

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1,

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE¹

Facebook, Inc. (“Facebook”) provides a free Internet-based service that enables its users to connect with their friends and family, to discover what is going on in the world around them, and to share what matters to them and to the people they care about. Facebook’s members (“Users”) can share and publish their opinions, ideas, photos, and activities to audiences ranging from their closest friends to Facebook’s over 950 million Users, giving every User a voice within the Facebook community.

Facebook strives to create an online environment that facilitates communication, social connection, and the sharing of ideas, and in which Users can engage in debate and advocate for the political ideas, parties, and candidates of their choice. Facebook files this brief to explain how Facebook operates and thus to provide additional background that may illuminate the nature of the speech interests at stake in this case. Facebook, for itself and its Users, has a vital interest in ensuring that speech on Facebook and in other online communities is afforded the same constitutional protection as speech in newspapers, on television, and in the town square.

¹ No party’s counsel authored this brief in whole or in part. No party, party’s counsel, or any other person other than the *amicus curiae* or its counsel contributed money intended to fund preparing or submitting this brief.

On August 6, 2012, Facebook filed a motion for leave to file this brief as *amicus curiae*. Plaintiffs consented to Facebook's request, but Defendant did not.

SUMMARY OF ARGUMENT

When a Facebook User Likes a Page on Facebook, she engages in speech protected by the First Amendment. In this case, Plaintiff Daniel Ray Carter, Jr. alleges that Defendant B.J. Roberts, the elected sheriff of Hampton, Virginia, fired him from his position as deputy sheriff because Carter Liked the Facebook campaign Page of Roberts's challenger in the 2009 election, and that his firing violated his rights under the First Amendment. The district court's holding that "'liking' a Facebook page is insufficient speech to merit constitutional protection" because it does not "involve[] actual statements," J.A. 1159, betrays a misunderstanding of the nature of the communication at issue and disregards well-settled Supreme Court and Fourth Circuit precedent. Liking a Facebook Page (or other website) is core speech: it is a statement that will be viewed by a small group of Facebook Friends or by a vast community of online users.

When Carter clicked the Like button on the Facebook Page entitled "Jim Adams for Hampton Sheriff," the words "Jim Adams for Hampton Sheriff" and a photo of Adams appeared on Carter's Facebook Profile in a list of Pages Carter had Liked, J.A. 570, 578 – the 21st-century equivalent of a front-yard campaign sign. In addition, an announcement that Carter likes the campaign's Page was

shared with Carter's Friends, and Carter's name and photo appeared on the campaign's Page in a list of people who Liked the Page. *See* J.A. 570, 578. If Carter had stood on a street corner and announced, "I like Jim Adams for Hampton Sheriff," there would be no dispute that his statement was constitutionally protected speech. Carter made that very statement; the fact that he did it online, with a click of a computer's mouse, does not deprive Carter's speech of constitutional protection.

This Court should accordingly vacate the grant of summary judgment in favor of Roberts in his individual capacity as to Carter's free speech claim and remand the case so that the district court can continue the analysis it short-circuited with its erroneous conclusion that Carter did not engage in protected speech.²

FACTUAL AND PROCEDURAL BACKGROUND

A. Facebook enables fast, easy, and rich communication. Facebook Users can exchange photos, news stories, and notes about their daily lives. Over 500 million Facebook members use the site on a daily basis, and over 3 billion Likes and comments are posted every day.

² *Amicus curiae* Facebook takes no position on the district court's conclusion that Plaintiff Robert W. McCoy did not adequately describe his Facebook activity. *See* J.A. 1158. To the extent McCoy was terminated based on his Facebook activity, the analysis described here would apply to his claims as well.

Each Facebook User has a “Profile.”³ A Profile typically includes, among other things, the User’s name;⁴ photos the User has placed on the website (including one photo that serves as the User’s profile photo); a brief biographical sketch; a list of individual Facebook Users with whom the User is Friends; and – as described further below – a list of Facebook “Pages” the User has Liked. *See* J.A. 577-78. A Facebook User can adjust privacy settings to provide that various content on her Profile Page may be viewed only by Friends or more broadly by Facebook Users generally.

Unlike Profiles, which are designed for individuals to represent their identity, Facebook Pages are designed primarily for businesses, brands, sports teams, musical groups, and organizations – including religious groups and political campaigns – to share their stories and connect with Facebook Users.⁵ Each Page is managed by one or more “administrators” who control the Page and can upload photos and post messages on the Page, much as individual Users can on their Profiles.

