter had one disciplinary action taken against him for an error, it occurred more than five years prior to his termination. *Ex. 6*, Carter Dec. ¶20 (J.A. 572). All of his evaluations were above average or outstanding. *Ex. 6*, Carter Dec. ¶20 (J.A. 572). A juror could reasonably infer on the totality of all facts that Carter engaged in both protected expression and affiliation, that the Sheriff knew it and fired him in retaliation for it.

E. Appellants Have Established Causation.

Sheriff Roberts has offered no evidence in support of his assertions that the Appellants had job difficulties or, in the case of Woodward and Bland, had to be replaced by uniformed deputies or an explanation for not offering them the positions as he had done in the past. Not one of the Appellants has any poor evaluations in their record. In fact, quite the opposite is true. Their performance histories are exemplary and far above average in the Hampton Sheriff's Office. *Ex. 1*, Roberts Dep. 94-120 (J.A. 373-399); *Ex. 10*, Bland Dec. ¶1 (J.A. 595); *Ex. 6*,

Carter Dec. ¶2 (J.A. 567); *Ex. 7*, Dixon Dec. ¶2 (J.A. 579); *Ex. 8*, McCoy Dec. ¶2 (J.A. 584); *Ex. 9*, Sandhofer Dec. ¶2 (J.A. 589); *Ex. 11*, Woodward Dec. ¶1 (J.A. 598). There is no contrary evidence in this Record. Actual retaliatory animus is patent in the context of the "shift change" speech. This is rare direct evidence of motive and it applies to support all of the Appellants' claims, not just those on Facebook. There is ample corroborating evidence including the Sheriff establishing a work environment that was indeed a political cauldron during election season.

F. Sheriff Roberts is Not Entitled to Eleventh Amendment or Qualified Immunity.

Eleventh Amendment immunity bars suits against states and state government actors for retroactive monetary relief, but not for prospective injunctive relief. *Edelman v. Jordan*, 415 U.S. 651, 664, 665, 94 S. Ct. 1347 (1974). The trial court and Sheriff Roberts utterly failed to address this rule of law. Qualified immunity is only applicable to potentially bar liability in the Sheriff's individual capacity. All of the Appellants sought reinstatement in their respective prayers for relief. Reinstatement, back pay, and front pay in lieu of reinstatement are all elements of equitable, not legal, relief. Accordingly, Sheriff Roberts' assertions of Eleventh Amendment and qualified immunity do not reach these claims.

As to the Sheriff's qualified immunity claims, contrary to the assertions of Sheriff Roberts and the trial court, the state of the law is not "convoluted." The *Dodson* case held that sheriff deputies in North Carolina, whether serving in the capacity of police officers or jailors, were entitled to full First Amendment protections for both expression and affiliation. This was the clear law in the Fourth Circuit for nearly fifteen years until *Medford* was decided in 1997. But *Medford* dialed these protections back only for police officers. This explicit caution was noted and contained within the body of the *Medford* decision. The *Knight* case then made this clear and expressly noted that "oaths" and job titles do not matter – what matters is the actual job tasks and requirements that are performed on a daily basis. *Knight*, 214 F.3d at 550. The *Knight* case held that the plaintiff jailor was entitled to First Amendment protection because of the exact same facts presented by the Appellants in this case: she did not patrol the community in a law enforcement capacity, she did not have general and immediate powers of arrest, etc. *Id.* In the present case there is further factual support and greater clarity that these Appellants fall within the rule of *Knight*: the plaintiffs did not attend the basic law enforcement course Virginia requires and Sheriff Roberts has conceded this as being necessary for deputies to "patrol" and have "immediate powers" of "general arrest." *Ex. 1*, Roberts Dep. 11-12, 18 (J.A. 290-291, 296-297).

It is also important to note that Sheriff Roberts himself has clearly testified that he fully understood it to be unlawful to fire a deputy sheriff because of political opposition to him. *Ex. 1*, Roberts Dep. 111-113 (J.A. 390-392). Sheriff Roberts' deposition testimony on this point is not irrelevant. Given this fact, it is only reasonable to conclude that Sheriff Roberts held a correct and clear view of the law as a result of *Dodson* being the law in this Circuit for nearly fifteen years, *Medford* drawing a bright line between jailors and police officers and *Knight* then clarifying that line of demarcation. The mere fact that this area of law may be complicated cannot shield state agents in Sheriff Roberts' position from liability. Such a holding would have the practical effect of eviscerating First Amendment protections.

CONCLUSION

For the foregoing reasons, the Appellants respectfully request that this Court reverse the District Court decision granting Sheriff B. J. Roberts summary judgment and remand this case for trial on all issues presented in Appellants' Complaint.

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Dated: October 1, 2012

/s/ James H. Shoemaker, Jr
Counsel for Appellants

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I hereby certify that on this 1st day of October, 2012, I caused this Reply Brief of Appellants to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 1st day of October, 2012, I caused the required copies of the Reply Brief of Appellants to be hand filed with the Clerk of the Court.

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