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

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PLAINTIFFS – APPELLANTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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I. CERTIFICATE OF INTERESTED PARTY, INTEREST OF NAPO AS AMICUS CURIAE[1] AND SOURCE OF AUTHORITY TO FILE

The National Association of Police Organizations, Inc. ("NAPO") and its affiliate, the National Law Enforcement Officers' Rights Center of the Police Research and Education Project, is a national non-profit organization which represents law enforcement officers throughout the United States.

NAPO is a coalition of police associations and unions that serve to advance the interests and rights of law enforcement officers through legal advocacy, education and legislation. NAPO represents over 1,000 law enforcement organizations, with over 238,000 sworn law enforcement officers and 11,000 retired officers. NAPO often appears as amicus curiae in appellate cases of special importance to the law enforcement profession.

NAPO has a vital interest in the enormously important issues of law before this Court. The District Court's unprecedented holding unduly restricts the free expression and association rights of police officers and is inconsistent with this Court's precedent. If adopted by this Court, the Sheriff's positions serve as a dangerous impediment to non-retaliatory law enforcement personnel administration throughout this Circuit. NAPO respectfully urges this Court to reverse the decision below and reaffirm Fourth Circuit precedent.

NAPO has filed a motion seeking leave to file this amicus brief.

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[1] Pursuant to Rule 29(c)(5), counsel for NAPO state that no counsel for a party authored this brief in a whole or in part, and no person or entity other than NAPO or its counsel made a monetary contribution to the preparation or submission of this brief.

II. STATEMENT OF SUBJECT MATTER JURISDICTION AND BASIS FOR APPELLATE JURISDICTION

NAPO adopts Appellants' statement of jurisdiction.

III. STATEMENT OF ISSUES

Issue: Whether the District Court erred in granting summary judgment for the employer where there is significant evidence, both direct and circumstantial, that Plaintiffs' political expression was a factor in their terminations?

NAPO adopts Appellants' statement of issues presented. NAPO will limit its argument to issues involving the scope of constitutional protection under the First Amendment, particularly the right to free expression.

IV. STATEMENT OF THE CASE

NAPO adopts Appellants' statement of the case.

V. STATEMENT OF FACTS

NAPO adopts Appellants' statement of facts.

The evidence of record demonstrates that the Hampton Sheriffs' Office under Sheriff B.J. Roberts became an intense political campaign organization for Sheriff Roberts where he orchestrated electioneering activities through use of his official office. See JA586-87, 592, 600, 792-94, 795-96, 797-98, 890-91, 1082-83, Appellants' opening brief at 10 - 21. These political activities included everything from overt campaign meetings at the Sheriffs' Office during the work day, the use of office equipment to create campaign documents, using employees to work the Sheriff's barbeque function, monitoring and tracking the levels of political support of various employees, and many other overt political activities - being carried out at taxpayer expense. Id.

When Sheriff Roberts learned about one of the relevant facebook entries, he told Plaintiff Daniel Carter that: "You've made your bed, now you're going to lie in it, after the election you're out of here." JA571-72; Appellants' brief at 18. Sheriff Roberts was true to his word, and used his employment power to get rid of those employees who did not play political ball. Immediately after the election, they were fired.

The particular positions held by the Plaintiffs/Appellants are especially relevant to the legal analysis. JA602-609. Carter, McKoy and Dixon were jailors, not law enforcement officers. JA567, 579, 584. Sandhofer was a civil process server. JA589 Bland and Woodward were employed in non-uniformed, non-sworn administrative positions. JA598. None of these positions involved policymaking, leadership responsibilities, and none had ever arrested anyone. JA 567-68, 579, 584-85, 595-96, 598-99, 602-09.

VI. SUMMARY OF ARGUMENT

The District Court below erred in granting summary judgment because the evidence shows that there are genuine issues of material fact for trial and because the evidence demonstrates that Plaintiffs were terminated due to their protected political expression.