³ Facebook recently launched a new version of Profile called “Timeline,” which offers different functionality, but those changes are not relevant to the issues in this case. *See* <http://www.facebook.com/about/timeline> (last viewed Aug. 6, 2012).

⁴ Unlike some other websites that provide similar services, Facebook requires its Users to provide their real names rather than nicknames.

⁵ *See* <http://www.facebook.com/pages/create.php> (last viewed Aug. 6, 2012).

B. When a User logs on to Facebook, the first thing the User typically sees is her Home Page. The Home Page has a three-column layout. The left-hand column contains links and tools that help the User to navigate the Facebook website. The right-hand column displays a variety of sponsored content (including advertisements) and non-sponsored content.⁶ The center column of the Home Page contains the News Feed, which, for most Users, is the primary place where they see and interact with news and stories from and about their Friends and Pages they have connected with on Facebook. Each User's News Feed contains a customized and constantly updated flow of "stories" about the User's Friends and selected Pages. Just as a User's News Feed includes information shared with that User by his Friends, the information that the User chooses to share with his Friends appears in *their* News Feeds.

C. The "Like" button on Facebook, represented by a thumbs-up icon, is a way for Users to share information on Facebook. The Like button (like its pre-2010 precursor, the "Become a Fan" button) appears next to many different types of content on Facebook – including brands, politicians, religious organizations, charitable causes, and other entities that have established a presence on Facebook. Many other (that is, non-Facebook) websites have also incorporated Like buttons

⁶ Since 2011, the right-hand column of the Home Page has displayed a Ticker that includes updates concerning a User's Friends' Facebook activity, and sponsored content.

When a Facebook User clicks the Like button, she is expressing an idea, both via her Profile and via her Friends' News Feeds. She is telling other Users something about who she is and what she likes.

D. Deputy Sheriff Carter visited th

J.A. 1158-59. The court reached that conclusion because, in its view, Liking a Facebook Page does not “involve[] actual statements.” J.A. 1159. Having concluded that Carter did not engage in protected speech, the court did not conduct the remainder of the First Amendment analysis required under *McVey*. J.A. 1160.

ARGUMENT

“LIKING” THE ADAMS CAMPAIGN’S FACEBOOK PAGE WAS SPEECH ENTITLED TO CONSTITUTIONAL PROTECTION

A. Liking a Facebook Page is entitled to full First Amendment protection. The district court reached a contrary conclusion based on an apparent misunderstanding of the way Facebook works; the resulting decision clashes with decades of precedent and bedrock First Amendment principles. The Court should squarely reject the district court’s decision and reasoning, and reconfirm that online speech must be afforded the same level of constitutional protection as all other forms of speech.

1. Contrary to the district court’s understanding, Liking a Facebook Page (or a non-Facebook website) *is* speech: it generates verbal statements and communicative imagery on the User’s Profile (or Timeline) Page – *i.e.*, a statement that the User likes a particular Page, accompanied by the Page’s icon – as well as similar statements and imagery in the News Feeds of the User’s Friends. In this case, by Liking the Adams campaign’s Page, Carter ensured that the slogan “Jim Adams for Hampton Sheriff” would appear alongside Adams’s photo on Carter’s

Facebook Profile. J.A. 576, 578. Carter also triggered an announcement on his Friends' News Feeds and on the campaign's Page itself that he liked the campaign's Page. Any visitor to Carter's Profile would have been able to see the candidate's photograph and campaign slogan.⁹ Carter's use of Facebook to "convey his message" was "speech" within the meaning of the First Amendment. *Cohen v. California*, 403 U.S. 15, 18 (1971).

Critically, Carter's statements are entitled to no lesser degree of First Amendment protection because he spoke online rather than elsewhere – a principle that the district court did not expressly question. The Supreme Court so held in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), and this Court has likewise recognized the principle. *See Reno*, 521 U.S. at 870 ("As the District Court found, 'the content on the Internet is as diverse as human thought.' We agree with its conclusion that our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium." (citation omitted)); *Ostergren v. Cuccinelli*, 615 F.3d 263, 272 (4th Cir. 2010).

