Fourth Annual Entertainment Law Symposium

CLE MATERIALS

Tuesday, March 13, 2018
10:30 a.m. – 2:45 p.m.
Fordham Law School
Costantino Room
150 W 62nd St, New York, NY 10023
Table of Contents

CLE Materials

Panel 1
Say What You Need to Say: Social Media & The First Amendment

Panel 2
The Show Must go on: Live Events & the Law
@realDonaldTrump and the First Amendment

BY ALEX ABDI
JUNE 19, 2017

The Supreme Court’s decision today in Packingham v. North Carolina (https://www.supremecourt.gov/opinions/16pdf/15-1194_08l1.pdf) explicitly recognizes the centrality of social media to public discourse. The Court highlighted “Twitter, [where] users can petition their elected representatives and otherwise engage with them in a direct manner.”

We were particularly interested to read the Court’s thoughts on Twitter, given the letter (https://www.documentcloud.org/documents/3859469-White-House-Twitter-Letter-FINAL.html) we sent to President Trump on June 6 contending that @realDonaldTrump is a “designated public forum” under the First Amendment and that the Constitution bars the President from blocking users from the account based on their views.

While the White House hasn’t responded to our letter, the letter has sparked a lively debate among First Amendment scholars and commentators. Packingham will, no doubt, feature in that debate going forward. Below are our replies to a few of the objections raised so far:

**Objection 1: @realDonaldTrump can’t be a public forum because Twitter is a private company.**
At Bloomberg, Noah Feldman argues (https://www.bloomberg.com/view/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets) that @realDonaldTrump can’t be a public forum because Twitter is a private company. The mere fact that a forum is on private property can’t be determinative, though. In Southeastern Promotions v. Conrad (https://scholar.google.com/scholar_case?case=5179591971825287612), the Supreme Court held that the government had created a public forum by opening up to the public a private theater that the government had leased. Just this year, a federal district court held (https://scholar.google.com/scholar_case?case=12518687213539211030) that official use of Facebook may create a public forum, notwithstanding Facebook’s private ownership. These cases make sense. Imagine that your county held town hall meetings at a private community center and excluded people who belonged to a particular political party. Would anyone defend those exclusions on the ground that the meetings were held on private property?

As Amanda Shanor writes (https://takecareblog.com/blog/the-president-s-twitter-account-and-the-first-amendment) at the Take Care blog, the public-forum doctrine “may apply to spaces or channels of communication that the government controls or uses for official purposes, even if they are owned by a private entity.” Eugene Volokh, writing (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/14/more-on-the-first-amendment-and-realonaldtrump/?utm_term=.0ef1b083988a) at the Washington Post, makes the same observation. The fact that Twitter is a private company doesn’t mean the First Amendment is inapplicable to President Trump’s Twitter account. The key question is whether the President has opened up a forum for expressive activity to the public.

**Objection 2: @realDonaldTrump can’t be an official account because Trump established the account before he became president.**

Some online commentators think it’s decisive that President Trump created his Twitter account prior to his election. This formalistic approach to public-forum doctrine makes little sense. The appropriate test is a functional one: has President Trump used his account in a way better understood as personal or as official? Thus, in Davison v. Loudoun County (https://scholar.google.com/scholar_case?case=278043782675196279), a federal district court allowed a public-forum claim to proceed after noting that a county board member had used her private Facebook page in a manner seemingly official in nature.

Commentators who focus on when President Trump’s account was established may be concerned with protecting President Trump’s own First Amendment rights. But while the President certainly has First Amendment rights, the strength of those rights turns on whether he is speaking in a private capacity or an official one.

In other contexts, courts conduct a functional analysis to disentangle public officials’ private speech from their official speech. For example, lawsuits by government employees alleging that they have been fired in violation of the Constitution on the basis of the content of their speech often turn on how closely the speech relates to the official position they held at the time—the more closely the speech relates to their official duties, the less likely the speech will be found to be protected. Courts have also construed (https://scholar.google.com/scholar_case?)
case=14061005021805874521&c=827+f.3d+145+&hl=en&as_sdt=6,33) the Freedom of Information Act to require disclosure of correspondence determined to be official in nature even if it was sent over private email accounts. (Think back to the controversy over Hillary Clinton’s private email account.)

The appropriate inquiry here is a functional one, not a formalistic one. That @realDonaldTrump was created before Donald Trump was elected is not determinative.

### Objection 3: @realDonaldTrump is best characterized as a personal account.

Eugene Volokh argues (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/06/is-realdonaldtrump-violating-the-first-amendment-by-blocking-some-twitter-users/?utm_term=.a9b0dfc420f6) that @realDonaldTrump is best understood as a personal account. John Samples of the CATO Institute makes a similar argument (https://www.cato.org/blog/do-you-have-constitutional-right-follow-president-twitter): “It is difficult to understand Trump’s tweets as official government communications of the sort that might push his account into designated public forum territory.”

In our view, neither Professor Volokh nor Mr. Samples fully engages the relevant facts. Given the way that President Trump uses the account, it’s hard for us to see how the account can plausibly be characterized as “personal.” To expand on a list that Jameel Jaffer began in an earlier post (https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/14/more-on-the-first-amendment-and-realdonaldtrump/?utm_term=.bb0456c59006), here’s why:

- In the account’s “bio” line, President Trump identifies himself precisely as he does on the @POTUS account, as the “45th President of the United States of America.” The location line says “Washington D.C.” The background image is a photograph of Air Force One.
- The President uses the account almost exclusively to communicate about government affairs, including international affairs, economic policy, and appointments to senior government positions. This is not an account focused on personal interests, say, television, golf courses, or family.
- The President makes major official announcements—sometimes for the first or only time—on the account. For example, the President announced (https://twitter.com/realdonaldtrump/status/872419018799550464) at (https://twitter.com/realdonaldtrump/status/872419018799550464) 44 a.m. on June 7 that he intended to nominate Christopher Wray for the position of FBI director. The President announced this through @realDonaldTrump before he (or anyone else) announced it through any other channel. @POTUS did not tweet it at all.
- The President uses the account to engage foreign leaders, to frame world events, to conduct diplomacy, and to state foreign policy goals (https://twitter.com/realdonaldtrump/status/856172056932700164).
- The White House press secretary, Sean Spicer, has said (http://www.nbcnews.com/politics/white-house/trump-s-tweets-official-statements-spicer-says-n768931) that the administration considers the President’s tweets to be “official statements.”
The White House social media director, Dan Scavino, promotes (https://twitter.com/Scavino45/status/87221311090778114) @realDonaldTrump, @POTUS, and @WhiteHouse equally as channels through which “President Donald J. Trump . . . communicat[es] directly with you, the American people! #USA.”

In the travel-ban litigation, the Ninth Circuit treated (http://cdn.ca9.uscourts.gov/datastore/uploads/general/cases_of_interest/17-15589%20per%20curiam%20opinion.pdf#page=40) tweets from @realDonaldTrump as official statements.

Some of the President’s aides are reported (http://www.politico.com/story/2017/06/10/dan-scavino-trump-social-media-profile-239381) to have posted some of the tweets.

The President hasn’t limited access to the account to, for example, family members, friends, or business colleagues. To the contrary, the account is open to everyone—except those who are blocked because of their viewpoints.

Professor Volokh argues that some of these factors aren’t sufficient in themselves to establish that @realDonaldTrump is something other than a personal account. Perhaps he’s correct about that, but it doesn’t matter. The question isn’t whether any of the factors individually would be sufficient, but whether the combination of them is. And in our view the answer to that question is clear. As Bob Loeb writes (https://www.lawfareblog.com/blocking-twitter-users-presidential-account-0) at Lawfare: “Given how the account is used, it is clear that Mr. Trump is writing in his official capacity as President of the United States.” We agree with Loeb—and the White House Press Secretary, the White House Social Media Director, and the Ninth Circuit—that tweets from @realDonaldTrump should be understood as official statements.