The American law enforcement community including related administrative personnel are being increasingly undermined by retaliatory employment practices that impede police operations and destroy *esprit de corps*. Especially in southern sheriffs' departments, deputy sheriffs and administrative personnel continue to suffer from one of the oldest forms of workplace retaliation: *political patronage*. In police agencies,

this is a dangerous phenomenon that undermines important law enforcement interests and constitutional rights of officers.

There is no legitimate place for political patronage in the management of rank and file deputy sheriffs, detectives and other law enforcement officers except for senior management officials where political party affiliation is a requirement for the effective performance of the position. Law enforcement officers on the front line and hard ball politics simply do not mix. When police officers are subjected to the whims of political gamesmanship and electioneering, the result is often varying degrees of public corruption.

Serving as a rank and file law enforcement officer often thrusts the officer into workplaces which are infected with de facto and camouflaged systems of political patronage. Deputy Sheriffs and law enforcement officers, particularly in the south, are no better off than they were in 1970 as explained in a leading text: "The policeman's world is spawned of degradation, corruption and insecurity... he walks alone, a pedestrian in hell." William Westley, *Violence and the Police* (MIT Press 1970).

This Court has reaffirmed the black letter law that law enforcement officers "are not relegated to a watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Law enforcement employers, including Sheriff Roberts, know the constitutional prohibitions against retaliation for protected activities and political patronage. JA 390-392 However, these kinds of expression cases in law enforcement agencies continue to arise with even greater abuse. *See*, *e.g.*, *Mansoor v. Trank*, 319 F.3d 133 (4th Cir. 2003); *Edwards v. City of Goldsboro*,

178 F.3d 231 (4th Cir. 1999), *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996), *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000).

Contemporary law enforcement bureaucracies often present vast opportunities for bureaucrats on personal political missions to employ abusive tactics. *See*, *e.g.*, *Jordan v. Ector County,* 516 F.3d 290 (5th Cir. 2008); *Breaux v. City of Garland*, 205 F.3d 150 (5th Cir. 2000).

Political patronage in law enforcement agencies has been a plaguing problem with devastating impact on deputy sheriffs and law enforcement operations. In *Hall v. Tollett*, 128 F.3d 418, 427 (6th Cir. 1997), a Tennessee Sheriff fired a deputy because he "hauled around the wrong bumper sticker." Summary judgment was denied. In *Diruzza v. County of Tehama*, 206 F.3d 1314, 1309 (9th Cir. 2000), the Ninth Circuit rejected the assertion that California deputies were subject to political patronage discharge. The Deputy in *Diruzza* supported the candidate opposing the incumbent sheriff.

This case demonstrates the practical dangers to the American law enforcement community when law enforcement employers implement political patronage schemes. The evidence demonstrates multiple genuine issues of material fact showing that Sheriff B.J. Roberts engaged in an abuse of government power to unlawfully enhance his reelection campaign through patronage practices.

Summary judgment was erroneously granted below because the District Court failed to apply this Court's precedent in several cases including in the leading causation case of *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998). Qualified immunity is also inapplicable because a Virginia Sheriff should have known that it was

unlawful to terminate non-policymaking employees because of political opposition to him. In fact, the *Sheriff testified to that effect* (JA390-92), which makes this the strongest possible case against qualified immunity.

The Sheriff was asked: "So you believe that you have the right to terminate them for any reason, including political opposition to you?" Sheriff Roberts responded "no." JA391. The Sheriff was asked again: "it's your understanding that you don't have the right to end a non-supervisory employee's employment at will for political opposition to you?" Sheriff Roberts responded: "The answer to that would be no." JA392. Therefore, qualified immunity is unavailable and the District Court erred.