2. Speech on Facebook – including the speech generated by Users'

Liking of websites – may cover a vast array of subjects; like speech in any other

⁹ The district court stated that it would "not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page." J.A. 1159-60. As demonstrated above, no inference is necessary; the content of the statements was in the record. Moreover, it should not matter whether Carter generated those statements with one click of a mouse or two dozen keystrokes on a keyboard.

medium, *all* such speech is entitled to First Amendment protection with limited exceptions not at issue here. In this case, moreover, when Carter Liked a political candidate's campaign Page, he issued an endorsement "at the core of our electoral process and of the First Amendment freedoms." *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-23 (1989) (internal quotation marks omitted). "[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office." *Id.* at 223 (internal

campaign makes this form of speech, like the residential signs in *City of Ladue*, especially valuable and

First Amendment and this Court's decision in *McVey*.¹⁰ At least two other circuit courts have held that putting up campaign signs, placing campaign bumper stickers

The district court also concluded that Carter's Like was "not the kind of substantive statement that has previously warranted constitutional protection." J.A. 1159. But the First Amendment is not limited to "substantive statements." "Most of what we say to one another lacks religious, political, scientific, educational, journalistic, historical, or artistic value (let alone serious value), but it is still sheltered from government regulation." *United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (internal quotation marks omitted). Whenever a Facebook User Likes a website – whatever the subject – she generates statements that warrant protection. Moreover, a campaign endorsement in particular need not be elaborate or lengthy to constitute political speech. *See Jackson v. Bair*, 851 F.2d 714, 720 (4th Cir. 1988) (holding that, to be protected, a public employee's speech "need only be *upon* a matter of public concern; its practical effectiveness in addressing the concern is irrelevant"). As *City of Ladue* demonstrates, Carter need not have published a detailed analysis of the competing candidates' platforms for his speech to warrant First Amendment protection. His endorsement of his preferred candidate is enough.

police officer because of his participation in controversial musical performances. *See also Corbett v. Duerring*, No. 2:10-cv-01053, 2012 WL 1855193, at *1, *6, *11 (S.D. W. Va. May 21, 2012) (denying defense motion for summary judgment on claim of unlawful discharge in retaliation for both actual speech and symbolic speech in the form of selling hot dogs). A political endorsement is entitled to no less protection.

Furthermore, the evidence before the district court demonstrated that several members of the sheriff's office saw and understood Carter's message. Former deputy sheriff Robert McCoy testified that, after Carter Liked Adams campaign's Page, "everybody was saying that Danny Carter is out of there because he supported Adams openly." J.A. 159-160. Lt. Sammy Mitchell knew from Carter's Facebook Profile that Carter was supporting Adams. J.A. 1031, 1069. Capt. Robert McGee and Sgt. Theodore Ford were "shocked" to learn that Carter had visited the Adams campaign's Facebook Page. J.A. 614, 680. According to Kenneth Darling, a civilian employee of the office, Roberts himself said that "certain employees were on the Facebook page of his opponent, Jim Adams, indicating their support of Adams for Sheriff." J.A. 793. Referring to the same incident, former deputy sheriff John Sandhofer said that Roberts "express[ed] his displeasure that certain employees were openly on Jim Adams' campaign Facebook page supporting him," J.A. 592, and former deputy sheriff David Dixon described Roberts's remarks similarly, J.A. 582.¹²

¹² Col. Karen Bowden, the second-ranking officer in the department, testified that she did not infer from Carter's act that Carter supported Adams. *See* J.A. 444, 509. This denial alone cannot justify granting summary judgment to Roberts. *See Corbett*, 2012 WL 1855193, at *10 ("At bottom, defendants contend that they did not subjectively understand the content of plaintiff's message, and this may ultimately be the case. But if this alone were a defense to a First Amendment retaliation claim, all defendants in symbolic speech cases could win summary judgment simply by claiming that they did not grasp the message the plaintiff intended to convey.").

Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir. 1996) (same); and comments made in a lunch table conversation in a prison staff dining room, *see Jackson*, 851 F.2d at 716, 720 (same). Even if Carter's Liking the campaign's Page had resulted only in statements visible to Carter's Friends and no one else, that speech would be protected by the First Amendment.

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rules of Appellate Procedure 29(c)(7) and 32(a)(7)(c), the undersigned certifies that this brief complies with the applicable type-volume limitations. Exclusive of the portions exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief contains 4,405 words. This certificate was prepared in reliance on the word-count function of the word-processing system (Microsoft Word 2007) used to prepare the text of this brief.

The undersigned further certifies that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 30(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times Roman font.

/s/ Aaron M. Panner

Aaron M. Panner

CERTIFICATE OF SERVICE

I hereby certify that, on the 6th day of August 2012, I caused the foregoing Brief of Facebook as *Amicus Curiae* in Support of Plaintiffs-Appellants and in Support of Vacatur to be filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to all participants in the case who are registered CM/ECF users.

/s/ Aaron M. Panner

Aaron M. Panner