The press secretary’s description of the tweets as “official statements” is also more probative than Professor Volokh credits. It’s true, as he says, that the press secretary’s statements do not “bind the president,” but that’s not the claim. It’s not that President Trump is bound by the press secretary’s statement, but that the press secretary’s statement is good evidence of what President Trump intended and how the White House itself views the tweets.

**Objection 4: holding that @realDonaldTrump is a public forum would impose unworkable obligations on Twitter.**

Noah Feldman and John Samples suggest that recognizing @realDonaldTrump as a public forum would impose unworkable or even unconstitutional obligations on Twitter. Mr. Samples writes (https://www.cato.org/blog/do-you-have-constitutional-right-follow-president-twitter): “A determination that Trump’s account represents a designated public forum would greatly undermine Twitter’s ability to establish rules for the digital pseudo-commons it maintains.” And Professor Feldman writes (https://www.bloomberg.com/view/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets): “A judicial decision forcing Twitter to make Trump unblock followers would actually violate Twitter’s First Amendment rights.”

These critiques suggest a misunderstanding of our complaint. Our quarrel is not with Twitter; it’s with President Trump. Twitter is entitled to allow its users to block whomever they want to, but the President, in using his account in an official capacity, is bound by different rules, one of which bars him from blocking
people because of their viewpoints. Any remedy for what we contend is unconstitutional blocking would run against Trump and his subordinates, not against Twitter.

**Objection 5: even if @realDonaldTrump is a public forum, the First Amendment doesn’t bar President Trump from blocking trolls.**

This argument doesn’t fairly characterize what’s going on. We’ve now spoken with many people blocked by @realDonaldTrump. All of them were blocked soon after they criticized the president or his policies. The president isn’t blocking “trolls”; he’s blocking critics.

The situation might be different if the president were intervening, in some viewpoint-neutral way, to ensure the integrity of the forum he established. The First Amendment surely doesn’t require public officials to surrender online public forums to individuals whose actions would render the forums worthless. Perhaps the President could impose a bar against users who tweet at him more than 100 times a day. But any government intervention in this public forum would have to be viewpoint neutral, and it would have to be applied evenhandedly.

**Objection 6: even if @realDonaldTrump is a public forum, the injury to individuals who’ve been blocked is trivial.**

The @realDonaldTrump account allows several functions relevant to our letter: (1) it allows President Trump to broadcast messages to the public; (2) it allows members of the public to respond; and (3) it allows members of the public to engage each other directly in the comment threads created by each of the President’s tweets.

When President Trump blocks someone from his account, he interferes with each of these functions. A blocked user can’t read the President's tweets, respond directly to the President’s tweets, or participate in the discussions surrounding each of the President’s tweets.

Some have pointed out that there are workarounds to the first of these burdens: blocked users can still view the President’s tweets by logging out of their accounts or by logging in under different accounts. That’s true. If President Trump blocked my @AlexanderAbdo account, I could still read his tweets by logging out of that account or creating a new one.

But these possibilities are not constitutionally adequate alternatives for users blocked by President Trump any more than the possibility of reentering a town meeting in disguise, or listening in through an open window, would be a constitutionally adequate alternative for a person wrongly ejected from a town hall.

And, in any event, the objection goes only to the first burden. Even if a person blocked by President Trump can view the President’s tweets, she will be seriously inhibited in her ability to participate in the discussion surrounding his tweets, and this is a substantial constitutional harm, akin to any classic viewpoint-based exclusion of a speaker from a public forum. A blocked person could participate using a new account that hasn’t been blocked, but assuming she maintains the views that caused President Trump to block her in the
first instance, the result would be a game of whack-a-mole. Even then, she would be participating not as herself, but in pseudonymous disguise, without her followers or social status to give context and weight to her contributions to the debate.

The president’s practice of blocking critics has a subtler distortive effect, too. By excluding those with opposing viewpoints, President Trump is manufacturing echo chambers in the discussions that surround his posts. Those in the echo chambers aren’t exposed to the views of those who disagree with the President, and they lose the opportunity to engage those people in debate.
claims place a ceiling on future innovation. The concept of converting a mobile video signal to an HDTV is an abstract concept, and neither the patents’ individual claims nor their ordered combination can save it from that conclusion. As such, Amazon’s motion to dismiss is **GRANTED** in full. An appropriate order shall issue.

**Brian C. DAVISON, Plaintiff,**

**v.**

**LOUDOUN COUNTY BOARD OF SUPERVISORS, et al., Defendants.**

1:16cv932 (JCC/IDD)

United States District Court,

E.D. Virginia,

Alexandria Division.

Signed 01/04/2017

**Background:** County resident brought action against county board of supervisors and an official who served as chair of the board, alleging official violated his First Amendment and due process rights by blocking him from official’s social media page. Official moved to dismiss for failure to state a claim, and resident moved for summary judgment.

**Holdings:** The District Court, James C. Cacheris, J., held that:

1. district court would decline to consider affidavits submitted by resident and official in ruling on resident’s motion for summary judgment;
2. resident was not estopped from asserting claims against official;
3. resident adequately alleged that official’s page was a limited public forum under the First Amendment;
4. resident stated a claim for violation of his due process rights;
5. fact that board was a party to action did not preclude resident’s official capacity claims against official; and
6. official was not entitled to qualified immunity from resident’s claims.

Motions denied.

1. **Federal Civil Procedure ⇑2491.5**

   Complaint allegations, cited by county resident in support of his motion for summary judgment in action alleging county official violated his First Amendment and due process rights by blocking him from official’s social media page, did not establish a factual basis for summary judgment. U.S. Const. Amends. 1, 14.

2. **Federal Civil Procedure ⇑2536.1**

   In county resident’s action alleging county official violated his First Amendment and due process rights by blocking him from official’s social media page, district court would decline to consider affidavits submitted by resident and official in ruling on resident’s motion for summary judgment, since the affidavits were submitted after the close of briefing and on the eve of the hearing, such that neither party had an opportunity to meaningfully address the allegations contained in the other’s affidavit. U.S. Const. Amends. 1, 14.

3. **Judgment ⇑570(1), 585(3), 654**

   County resident was not estopped from asserting claims against county official for violations of his First Amendment and due process rights, based on official blocking him from her social media page, even though resident’s prior claims against official were dismissed with prejudice, since resident did not previously raise the First Amendment and due process claims. U.S. Const. Amends. 1, 14.
4. Constitutional Law \(\Rightarrow 2151\)  
   Counties \(\Rightarrow 47\)
   County resident adequately alleged that social media page of county official, who served as chair of county board of supervisors, was a social media site governed by county's social media policy, which encouraged visitors to submit questions, comments, and concerns within limits, such that official's page was a limited public forum under the First Amendment; resident alleged that official used the page in connection with her official duties and incorporated an image of the page into his complaint which showed that official's page included information about her in her capacity as chair of the board, did not include any information of a personal nature, and was visible to the general public. U.S. Const. Amend. 1.

5. Constitutional Law \(\Rightarrow 1743\)
   Once it has opened a limited public forum, for First Amendment purposes, the government must respect the lawful boundaries it has itself set. U.S. Const. Amend. 1.

6. Constitutional Law \(\Rightarrow 1742\)
   Limited public forums are characterized by purposeful government action intended to make the forum generally available for certain kinds of speech. U.S. Const. Amend. 1.

7. Constitutional Law \(\Rightarrow 1730, 2149\)
   A metaphysical forum created by a government policy is subject to the same First Amendment analysis regardless of whether that policy is applied to online speech. U.S. Const. Amend. 1.

8. Constitutional Law \(\Rightarrow 1734\)
   Courts look to the policy and practice of the government to ascertain whether it intended to designate a non-traditional forum as a public forum under the First Amendment. U.S. Const. Amend. 1.