VII. ARGUMENT

A) THE VIRGINIA DEPUTY SHERIFFS IN THIS CASE, LIKE OTHER AMERICAN LAW ENFORCEMENT OFFICERS, ARE ENTITLED TO FIRST AMENDMENT PROTECTIONS TO BE FREE OF POLITICAL PATRONAGE RETALIATION SCHEMES AS EMPLOYED BY SHERIFF ROBERTS WHERE HE RETALIATED AGAINST PLAINTIFFS BY TERMINATING THEIR EMPLOYMENT DUE TO PROTECTED POLITICAL EXPRESSION

Standard of Review: *De Novo*

In *West Virginia v. Barnette*, 319 U.S. 624, 642 (1943), the Court held:

> "If there is a fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or for citizens to confess by word or act their faith therein."

Barnette and its progeny recognized that governmental officials cannot impose their own notions of political views upon public employees. Government "may not condition public employment on an employee's exercise of his or her First

Amendment rights." *O'Hare v. City of Northlake*, 518 U.S. 712, 717 (1996). "The First Amendment demands a tolerance of verbal tumult, discord, and even offensive utterance." *Waters v. Churchill*, 511 U.S. 661, 672 (1994).

The Supreme Court has condemned the arbitrary practices of political patronage in public employment. *E.g. Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). *Branti* provides the key test in order for a position to be subject to permissible political patronage, whereby the employer must "demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Sales v. Grant*, 158 F.3d 768, 776 (4th Cir. 1998); *Fields v. Prater*, 566 F.3d 381 (4th Cir. 2009); *Knight v. Vernon*, 214 F.3d 544, 550 (4th Cir. 2000).

This case is remarkably different than *Jenkins v. Medford*, 119 F.3d 1156 (4th Cir. 1997) (en banc) where this Court addressed political patronage issues involving employees with different underlying state law based authority. There are vast differences in the applicable underlying Virginia and North Carolina statutory schemes. Plaintiffs herein are much closer to those in *Knight v. Vernon*, 214 F.3d 544 (4th Cir. 2000), decided after *Jenkins*. The underpinnings of *Jenkins* plainly do not apply here. The unique positions of the Plaintiffs, summarized *supra*., are completely different than those in *Jenkins*.

Few law enforcement jobs will meet this stringent *Branti* test to permit raw political patronage because party affiliation or political loyalty has no legitimate role in law enforcement activities by rank and file officers. The job positions of Plaintiffs in this case cannot possibly rise to the level of requiring a particular political party

affiliation for the effective performance of the position, which is the mandatory test by the Supreme Court in *Branti v. Finkel*, 445 U.S. 507 (1980).

In *Edwards v. City of Goldsboro*, 178 F.3d 231 (4th Cir. 1999), this Court held that an officer's course of instruction about the proper manner of carrying a concealed handgun was a matter of public concern and protected. The officer had been disciplined for teaching a concealed carry firearms course. The Goldsboro Chief of Police had politically opposed the Concealed Carry law. The Goldsboro Chief of Police's political interests in opposing the North Carolina Concealed Carry law were outweighed by the officer's First Amendment Rights. This Court also concluded that the Chief and the City Manager were not entitled to qualified immunity because the law was clearly established that the officer was entitled to engage in the expression. "Because the speech at issue is on a categorically public issue, it occupies the highest rung of the hierarchy of First Amendment values." 178 F.3d at 247.

Scores of cases demonstrate how law enforcement officers, especially deputies whose livelihoods exist in the shadows of hardball politics in sheriffs' departments, have been crushed because of simple expression. *See*, *e.g.*, *Scott v. County*, 180 F.3d 913 (8th Cir. 1999); *Brady v. Ford*, 145 F.3d 691, 704 (5th Cir. 1998); *Worrell v. Sheriff Bedsole*, 110 F.3d 1376, 1997 WL 153830 (4th Cir. 1997)(Lieutenant pressed Sheriff with repeated complaints about personnel shortages and equipment failures; expression held protected). *Worrell* and other cases show how First Amendment protections for police officers have evolved to often provide greater constitutional protection for officers, which in turn promotes greater public safety.