9. Constitutional Law \(\Rightarrow 2151\)  
   Counties \(\Rightarrow 47\)
   County resident stated a claim against county official, who served as chair of county board of supervisors, for violation of his due process rights under the Fourteenth Amendment, where he alleged that official blocked him from her social media page without providing him an opportunity to voice objections. U.S. Const. Amend. 14.

10. Civil Rights \(\Rightarrow 1360\)
    Fact that county board of supervisors was a party to county resident's action alleging that county official who served as chair of the board violated his First Amendment and due process rights by blocking him from her social media page did not preclude resident's official capacity claims against official, since office of the chair of county board of supervisors was distinct from the county board of supervisors itself. U.S. Const. Amends. 1, 14.

11. Civil Rights \(\Rightarrow 1376(4)\)
    County official was not entitled to qualified immunity from county resident's claims alleging official violated his First Amendment and due process rights by blocking him from her social media page; it was well established that online speech was subject to the same First Amendment standard as offline speech and that government could create a metaphysical limited public forum for speech by promulgating policy like county's social media policy, and a reasonable government official would have been put on notice that suppressing public comment in violation of that policy would run afoul of the First Amendment and that depriving an individual of their First Amendment rights without warning or recourse implicated that individual's due process rights. U.S. Const. Amends. 1, 14.
12. Civil Rights

A government official is entitled to qualified immunity with respect to civil rights suits against her in her individual capacity unless (1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly established right of which a reasonable person would have known.

Brian C. Davison, Leesburg, VA, pro se.

MEMORANDUM OPINION

James C. Cacheris, UNITED STATES DISTRICT COURT JUDGE

Defendant Phyllis Randall, Chair of the Loudoun County Board of Supervisors, blocked Plaintiff Brian Davison from what Plaintiff claims is her official County Facebook page. Plaintiff alleges that this violated his First Amendment and Due Process rights. Defendant Randall has moved to dismiss Plaintiff's claims against her [Dkt. 35], and Plaintiff has in turn moved for summary judgment on those claims [Dkt. 39]. For the reasons that follow, the Court will deny both Motions.

I. Background

A detailed discussion of the events giving rise to this case can be found in the Court's Memorandum Opinion [Dkt. 11] granting in part and denying in part a previous motion to dismiss. As such, the Court repeats here only what is germane to its rulings on the present Motions.

Plaintiff is a resident of Loudoun County, Virginia, who takes "an interest in rules of ethics for public officials." Compl. [Dkt. 1] ¶ 1. He filed suit against the Loudoun County Board of Supervisors and its individual members after the Board allegedly ratified a subordinate’s decision to delete his comments from the Board's official Facebook page.

Plaintiff’s original Complaint referenced a previous incident during which Defendant Randall allegedly blocked Plaintiff from commenting on her official Facebook page. See id. ¶¶ 24, 33. That incident, however, was not the subject of any of Plaintiff’s claims.

All Defendants—including Defendant Randall—moved to dismiss Plaintiff’s original Complaint. In a Memorandum Opinion, the Court granted that Motion in part and denied it in part. As relevant here, the Court dismissed Plaintiff’s claims against the individual members of the Loudoun County Board of Supervisors, but permitted Plaintiff's First Amendment and Due Process claims to proceed against the Board itself. In doing so, the Court found Plaintiff had plausibly alleged that Loudoun County's Social Media Comments Policy, see Compl. Exh. 11 [Dkt. 1–11], serves to designate the Board's official Facebook page as a limited public forum under the First Amendment.

Plaintiff then filed an Amended Complaint [Dkt. 33] adding claims against Defendant Randall based on the incident mentioned in Plaintiff's original Complaint. To wit, Plaintiff alleges that Defendant Randall utilizes an official Facebook page in connection with her duties as Chair of the Loudoun County Board of Supervisors. See Am. Compl. [Dkt. 33] ¶¶ 5–6. He claims that Defendant Randall uses her Facebook page to communicate with her constituents, and through it “solicit[s] and allow[es] public comments and discussions.” See id. ¶¶ 5–6. He further contends that, as an official County social media website, the County's Social Media Comments Policy applies to Defendant Randall's Face-
book page. See id. ¶¶ 1, 2, 10; Compl. [Dkt. 1] ¶¶ 21, 29–30.

Plaintiff claims that on February 3, 2016, Defendant Randall blocked him from posting comments to her official Facebook page. See Am. Compl. [Dkt. 33] ¶ 15. She allegedly did so because Plaintiff had made “comments critical of either Randall’s actions or those of other government officials of Virginia.” Id. Defendant Randall later acknowledged that she had blocked Plaintiff from her Facebook page. See id. ¶ 17. Plaintiff argues that this violated his First Amendment and Due Process rights.

On November 17, 2016, Defendant Randall filed a Motion to Dismiss Plaintiff’s claims against her [Dkt. 35]. Plaintiff subsequently filed a Motion for Partial Summary Judgment [Dkt. 39] with respect to his new claims.

II. Legal Standard

“Summary judgment is appropriate only if taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, ‘no material facts are disputed and the moving party is entitled to judgment as a matter of law.’” Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (quoting Ausherman v. Bank of Am. Corp., 352 F.3d 896, 899 (4th Cir.2003)). An unresolved issue of fact precludes summary judgment only if it is both “genuine” and “material.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A factual dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party” on that issue. Id. at 248, 106 S.Ct. 2505. It is material if it “might affect the outcome of the suit under the governing law.” Id. “In the end, the question posed by a summary judgment motion is whether the evidence ‘is so one-sided that one party must prevail as a matter of law.’” Lee v. Bevington, 647 Fed.Appx. 275 (4th Cir. 2016) (quoting Anderson, 477 U.S. at 252, 106 S.Ct. 2505).


The Court is mindful that Plaintiff is proceeding in this matter pro se. A “document filed pro se is ‘to be liberally construed,’ and ‘a pro se complaint, however inartfully pleaded, must be held to less stringent standards than form pleadings drafted by lawyers.’” Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)).

III. Analysis

A. Plaintiff’s Motion for Partial Summary Judgment

[1] Turning first to Plaintiff’s Motion for Partial Summary Judgment [Dkt. 39], the Court notes that the Motion does not cite to any evidence of record. Indeed, it does not appear that there is, at this point, any record to speak of in this case. Plaintiff amended his Complaint on November 3, 2016, to include for the first time the claims that are the subject of the instant Motions. Defendant Randall has not yet filed an answer to the Amended Complaint and no discovery has taken place.
Instead of record evidence, Plaintiff cites to the allegations of his own Amended Complaint. Those allegations do not establish a factual basis for summary judgment. As Defendant notes, many of Plaintiff’s allegations are disputed and, at this point, remain only allegations. Material issues of fact—for example, who maintains Defendant Randall’s Facebook page and for what purpose—are left unsettled on the record now before the Court.

The party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion,” and identifying the evidence “it believes demonstrate[s] the absence of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Because Plaintiff’s Motion is supported by mere allegations, the Court finds that Plaintiff has not met his initial evidentiary burden. His Motion must therefore be denied.

[2] The Court notes that both parties submitted Affidavits [Dkts. 50, 52] in connection with Plaintiff’s Motion. Both, however, did so after the close of briefing, and on the eve of the hearing on this matter. Neither party had an opportunity to meaningfully address the allegations included in the other’s Affidavit. Neither party makes any excuse for their late filing. The Court therefore declines to consider the Affidavits in ruling on Plaintiff’s Motion.

B. Defendant Randall’s Motion to Dismiss

1. Estoppel

[3] Turning to Defendant Randall’s Motion to Dismiss, Defendant argues first that Plaintiff’s new claims against her should be barred because his previous claims against her were dismissed with prejudice. It is not clear why this should be so. Plaintiff did not, before now, bring claims based on Defendant Randall’s conduct with respect to her own Facebook page. Indeed, in dismissing Plaintiff’s prior claims against Defendant Randall, the Court expressly noted that the claims Plaintiff now brings were not among those at issue. See Mem. Op. [Dkt. 11] at 18 n.3 (“Defendants also argue at considerable length that Defendant Randall did not violate Plaintiff’s First Amendment rights by deleting comments Plaintiff made on her own Facebook page. But that incident, while mentioned in passing in Plaintiff’s Complaint, is neither the subject of this suit, nor particularly relevant to the instant Motion.”). That Plaintiff’s prior claims against Defendant Randall were dismissed does not bar Plaintiff from bringing tangentially related claims against her now.

2. Failure to State a First Amendment Claim

[4] Defendant Randall next argues that Plaintiff has failed to plead a violation of his First Amendment rights.

Loudoun County maintains a Social Media Comments Policy governing “Loudoun County social media sites.” See Compl. Exh. 11 [Dkt. 1–11]. The Court has already found that Plaintiff has plausibly alleged the Policy, as applied to official County Facebook pages, creates a limited public forum under the First Amendment. See Mem. Op. [Dkt. 11] at 16–18. Indeed, Defendant’s Motion also occasionally cites “Ex 24.” The exhibit in question, however, was not submitted to the Court prior to the hearing on Plaintiff’s Motion. As such, Defendant Randall had no opportunity to address it. The exhibit appears to be an image of Defendant Randall’s Facebook page—one including less detail than the image already appended to Plaintiff’s Complaint. See Compl. Exh. 18 [Dkt. 1–18]. It is not clear that the exhibit is properly before the Court on the present Motions, but even assuming it is, the image does not warrant summary judgment standing alone.
fendants appeared to concede as much in their first Motion to Dismiss. See Mem. in Supp. of Mot. to Dismiss [Dkt. 4] at 13–14. The Attorney for the Commonwealth for Loudoun County has likewise admitted that the policy serves such a function in a related case. See Reply in Support of Motion to Dismiss [Dkt. 10] at 2, Davison v. Plowman, No. 1:16–cv–180 (E.D. Va.).

[5] The Court has also previously found that, when County officials suppress comments in violation of the County’s Social Media Comments Policy, their actions implicate the commenters’ First Amendment rights. See Mem. Op. [Dkt. 11] at 16–18. “Once it has opened a limited forum,” the government “must respect the lawful boundaries it has itself set.” Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Defendant does not contend that her actions were consistent with the County’s policy. Instead, she denies that the County’s policy applies to her Facebook page at all.

In support of this contention, Defendant Randall notes first that she is not individually capable of binding the Loudoun County Board of Supervisors. The significance of that fact eludes the Court. Plaintiff alleges that Defendant Randall is an elected Loudoun County official who uses her Facebook page to conduct County business, such as corresponding with her constituents about her work in the local government. See Am. Compl. [Dkt. 33] ¶¶ 5–6. Whether or not Defendant is capable of unilateral action on behalf of the Board, the Loudoun County Social Media Comments Policy can easily be construed to cover such use of social media by an elected County official.

Defendant Randall next contends that she maintains the Facebook page at issue in her personal capacity, and that Plaintiff’s allegation that it is her “official” Facebook page is conclusory. Plaintiff, however, has incorporated an image of Defendant Randall’s Facebook page into his Complaint. See Compl. Exh. 18 [Dkt. 1–18]. Based on that image, one might reasonably—indeed, easily—infer that Defendant Randall maintains the Facebook page at issue in her capacity as Chair of the Loudoun County Board of Supervisors.

The website is not Defendant Randall’s personal Facebook profile. Rather, it is a Facebook “Page”—a public-facing platform through which public figures and organizations may engage with their audience or constituency. See Matt Hicks, Facebook Tips: What’s the Difference between a Facebook Page and Group?, http://tinyurl.com/jtb5hoa (Feb. 24, 2010) (last visited December 9, 2016); see also Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013), as amended (Sept. 23, 2013) (“Facebook is an online social network where members develop personalized web profiles to interact and share information with other members,” and that can be used by “businesses, organizations and brands . . . for similar purposes.”) (citations omitted). The Court notes that Defendant Randall’s page is visible to the general public without the need to first register for a Facebook account.

The page in question is titled “Chair Phyllis J. Randall, Government Official.” See Compl. Exh. 18 [Dkt. 1–18]. The “About” section of the page reads “Chair of the Loudoun County Board of Supervisors” and includes a link to Defendant Randall’s profile on Loudoun County’s website. See id. It does not include any information of a personal nature. The top of the page features an image of a plaque reading “Phyllis J. Randall Chair–At–Large,” as well as an image of what the Court presumes to be Defendant Randall
sitting behind the same plaque in front of a United States flag. See id.

The image appended to Plaintiff’s Complaint includes four posts by Defendant Randall. The two most recent are specifically addressed to “Loudoun,” Plaintiff’s constituency. See id. All pertain to matters of public, rather than personal, significance. Besides one warning of poor weather conditions in Loudoun County, all posts visible in the image involve Defendant’s duties as Chair of the Loudoun County Board of Supervisors. See id. They note recent events in the local government and solicit attendees for local government meetings. See id.

In short, the image of Defendant’s Facebook page substantiates Plaintiff’s claim that Defendant Randall uses the “Chair Phyllis J. Randall, Government Official” Facebook page in connection with her official duties. Drawing “all reasonable inferences” in Plaintiff’s favor, E.I. du Pont de Nemours & Co., 637 F.3d at 440 (4th Cir. 2011), Plaintiff has adequately plead that Defendant Randall’s Facebook page is a “Loudoun County social media site[ ],” Compl. Exh. 11 [Dkt. 1–11], governed by the County’s Social Media Comments Policy.

The Court notes that many of Defendant’s arguments attempt to answer the wrong question. The Court is not required to determine whether any use of social media by an elected official creates a limited public forum, although the answer to that question is undoubtedly “no.” Rather, the issue before the Court is whether a specific government policy, applied to a specific government website, can create a “metaphysical” limited public forum for First Amendment purposes. See Rosenberger v. Rector, 515 U.S. at 830, 115 S.Ct. 2510. That answer to that narrower question is undoubtedly “yes.”

[6] “Limited public forums are characterized by ‘purposeful government action’ intended to make the forum ‘generally available’ for certain kinds of speech. Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1067 (4th Cir. 2006) (quoting Goulart v. Meadows, 345 F.3d 239, 250 (4th Cir. 2003)). At the time of the events giving rise to this suit, the County maintained a Policy stating that “the purpose of Loudoun County social media sites is to present matters of public interest in Loudoun County.” Compl. Exh. 11 [Dkt. 1–11]. The Policy provided that visitors were “encourage[d] to submit questions, comments and concerns,” but that “the county reserve[d] the right to delete submissions” that violated enumerated rules, such as comments that include “vulgar language” or “spam.” Id. Such a policy evinces the County’s purposeful choice to open its social media websites to those wishing to post “questions, comments and concerns” within certain limits.

“[S]ocial networking sites like Facebook have…emerged as a hub for sharing information and opinions with one’s larger community.” Liverman v. City of Petersburg, 844 F.3d 400, 408 (4th Cir. 2016).

The Fourth Circuit has recently described Facebook as “a dynamic medium through which users can interact and share news stories or opinions with members of their community” in a manner “[s]imilar to writing a letter to a local newspaper.” Id. at 410. That Court has repeatedly affirmed the First Amendment significance of social media, holding that speech utilizing Facebook is subject to the same First Amendment protections as any other speech. See id.; Bland, 730 F.3d at 385–86.