Some Circuits apply the traditional expression analysis in political patronage cases. For example, in *Brady v. Fort Bend County*, 145 F.3d 691, 704 (5th Cir. 1998), the incumbent Sheriff discharged several deputies who supported the opposing candidate. Applying the balancing test, the Fifth Circuit concluded that the deputies' support for the opposing candidate related to a matter of public concern. The Court then weighed the respective rights of the parties, and concluded that the balance weighed in favor of the deputies. 145 F.3d at 710.

Piver v. Pender Bd. of Educ., 835 F.2d 1076, 1081 (4th Cir. 1987) reaffirmed the enormous importance of public employee speech:

> The value of freedom of speech, the Constitution's 'most majestic guarantee' is so high that it cannot be adequately described in purely instrumental terms.

B) STANDARD OF REVIEW FOR EXPRESSION CLAIMS: GOVERNMENTAL EMPLOYERS MUST HAVE A COMPELLING GOVERNMENTAL INTEREST THAT IS PARAMOUNT AND OF VITAL IMPORTANCE IN ORDER TO SUPPRESS POLITICAL EXPRESSION

The standard of review in public employee First Amendment cases is rigorous. The Government's conduct must "survive exacting scrutiny" in order to justify suppression of expression or association. *Elrod v. Burns*, 427 U.S. 347, 362 (1976). "The interest advanced must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Id.* Sheriff Roberts' interest in practicing patronage in a police agency is neither paramount or vital.

This Court has held that a public employer must prove a "compelling governmental justification" for limiting expression or protected activities of public employees. *Hickory Firefighters v. City*, 656 F.2d 917, 921 (4th Cir. 1981). In *Rutan*

v. Republican Party, 497 U.S. 62 (1990), the Court explained how government must have "a vital interest" in order to limit First Amendment freedoms of public employees. Sheriff Roberts has not shown the requisite "compelling governmental justification" or "vital interest" to suppress Plaintiff's political expression.

The constitutional rights of law enforcement officers "must be afforded great weight." *Konraith v. Williquette*, 732 F. Supp. 973, 978 (W.D. Wis. 1990). Law enforcement officers are not relegated to a "watered down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).

C) THE DISTRICT COURT'S CAUSATION ANALYSIS WAS ERRONEOUS BECAUSE IT FAILED TO APPLY CONTROLLING PRECEDENT RECOGNIZING THAT THE CAUSATION ELEMENT MAY BE ESTABLISHED WITH CIRCUMSTANTIAL EVIDENCE TO SURVIVE SUMMARY JUDGMENT

The District Court's causation analysis is flawed because it failed to apply the correct methodology from this Court. In *Hall v. Marion School District*, 31 F.3d 183, 192 (4th Cir. 1994), this Court explained how the causation determination in a public employee expression case "is a factual one." The prevailing proof standard essentially requires a plaintiff to establish that an improper reason was a substantial or motivating factor in the decision to terminate. *E.g.*, *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008); *Rivera-Cotto v. Rivera*, 38 F.3d 611, 614 (1st Cir. 1994).

The "substantial or motivating factor" issue is ordinarily a question of fact to be decided by the jury. *Roberts v. Van Buren Public Schools*, 773 F.2d 949, 954 (8th Cir. 1985). This Court has "emphasized repeatedly the drastic nature of the summary judgment remedy and [has] held that it should not be granted unless it is perfectly

clear that there are no genuine issues of materials fact in the case." *Ballinger v. North Carolina Ag.*, 815 F.2d 1101, 1004-05 (4th Cir. 1987).

Many speech cases by law enforcement officers confirm the general rule: "causation is an issue which must be decided by the jury." *Hadad v. Croucher*, 970 F. Supp. 1227, 1241 (N.D. Ohio 1997). Proof of causation "includes the sequence of events." *Id.*; *Matulin v. Lode*, 862 F.2d 609, 613 (6th Cir. 1988)("causation is an issue of fact which must be decided by the jury"; court may rely on "sequence of events" as sufficient proof).