[7] Defendant Randall contends further that the fact Facebook retains a degree of ownership and control over her Facebook page “demonstrates the unique and non-traditional circumstances under which even an acknowledged ‘official’ Fa-
cebook page can be deemed a governmental public forum, limited or otherwise.” Mem. in. Supp. of Mot. to Dismiss [Dkt. 36] at 9. But as discussed above, the County has expressly adopted a policy that governs official Loudoun County social media websites. As also discussed above, speech online is treated no differently from speech offline under the First Amendment. See Bland, 730 F.3d at 386 n.14. A "metaphysical" forum created by a government policy like the County's social media policy, see Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 880, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), is subject to the same First Amendment analysis regardless of whether that policy is applied to online speech. See Liverman, 844 F.3d at 407 ("What matters to the First Amendment analysis is not only the medium of the speech, but the scope and content of the restriction.").

[8] Finally, Defendant Randall contends that “[n]o individual has the right to hi-jack an individual’s Facebook page by relentlessly posting his or her comments at will, negative or otherwise, or demand that their comments remain posted indefinitely, just because the person is also a County official or employee.” Mem. in. Supp. of Mot. to Dismiss [Dkt. 36] at 9. This argument both assumes that the Facebook page in question is maintained by Defendant in her individual capacity—an argument the Court has rejected for purposes of the present Motion—and obscures the relatively narrow issue now before the Court. The Court is only tasked here with determining whether Plaintiff has adequately pled that Defendant Randall’s Facebook page is governed by the County’s Social Media Comments Policy, and that her actions failed to comport with that policy. The Court finds that Plaintiff has adequately plead as much, and so has stated a claim under the First Amendment.2

3. Failure to State a Due Process Claim

[9] Turning to Plaintiff’s claim under the Due Process Clause of the Fourteenth Amendment, Defendant contends first that “[t]he Supreme Court has made a distinction between cases in which there has been prior restraint[ ]” of speech “as opposed to facts such as raised in this case where no such action occurred and the alleged disruption is de minimis.” Mem. in. Supp. of Mot. to Dismiss [Dkt. 36] at 9. Plaintiff, however, has alleged that Defendant imposed a prior restraint on his speech. Moreover, the case Defendant Randall cites—Board of Regents of State Colleges v. Roth, 408 U.S. 564, 575 n.14, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)—does not recognize a due process exception for “de minimis” invasions of First Amendment rights. Rather, the Supreme Court in that case held that no constitutional right was implicated by the facts before the Court. See id.

Defendant next contends that due process required only “a post-deprivation opportunity to voice...objections,” and Plaintiff was afforded that opportunity insofar as he complained of Defendant Randall’s actions to other government officials. Rep. in. Supp. of Mot. to Dismiss

2. The Court emphasizes that it does not now hold the County’s Social Media Comments Policy does, in fact, apply to Defendant Randall’s Facebook page. Rather, based on the allegations of and exhibits to Plaintiff’s Amended Complaint, Plaintiff has plausibly pled that Defendant Randall’s Facebook page is subject to that policy. Courts “look[ ] to the policy and practice of the government to as-
Regardless of whether a post-deprivation opportunity to be heard would have satisfied Due Process in this instance, no such opportunity was provided Plaintiff. Plaintiff’s unilateral complaints to other government officials did not constitute “process” provided him by Loudoun County any more than did Plaintiff’s filing of this lawsuit. In short, Defendant’s Motion provides no reason to dismiss Plaintiff’s Due Process claim.

The Court notes further that Defendant Randall’s Reply implies it would be have been impracticable to provide Plaintiff with any form of process. Shortly after Defendant Randall filed the instant Motion, however, Loudoun County adopted a new social media policy that employs the following procedure:

The county’s social media platforms are administered by designated staff. When one of the county’s social media administrators suspects a violation of the Loudoun County Social Media Comments Policy, he or she will contact the Public Affairs and Communications Division of the Office of the County Administrator, which will review and authorize removal of a comment when appropriate. When appropriate and if possible, a social media administrator will contact the commenter regarding a violation of the county’s Social Media Comments Policy to notify the commenter and/or to request voluntary removal of the comment. Appeals regarding the Public Affairs and Communications Division’s decision to remove a comment may be submitted via email or phone at 703-777-0113; the Public Affairs and Communications Division will respond to appeals within two business days.

Loudoun County Social Media Comments Policy, https://www.loudoun.gov/index.aspx?NID=2779 (last visited Dec. 22, 2016). It therefore appears that affording Plaintiff process might not have been as impracticable as Defendant Randall contends.

4. Official Capacity Claims

Defendant next argues that Plaintiff’s claims against her in her official capacity should be dismissed because (1) the Court dismissed Plaintiff’s prior official-capacity claims against Defendant Randall and (2) the Loudoun County Board of Supervisors is already a party to this action. As to the former argument, again, the dismissal of Plaintiff’s prior claims against Defendant Randall has no bearing on Plaintiff’s ability to bring his new claims.

As to the latter argument, Defendant misapprehends the nature of an official-capacity suit. By suing Defendant in her official capacity, Plaintiff is bringing “a suit against [her] office,” Will v. Michigan Dept of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), which is to say the office of the Chair of the Loudoun County Board of Supervisors. That office is distinct from the Loudoun County Board of Supervisors itself. And while it is true that a claim against a government officer in her official capacity may be dismissed when duplicative of claims against a larger governmental body already named in the suit, see Mainstream Loudoun v. Bd. of Trustees of Loudoun Cty. Library, 2 F.Supp.2d 783, 790–91 (E.D. Va. 1998), that is not the case here.

5. Qualified Immunity

Defendant argues further that she is entitled to qualified immunity with respect to Plaintiff’s claims against her in her individual capacity.

Defendant argues further that she is entitled to qualified immunity with respect to Plaintiff’s claims against her in her individual capacity.

A government official is entitled to qualified immunity with respect to suits against her in her individual capacity unless “(1) the allegations underlying the claim, if true, substantiate the violation of a federal statutory or constitutional right; and (2) this violation was of a clearly es-
tablished right of which a reasonable person would have known.” *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006). Defendant contends that the law was not “clearly established” here in light of “the pleaded and acknowledged control and ownership all Facebook pages by Facebook, which imposes its own terms and conditions and possesses licensed software which allows for deletion of postings or blocking of individuals by third parties as well as Facebook.” Mem. in Supp. of Mot. to Dismiss [Dkt. 36] at 9.

Defendant, however, does not explain the manner in which this left the law unsettled. As discussed above, the Supreme Court has long rejected the proposition that speech online is subject to a different First Amendment standard than speech offline. See, e.g., *Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997). The Fourth Circuit has already applied this principle to speech on Facebook. See *Bland*, 730 F.3d at 385–86; see also *Liverman*, 844 F.3d at 410–12 (finding a police chief not entitled to qualified immunity for violating a police officer’s First Amendment rights in connection with the officer’s Facebook comments).

It is equally well established that the government may create a “metaphysical” forum for speech by promulgating a policy like the County’s Social Media Comments Policy. See *Rosenberger*, 515 U.S. at 830, 115 S.Ct. 2510. These principles in combination would put a reasonable government official on notice that suppressing public comment in violation of that policy would run afoul of the First Amendment—particularly where, as here, Defendant is alleged to have engaged in viewpoint discrimination, something the First Amendment proscribes in virtually all contexts. See, e.g., *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 385–86, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). That being so, a reasonable government official would also be on notice that depriving an individual of their First Amendment rights without warning or recourse implicates that individual’s Due Process rights. See *Bd. of Regents of State Colleges*, 408 U.S. at 575 n.14, 92 S.Ct. 2701; see also Mem. Op. [Dkt. 11] at 19–20.