The doctrine of inferred intent may be used to establish causation. *E.g.*, *Rokovich v. Wade*, 819 F.2d 1393, 1398 (7th Cir. 1987)(proof of actual intent to retaliate against an employee for exercise of constitutional rights not required; jury allowed to examine totality of evidence and to "infer a retaliatory motive."), *aff'd in pertinent part en banc*, 850 F.2d 1180 (7th Cir. 1988). In the leading case of *Anthony v. Sundlin*, 952 F.2d 603, 606 (1st Cir. 1992), the Court explained:

> "what an actor says is not conclusive on a state-of-mind issue. Notwithstanding a person's disclaimers, a contrary state of mind may be inferred from what he does and from a factual mosaic tending to show that he really meant to accomplish that which he professes not to have intended."

The Court in *Anthony* observed that "circumstantial evidence alone can support a finding of political discrimination." *Id.* at 605-606.

1. Sales v. Grant Is Controlling

In *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998), this Court reversed the District Court's dismissal of a political discrimination claim by assistant registrars employed by a board of elections. *Sales* demonstrates how the causation evidence in a

patronage case is often only tangentially linked through meetings and conversations, which when considered alone might not amount to much, but taken together translate into the workings of political retaliation.

Sales is particularly instructive on the issue of causation and political discrimination:

> "Critically for this case, the Section 1983 causation language, 'subject or caused to be subjected', imposes liability not only for conduct that directly violates the right but for conduct that is the effective cause of another's direct infliction of the constitutional injury. As the First Circuit has put it: the requisite causal of connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury." [omitting citations]
>
> This principle of effective causation by indirect means, grounded in the literal language of Section 1983 and in general tort law [omitting citations] (holding that Section 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his action') [omitting citations] has been widely recognized and applied in Section 1983 litigation. 158 F.3d at 776.

Sales further explained: "Constitutional 'patronage' law is clear that the requisite political motivation, as any state of mind, can be proved by circumstantial evidence is commonly the only kind available for this purpose." 158 F.3d at 780. Applying these sound principles, Plaintiffs' evidence demonstrates the necessary inference of motive and circumstantial evidence of causation.

D) THE EMPLOYER'S PRETEXTUAL ALLEGED GROUNDS FOR TERMINATION, THE DOCTRINE OF INFERRED INTENT, AND OTHER EVIDENCE RAISES A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER PLAINTIFFS' EXPRESSION WAS A SUBSTANTIAL OR MOTIVATING FACTOR IN PLAINTIFFS' TERMINATIONS

Scores of cases demonstrate how even seemingly trivial inferences may establish improper motive and causation. *See*, *e.g.*, *Ratliff v. Wellington*, 820 F.2d 792, 796 (6th Cir. 1987)(relying upon post-speech job criticism and post-speech vindictiveness as inference of improper motive; verdict affirmed); *Morro v. City*, 117 F.3d 508 (11th Cir. 1997)(proof of causation was based on the *chronology of events*; verdict affirmed); *Stever v. Independent*, 943 F.2d 845, 851-52 (8th Cir. 1991)(sequence of events and timing and order of events raises inference of retaliatory motive); *Martinez v. City*, 971 F.2d 708, 713 (11th Cir. 1992).

In *Ware v. Unified*, 881 F.2d 906 (10th Cir. 1989), the Tenth Circuit rejected the District Court's conclusion that the employee's evidence was insufficient as a matter of law because it was subjective. "Circumstantial evidence and reasonable inferences will necessarily involve subjective elements." *Id*. at 912. The Court explained:

> "A plaintiff may create a reasonable inference of improper motivation by presenting evidence tending to show that the reasons proffered for the adverse action are without merit." *Id.* at 911, citing numerous cases.