Finally, Defendant contends that “[t]here is no distinction between the court’s finding in favor of the Sheriff on his entitlement to qualified immunity in *Bland [v. Roberts]* and [Defendant’s] entitlement to qualified immunity in this case.” Rep. in Supp. of Mot. to Dismiss [Dkt. 36] at 8. In *Bland*, the Fourth Circuit found that a sheriff who declined to reappoint a deputy in retaliation for the deputy’s act of “liking” a political rival’s Facebook page was entitled to qualified immunity. See 730 F.3d at 391. The Court’s decision, however, rested entirely on its finding that its prior precedent regarding when sheriffs may discharge deputies “sent very mixed signals.” *Id.*

That precedent has no application here. In short, Defendant is not entitled to qualified immunity simply because this case involves a relatively new technology. The Court confines its qualified immunity analysis to the brief argument that Defendant Randall has put forward, and reserves the question of whether Defendant Randall is in fact entitled to qualified immunity on other grounds or on a more fully developed record. The Court declines, however, to supply arguments Defendant Randall has not made.

**III. Conclusion**

For the foregoing reasons, the Court will deny both Plaintiff’s Motion for Summary Judgment [Dkt. 39] and Defendant’s Motion to Dismiss [Dkt. 35].

An appropriate order will issue.
S.Ct. 1473, 1484, 176 L.Ed.2d 284 (2010). Here, the appearance of advantages and disadvantages was warped by rife government misconduct. As such, Dyess’s admission to drug quantity should not be dispositive in our Apprendi analysis.

Even if plain error applies to this case, as the majority contends, Cotton does not control the outcome. The majority correctly explains that in Cotton, the Supreme Court declined to notice plain error under the fourth prong of the test put forward in United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), because evidence of drug quantity was “overwhelming,” and “essentially uncontroverted.” Ante 361 (quoting Cotton, 535 U.S. at 633, 122 S.Ct. 1781). Ultimately, the Cotton Court found that while there may have been plain Apprendi error, there was “no basis for concluding that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” Cotton, 535 U.S. at 632–33, 122 S.Ct. 1781.

Unlike in Cotton, the pervasive nature of the misconduct committed by the government in this case has discredited a substantial amount of the evidence against Dyess. For instance, Rader admitted that she lied when she testified that she created the demonstrative exhibits illustrating the quantity of drugs she had observed Dyess handle. See J.A. 89–94, 621–24. As mentioned above, the lead investigator created those exhibits. J.A. 621. He then coached Rader on how to testify about the exhibits, and became angry and abusive when she told him she could not remember or did not know how much drugs she had seen. J.A. 623–24.

While we may have affirmed the district court’s finding that sufficient untainted evidence remained to sustain the conviction, it is undeniable that government misconduct in this case severely weakened the evidence against Dyess. The remaining untainted evidence is not “overwhelming” and “essentially uncontroverted.” See Cotton, 535 U.S. at 633, 122 S.Ct. 1781. Further, it is hypocrisy of the first order for the government to proclaim that we should not notice plain error because there has been no damage to the “fairness, integrity or public reputation of judicial proceedings.” See id. The lead investigator’s behavior and misconduct undermined the judicial proceedings in this case. The best way for the prosecution to repair that damage would have been to concede to resentencing in a conciliatory effort to condemn this mess to history. Instead, the government charges headlong towards securing a life sentence under these troubling circumstances. I cannot condone this. I respectfully dissent.

Bobby BLAND; Daniel Ray Carter, Jr.; David W. Dixon; Robert W. McCoy; John C. Sanchofer; 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.; National Association Of Police Organizations, Amici Supporting Appellants.

No. 12–1671.

United States Court of Appeals, Fourth Circuit.

Argued: May 16, 2013.
As Amended Sept. 23, 2013.

Background: Sheriff’s Office employees brought civil rights action alleging that
sheriff retaliated against the employees in violation of their First Amendment rights by choosing not to reappoint them because of their support of his electoral opponent. The United States District Court for the Eastern District of Virginia, Raymond A. Jackson, J., 857 F.Supp.2d 599, granted summary judgment in favor of sheriff, and employees appealed. 

**Holdings:** The Court of Appeals, Traxler, Chief Judge, held that:

(1) First Amendment prohibited Virginia sheriff's deputies from being terminated for their lack of political allegiance to sheriff;

(2) genuine issues of material fact existed as to whether certain deputies' lack of political allegiance to sheriff was a substantial basis for their non-reappointment;

(3) sheriff was entitled to qualified immunity concerning deputies' First Amendment claims.

Affirmed in part, reversed in part, and remanded.

Ellen Lipton Hollander, District Judge, sitting by designation, filed opinion concurring in part and dissenting in part.

1. **Constitutional Law ⊕1553**

   Not only does the First Amendment protect freedom of speech, it also protects the right to be free from retaliation by a public official for the exercise of that right. U.S.C.A. Const.Amend. 1.

2. **Constitutional Law ⊕1925**

   Although government employees do not forfeit their First Amendment rights at work, government may impose certain restraints on its employees' speech and take action against them that would be unconstitutional if applied to the general public. U.S.C.A. Const.Amend. 1.

3. **Constitutional Law ⊕1938**

   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. U.S.C.A. Const.Amend. 1.

4. **Constitutional Law ⊕1475(9)**

   First Amendment generally bars the firing of public employees solely for the reason that they were not affiliated with a particular political party or candidate. U.S.C.A. Const.Amend. 1.

5. **Constitutional Law ⊕1475(3, 9)**

   In determining whether dismissal of public employee was permissible under First Amendment exception for patronage dismissals of public employees occupying policymaking positions, court considers whether employee's position involved government decisionmaking on issues where there was room for political disagreement on goals or their implementation, and, if so, court then examines 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 or political allegiance is an equally appropriate requirement; first step of the inquiry requires court to examine the issues dealt with by the employee at a very high level of generality, while second step requires a much more concrete analysis of the specific position, focusing on the powers inherent in a given office, as opposed to the functions performed by a particular occupant of that office. U.S.C.A. Const. Amend. 1.

6. **Civil Rights ⊕1421**

   With respect to First Amendment association claims, public employee bears the initial burden of proving that his exercise of his First Amendment rights was a sub-
substantial or motivating factor in the employer's decision to terminate him and if employee satisfies that burden, the employer will avoid liability if it can demonstrate, by a preponderance of the evidence, that it would have made the same employment decision absent the protected expression. U.S.C.A. Const.Amend. 1.

7. Constitutional Law ᴼ≡1475(9)
  Sheriffs and Constables ᴼ≡21
  First Amendment prohibited Virginia sheriff's deputies, who were trained as jailers and had not taken the "basic law enforcement" course that Virginia Department of Criminal Justice Services required officers to take before they could exercise the statutorily granted general arrest power, from being terminated for their lack of political allegiance to sheriff; sheriff had not established that deputies' duties resembled those of a policymaker, a prvky to confidential information, a communicator, or some other office holder whose function was such that party affiliation or political allegiance was an appropriate requirement. U.S.C.A. Const.Amend. 1.

8. Federal Civil Procedure ᴼ≡2497.1
  Genuine issues of material fact existed as to whether certain deputies' lack of political allegiance to sheriff was a substantial basis for their non-reappointment, precluding summary judgment in favor of sheriff on those deputies' First Amendment free association claims against sheriff in his individual and official capacities. U.S.C.A. Const.Amend. 1.

9. Constitutional Law ᴼ≡1681
  Use of a single mouse click to produce a message that user "likes" political candidate's campaign page on social media website constitutes First Amendment protected speech; liking a political candidate's campaign page communicates the user's approval of the candidate and supports the campaign by associating the user with it, and is the Internet equivalent of displaying a political sign in one's front yard. U.S.C.A. Const.Amend. 1.

10. Constitutional Law ᴼ≡1929
  Public employee can speak as a private citizen in his workplace, even if the content of the speech is related to the speaker's job.