Circumstantial evidence alone is sufficient to establish proof of both motivation and causation. This Court has recognized how improper motive is often "camouflaged." *Smith v. Town of Clarkton, N.C.*, 682 F.2d 1055, 1066 (4th Cir. 1982). As Chief Justice Rehnquist explained: "There will seldom be eyewitness testimony as to the employer's mental processes." *U.S. Postal Serv. v. Aikens*, 460 U.S. 711, 716 (1983)(direct evidence of improper intent is not required). Invidious

discriminatory or improper intent "may often be inferred from the totality of the relevant facts." *Washington v. Davis*, 426 U.S. 229, 242 (1976).

The District Court erred by failing to recognize and apply these important causation principles.

E) THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS PROHIBITS DEFENDANTS FROM IMPOSING PATRONAGE OR POLITICAL LOYALTY AS A CONDITION OF EMPLOYMENT

Sheriff Roberts' conduct further offends another bedrock First Amendment principle, the doctrine of unconstitutional conditions. The import of Sheriff Roberts' employment scheme used political patronage as an unconstitutional condition of employment.

The doctrine of unconstitutional conditions has historically prevented government officials from coercing conduct of citizens through the threat and withholding of benefits. *E.g.*, *Perry v. Sinderman*, 408 U.S. 593, 597 (1972)(noting that "we have most often applied the principle [of unconstitutional conditions] to denials of public employment"). The "unconstitutional conditions line of analysis" is most prevalent in public employment litigation. See *Rutan v. Republican Party*, 497 U.S. 62, 77-78 (1990); *Elfbrandt v. Russell*, 384 U.S. 11, 16 (1966).

Public employees "have the right to be free from the imposition of unconstitutional conditions in connection with that employment." *Buckley v. Board*, 476 F.2d 92, 97 (10th Cir. 1973). As explained in *Frost v. Railroad Commission*, 271 U.S. 583, 594 (1926):

> No conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States .... [Government] may not

> impose conditions which require the relinquishment of constitutional rights....

"Whether a condition is unconstitutional depends upon whether the government may properly sacrifice of the particular right asserted in the context of its exercise." *Rosenberger v. Rector*, 18 F.3d 269, 279 (4th Cir. 1994), *rev'd on other grounds*, 115 S. Ct. 2510 (1995).

In *Lovvorn v. City of Houston*, 846 F.2d 1539, 1545 (6th Cir. 1988), the Court explained that the doctrine of unconstitutional conditions is "a doctrine increasingly used today to limit the conditioning of government jobs and benefits upon a waiver of constitutional rights."

Retaliating against deputy sheriffs due to their political expression effectively imposes an unconstitutional condition of employment.

F) QUALIFIED IMMUNITY WAS UNAVAILABLE TO SHERIFF ROBERTS BECAUSE THE PERTINENT LAW WAS CLEARLY ESTABLISHED AS HE RECOGNIZED IN HIS DEPOSITION

Sheriff Roberts admittedly knew that he was not free to politically retaliate. JA391-392

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The burden of proof and persuasion on a qualified immunity issue is upon the defendant official. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980).

This Court's decision in *Edwards v. City of Goldsboro*, 178 F.3d 231, 250-252 (4th Cir. 1999) provides a leading qualified immunity model for application in law

enforcement expression cases. This Court denied qualified immunity to the Goldsboro Police Chief and City Manager in a case involving off-duty conduct of a police officer. There, this Court addressed issues of qualified immunity in a novel case, where the fact pattern had never before been adjudicated. There, the officer was suspended and disciplined for teaching an off-duty concealed-carry firearms safety course where the Goldsboro Chief had opposed the N.C. Concealed Carry law.

In deciding whether a defendant is entitled to qualified immunity, the Court first examines whether the plaintiff has alleged a violation of a clearly established right. If so, the Court determines whether the defendant's actions were objectively reasonable. *Siegert v. Gilley*, 500 U.S. 226, 231-35 (1991). "Clearly established" means that "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Sheriff Roberts admittedly understood that he did not have a legal right to terminate Plaintiffs for political opposition to him. JA391-392.

In *Sales v. Grant*, 158 F.3d 768, 775 (4th Cir. 1998), this Court observed that the "governing law" of adverse employment actions due to "political affiliation" is "settled and undisputed." "It is well established that a public official may not misuse his power to retaliate...." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001)(Michael, J., concurring) (denying qualified immunity to public employer official).

The crux of this case boils down to the Sheriff's retaliatory termination of Plaintiffs despite the fact that he knew it was unlawful. See Sheriff Roberts'

deposition at JA390-392. This crucial fact distinguishes this case from this Court's qualified immunity analysis in *Fields v. Prater*, 566 F.3d 381 (4th Cir. 2009). *Fields* was predicated upon a unique position, the local director for the County Social Services Department. That position is materially different than the positions before the Court here.

In *Ridpath v. Board of Governors of Marshall University*, 447 F.3d 292 (4th Cir. 2006), this Court held that the Board of Governors were not entitled to qualified immunity. This Court explained that "a constitutional right is clearly established when its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 313, quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Ridpath*, 447 F.3d at 313, citing *United States v. Lanier*, 520 U.S. 259, 270-71 (1997). The "salient question" is whether the state of the law of the time of the events in question gave the officials "fair warning" that their conduct was unconstitutional. *Id.*

In *Campbell v. Galloway*, 483 F.3d 258, 271 (4th Cir. 2006), this Court, in a police expression case, that "a right is clearly established if the contours of the right are sufficiently clear so that a reasonable officer would have understood, under the circumstances at hand, that his behavior violated that right."

In *Cromer v. Brown*, 88 F.3d 1315 (4th Cir. 1996), this Court issued a leading qualified immunity decision in an expression case brought against a sheriff. This Court reversed in pertinent part and remanded. This Court cataloged cases

demonstrating various circumstances where rights to expression have been held clearly established. 88 F.3d at 1326 at n. 8, citing *Stough v. Gallagher*, 967 F.2d 1523, 1528-29 (11th Cir. 1992)(captain spoke in support of Sheriff's political opponent). See Siegel, *Clearly Established Enough: The Fourth Circuit's New Approach To Qualified Immunity in Bellote v. Edwards*, 90 N.C. Law Rev. 1241 (2012).

The law enforcement profession has been taught these bedrock non-discriminatory principles by this Court for decades. E.g., *Cromer*, *supra*. Sheriffs well know that they are not free to practice political discrimination. See JA391-392; *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992), where the Fifth Circuit denied qualified immunity in a political retaliation case against a Sheriff. Similarly, in *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992), the Eight Circuit reached the same conclusion, denying qualified immunity to a Sheriff in a First Amendment case.

In *Jordan v. Ector County*, 516 F.3d 290 (5th Cir. 2008), the Fifth Circuit affirmed a verdict in a political retaliation case. There, the Court stated that the Supreme Court has consistently held that the First Amendment forbids government officials to discharge for political reasons "for more than two decades." It is not surprising that Sheriff Roberts acknowledged the illegality of patronage based employment decisions. JA390-392.

In *Anderson*, the Court explained the "clearly established right" principle. There, the Court explained that it is not necessary that a prior official act of the same type has been previously held unlawful. It "is not to say that an official action is protected by qualified immunity unless the very action question has previously been

held unlawful..." 483 U.S. at 640. Even a total absence of a particularized precedent does not result in qualified immunity. *See*, *e.g.*, *Anderson v. Romero*, 72 F.3d 518, 527 (7th Cir. 1995); *Wilson v. Layne*, 526 U.S. 603, 615 (1999)(there is no requirement that action in question has been previously held unlawful).