11. Constitutional Law ᴼ≡1937
  For purposes of First Amendment analysis, public employee was speaking as a private citizen on a matter of public concern when he used a single mouse click to produce a message that he "liked" political candidate's campaign page on social media website. U.S.C.A. Const.Amend. 1.

12. Federal Civil Procedure ᴼ≡2497.1
  Genuine issue of material fact existed as to whether deputy's support for sheriff's electoral opponent was a substantial factor for his non-reappointment, precluding summary judgment in favor of sheriff on deputy's First Amendment free speech claim against sheriff in his individual and official capacities. U.S.C.A. Const.Amend. 1.

13. Federal Courts ᴼ≡269
  Eleventh Amendment immunity protects state agents and state instrumentalities, meaning that it protects arms of the state and state officials; when a judgment against a governmental entity would have to be paid from the state's treasury, the governmental entity is an arm of the state for Eleventh Amendment purposes. U.S.C.A. Const.Amend. 11.

14. Federal Courts ᴼ≡269, 272
  Ex parte Young exception permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for purposes of the Elev-

15. Federal Courts \(\Rightarrow 269\)
Virginia sheriff was not entitled to Eleventh Amendment immunity to the extent that discharged deputies sought reinstatement based on violations of their constitutional rights; however, to the extent that the claims sought monetary relief against the sheriff in his official capacity, sheriff was entitled to Eleventh Amendment immunity. U.S.C.A. Const.Amend. 11; West’s V.C.A. § 15.2–1609.

16. Civil Rights \(\Rightarrow 1376(10)\)
Sheriff was entitled to qualified immunity concerning deputies’ First Amendment claims because in December 2009 a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons, including speech indicating the deputies’ support for the sheriff’s political opponent; law regarding the legality of a sheriff firing a deputy for political reasons was not clearly established as of that date and would not have been so recognized by a reasonable sheriff, as opposed to judge trained in the law. U.S.C.A. Const. Amend. 1.

17. Constitutional Law \(\Rightarrow 1947\)
In cases in which the *Elrod–Branti* exception applies, and an employer therefore does not violate his employee’s First Amendment association rights by terminating him for political disloyalty, the employer also does not violate his employee’s free speech rights by terminating him for speech displaying that political disloyalty. U.S.C.A. Const.Amend. 1.


Before TRAXLER, Chief Judge, THACKER, Circuit Judge, and ELLEN LIPTON HOLLANDER, United States District Judge for the District of Maryland, sitting by designation.

Affirmed in part, reversed in part, and remanded by published opinion. Chief Judge TRAXLER wrote the opinion, in which Judge THACKER joined. Judge HOLLANDER wrote a separate opinion concurring in part and dissenting in part.

TRAXLER, Chief Judge:
Six plaintiffs appeal a district court order granting summary judgment against them in their action against B.J. Roberts in his individual capacity and in his official capacity as the Sheriff of the City of Hampton, Virginia. The suit alleges that Roberts retaliated against the plaintiffs in violation of their First Amendment rights by choosing not to reappoint them because of their support of his electoral opponent. We affirm in part, reverse in part, and remand for trial.
I.

Viewing the facts in the light most favorable to the plaintiffs, as we must in reviewing an order granting summary judgment against them, the record reveals the following. Bobby Bland, Daniel Ray Carter, Jr., David W. Dixon, Robert W. McCoy, John C. Sandhofer, and Debra H. Woodward ("the Plaintiffs") are all former employees of the Hampton Sheriff's Office ("the Sheriff's Office").

Roberts was up for re-election in November 2009, having served as sheriff for the prior 17 years. Jim Adams announced in early 2009 that he would run against Sheriff Roberts. Adams had worked in the Sheriff's Office for 16 years and had become the third most senior officer, with a rank of lieutenant colonel, when he resigned in January 2009 to run.

The Hampton City Police Department has primary responsibility for law enforcement in Hampton. However, the Sheriff's Office maintains all city correctional facilities, secures the city's courts, and serves civil and criminal warrants. In December 2009, the Sheriff's Office had 190 appointees, including 128 full-time sworn deputy sheriffs, 31 full-time civilians, 3 unassigned active duty military, and 28 part-time employees. Carter, McCoy, Dixon, and Sandhofer were sworn, uniformed sheriff's deputies who worked as jailers in the Sheriff's Office Corrections Division. They had not taken the Virginia Department of Criminal Justice Services' "Basic Law Enforcement" course, completion of which was required in Virginia for an officer to patrol and have immediate arrest powers. However, they did take the "Basic Jailer and Court Services" course, which has about half as long a curriculum as the Basic Law Enforcement course.

Bland and Woodward were not deputies, but rather worked in non-sworn administrative positions. Woodward was a training coordinator and Bland was a finance and accounts payable officer.

Notwithstanding laws and regulations prohibiting the use of state equipment or resources for political activities, see Hatch Act, 5 U.S.C. § 1501, et seq.; 22 Va. Admin. Code § 40–675–210 (2012), Sheriff Roberts used his office and the resources that he controlled, including his employees' manpower, to further his own re-election efforts. His senior staff often recruited Sheriff's Office employees to assist in these efforts. For example, he used his employees to work at his annual barbeque/golf tournament political fundraiser, and his subordinates pressured employees to sell and buy tickets to his fundraising events.

The Sheriff won reelection in November 2009. He subsequently reappointed 147 of his 159 full-time employees. Those not reappointed included the six Plaintiffs as well as five other deputies and one other civilian.

On March 4, 2011, the Plaintiffs filed suit in federal district court against Sheriff Roberts in his individual and official capacities under 42 U.S.C. § 1983. All six Plaintiffs alleged that the Sheriff violated their First Amendment right to free association when he refused to reappoint them

1. Sandhofer worked as a jailer for most of his short time in the Sheriff’s Office, although he worked as a civil process server in the Sheriff’s Office Civil Process Division for the final three months of his tenure.

2. The Virginia Department of Criminal Justice Services, Division of Law Enforcement, has the responsibility of overseeing and managing training standards and regulations for the criminal justice community.
based on their lack of political allegiance to him in the 2009 election. Additionally, Carter, McCoy, Dixon, and Woodward alleged that the Sheriff violated their First Amendment right to free speech when he refused to reappoint them because of various instances of speech they made in support of Adams’s campaign. Among the remedies Plaintiffs requested were compensation for lost back pay and compensation for lost front pay or, alternatively, reinstatement. The Sheriff answered Plaintiffs’ complaint and asserted several affirmative defenses.

Roberts subsequently moved for summary judgment, and the district court granted it. See Bland v. Roberts, 857 F.Supp.2d 599 (E.D.Va.2012). Regarding the free-speech claims, the district court concluded that Carter, McCoy, and Woodward had all failed to allege that they engaged in expressive speech and that Dixon had not shown that his alleged speech was on a matter of public concern. See id. at 603–06. Regarding the association claims, the court concluded that Plaintiffs failed to establish any causal relationship between their support of Adams’s campaign and their non-reappointment. See id. at 606–07. Finally, assuming arguendo that the Sheriff did violate Plaintiffs’ First Amendment rights, the district court concluded he was entitled to qualified immunity on the individual-capacity claims and Eleventh Amendment immunity on the official-capacity claims. See id. at 608–10.

II.

On appeal, the Plaintiffs maintain that the district court erred in granting summary judgment against them.

This court reviews de novo a district court’s order granting summary judgment, applying the same standards as the district court. See Providence Square Assocs., L.L.C. v. G.D.F., Inc., 211 F.3d 846, 850 (4th Cir.2000). Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(a).