In *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992), this Court held that the Defendant was not entitled to qualified immunity even though the specific right violated had not explicitly been recognized. Clearly established rights include not only those specifically adjudicated, but also those that come within the more general applications of core constitutional principles.

As Judge Michael explained: "qualified immunity was never intended to relieve government officials from the responsibility from applying familiar legal principles to new situations." *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001)(Michael, J., concurring)(denying qualified immunity to public employer official). Because no two cases are ever completely alike, the requirement of a clearly established right is not overly stringent. See *Edwards v. City of Goldsboro*, 178 F.3d at 250-51.

As explained in *Stough v. Gallagher*, 967 F.2d 1523 (11th Cir. 1992), a demotion of a deputy sheriff for protected expression would violate the First Amendment was clearly established law in 1988. "A reasonable public official in Sheriff Gallagher's place could not have believed, in light of the holdings and rationale of *Pickering* and *Connick* and *Rankin*, that demoting Stough did not violate the First Amendment." 967 F.2d at 1529.

A plethora of similar cases specifically involving free speech rights of law enforcement officers and deputy sheriffs have rejected qualified immunity. *E.g.*, *Buzek v. County of Saunders,* 972 F.2d 992 (8th Cir. 1992); *Powell v. Basham*, 921 F.2d 165, 168 (8th Cir. 1990); *Click v. Copeland*, 970 F.2d 106 (5th Cir. 1992); *Brawner v. City of Richardson*, 855 F.2d 187, 193 (5th Cir. 1988).

In *Vasbinder v. Ambach*, 926 F.2d 1333 (2d Cir. 1991), the Court held that the law prohibiting retaliation against public employees has been clearly established since *Pickering* in 1968.

In any event, summary judgment is not favored on qualified immunity where there is an issue of motive. *Conner v. Reinhard*, 847 F.2d 384, 398-99 (7th Cir. 1988); *Prokey v. Watkins*, 942 F.2d 67, 74 n. 7 (1st Cir. 1991). Finally, Sheriff Roberts concedes in his brief that "[t]ypically, a public employee may not be terminated for his political affiliation." Appellee's brief at 23.

G) THE *PATENTLY UNCONSTITUTIONAL* EXCEPTION TO QUALIFIED IMMUNITY ALSO APPLIES THEREBY MAKING QUALIFIED IMMUNITY UNAVAILABLE TO DEFENDANT ROBERTS

Scores of cases have demonstrated how "even a total absence of precedent should not result in qualified immunity where the violation is patently unconstitutional." Avery, Rudovsky & Blum, *Police Misconduct: Law and Litigation* at section 3.6 at 3-24 - 3-26 (3d ed.), citing numerous cases including *Brokaw v. Mercer County*, 235 F.3d 1000, 1022, 1023 (7th Cir. 2000)("binding precedent is not necessary to clearly establish a right"; an analogous case may never arise because no one would litigate obvious cases); *Siebert v. Severino*, 256 F.3d 648, 655 (7th Cir. 2001); *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997).

Under the facts of this case, including the Sheriff's admissions, the "patently unconstitutional" exception applies. Virginia Sheriffs know or should know that termination of deputies for political expression is unlawful, as acknowledged by Sheriff Roberts, and are a relic of the bygone past.

VIII. CONCLUSION

This Court should reverse the District Court for the reasons cited in Appellant's brief and herein. Important issues involving political patronage in a Virginia Sheriffs Department, with disputed facts, warrants a trial on the merits.

Deputy Sheriffs in Virginia must be free, like the Tennessee Deputy in *Hall v. Tollett*, 128 F.3d 418 (6th Cir. 1997), to haul "around the wrong bumper sticker" as protected political expression.

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Dated: April 3, 2013

/s/ J. Michael McGuinness
Counsel for Amicus

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 3rd day of April, 2013, I caused this Brief of Amicus Curiae National Association of Police Organizations 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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