[1, 2] The Plaintiffs allege that they were retaliated against for exercising their First Amendment rights to free speech and association. The First Amendment, in relevant part, provides that “Congress shall make no law . . . abridging the freedom of speech.” U.S. Const. amend. I. The Fourteenth Amendment makes this prohibition applicable to the states. See Fisher v. King, 232 F.3d 391, 396 (4th Cir.2000). Not only does the First Amendment protect freedom of speech, it also protects “the right to be free from retaliation by a public official for the exercise of that right.” Suarez Corp. Indus. v. McGraw, 202 F.3d 676, 685 (4th Cir.2000). Although government employees do not forfeit their constitutional rights at work, it is well established “that the government may impose certain restraints on its employees’ speech and take action against them that would be unconstitutional if applied to the general public.” Adams v. Trustees of the Univ. of N.C.-Wilmington, 640 F.3d 550, 560 (4th Cir.2011) (internal quotation marks omitted).

[3] The Supreme Court in Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983), and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), has explained how the rights of public employees to speak as private citizens must be balanced against the interest of the government in ensuring its efficient operation. In light of these competing interests, we have held that in order for a public employee to prove that an adverse employment action violated his First Amendment rights to freedom of speech, he must establish (1)
that he "was speaking as a citizen upon a matter of public concern" rather than "as an employee about a matter of personal interest"; (2) that "the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public"; and (3) that "the employee's speech was a substantial factor in the employee's termination decision." McVey v. Stacy, 157 F.3d 271, 277–78 (4th Cir. 1998). In conducting the balancing test in the second prong, we must consider the context in which the speech was made, including the employee's role and the extent to which the speech impairs the efficiency of the workplace. See Rankin v. McPherson, 483 U.S. 378, 388–91, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987).

Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the [agency]; (6) undermined the mission of the [agency]; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the [agency]; and (9) abused the authority and public accountability that the employee's role entailed.

Ridpath v. Board of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir.2006). Accordingly, "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, 157 F.3d at 278.

[4] "This principle tends to merge with the established jurisprudence governing the discharge of public employees because of their political beliefs and affiliation." Id. Such claims must be analyzed under the principles established by Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976), and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). See Fields v. Prater, 566 F.3d 381, 385–86 (4th Cir.2009). These cases make clear that the First Amendment generally bars the firing of public employees "solely for the reason that they were not affiliated with a particular political party or candidate," Knight v. Vernon, 214 F.3d 544, 548 (4th Cir.2000) (internal quotation marks omitted), as such firings can impose restraints "on freedoms of belief and association," Elrod, 427 U.S. at 355, 96 S.Ct. (plurality opinion); see Smith v. Frye, 488 F.3d 263, 268 (4th Cir.2007).

Still, the Supreme Court in Elrod created a narrow exception "to give effect to the democratic process" by allowing patronage dismissals of those public employees occupying policymaking positions. Jenkins v. Medford, 119 F.3d 1156, 1161 (4th Cir.1997) (en banc). This exception served "the important government goal of assuring 'the implementation of policies of [a] new adminis-
tration, policies presumably sanctioned by
the electorate.” *Id.* (quoting *Elrod*, 427
U.S. at 367, 96 S.Ct. 2673). In *Branti*, the
Supreme Court modified the *Elrod* test
somewhat to “recognize[] that the labels
used in *Elrod* ignored the practical reali-
ties of job duty and structure.” *Id.* Under
the test as modified, “the ultimate inquiry
is not whether the label ‘policymaker’ or
‘confidential’ fits a particular position;
rather, the question is whether the hiring
authority can demonstrate that party affili-
ation [or political allegiance] is an appro-
priate requirement for the effective per-
formance of the public office involved.”
*Branti*, 445 U.S. at 518, 100 S.Ct. 1287.

(4th Cir.1990), we adopted a two-part test
for conducting this analysis. See *Fields*,
566 F.3d at 386. First, we consider
whether “the [plaintiff’s] position involve[s]
government decisionmaking on issues
where there is room for political disagree-
ment on goals or their implementation.”
*Stott*, 916 F.2d at 141 (internal quotation
marks omitted). If it does, we then “ex-
amine the particular responsibilities of the
position to determine whether it resembles
a policymaker, a privy to confidential infor-
mation, a communicator, or some other
office holder whose function is such that
party affiliation [or political allegiance] is an
equally appropriate requirement.” *Id.*
at 142 (internal quotation marks omitted).
The first step of the inquiry requires us to
examine the issues dealt with by the em-
ployee “at a very high level of generality,”
while “[t]he second step requires a much
more concrete analysis of the specific posi-
tion at issue.” *Fields*, 566 F.3d at 386. At
the second step, “courts focus on the pow-
ers inherent in a given office, as opposed
to the functions performed by a particular
occupant of that office.” *Stott*, 916 F.2d at
142. In this regard, we focus on the job
description for the position in question and
“only look past the job description where
the plaintiff demonstrates some systematic
unreliability, such as where the description
has been manipulated in some manner by
officials looking to expand their political
power.” *Nader v. Blair*, 549 F.3d 953, 961
(4th Cir.2008) (internal quotation marks
omitted).

[6] Our causation analysis for the asso-
ciation claims is the same as for the speech
claims. The plaintiff bears the initial bur-
den of proving that his exercise of his
First Amendment rights “was a ‘substan-
tial’ or ‘motivating’ factor in the employer’s
decision to terminate him.” *Wagner v.
Wheeler*, 13 F.3d 86, 90 (4th Cir.1993);
*Sales v. Grant*, 158 F.3d 768, 775–76 (4th
Cir.1998). And if the plaintiff satisfies
that burden, the defendant will avoid liabil-
ity if he can demonstrate, by a preponder-
ance of the evidence, that he would have
made the same employment decision ab-
sent the protected expression. See *Sales*,
158 F.3d at 776 (citing *O’Hare Truck
Serv., Inc. v. City of Northlake*, 518 U.S.
712, 725, 116 S.Ct. 2353, 135 L.Ed.2d 874
(1996)).

Plaintiffs challenge the district court’s
rulings with regard to the merits of both
their association and their speech claims as
well as with regard to qualified and Elev-
enth Amendment Immunity. We begin
our analysis with the merits of Plaintiffs’
association claims and will then address
the merits of the speech claims before

5. We note that in cases in which the *Elrod–Branti* exception applies, and an employer
thus can terminate his employees for political
disloyalty, he may also terminate them for
speech that constitutes such disloyalty. See
*Jenkins v. Medford*, 119 F.3d 1156, 1164 (4th
Cir.1997) (en banc) (holding that because
pleadings established that *Elrod–Branti* excep-
tion applied, deputies failed to state a First
Amendment speech retaliation claim that de-
puties were dismissed for campaigning against
the sheriff).
turning to Eleventh Amendment and qualified immunity.

A. Merits of Association Claims

We conclude that Carter, McCoy, and Dixon at least created genuine factual disputes regarding whether the Sheriff violated their association rights, but that Sandhofer, Woodward, and Bland did not.

1. Elrod–Branti

With regard to these claims, we start by asking whether the Sheriff had the right to choose not to reappoint the Plaintiffs for political reasons. Certainly there is legitimate disagreement over the goals and implementation of the goals of a sheriff’s office; accordingly, the outcome of the Stott test will turn on the outcome in Stott’s second step. See, e.g., Knight, 214 F.3d at 548–51. Thus, it is that part of the test on which we focus our attention.

Carter, McCoy, and Dixon all occupied the same position in the Sheriff’s Office. They were uniformed jailers and they held the title of sheriff’s deputy. Because they held that title, much of the debate between the parties concerning the application of the Elrod–Branti test to these three men relates to our decision in Jenkins. In Jenkins we analyzed the First Amendment claims of several North Carolina sheriff’s deputies who alleged that the sheriff fired them for failing to support his election bid and for supporting other candidates. In so doing, we considered the political role of a sheriff, the specific duties performed by sheriff’s deputies, and the relationship between a sheriff and his deputies as it affects the execution of the sheriff’s policies. See Jenkins, 119 F.3d at 1162–64. We generally concluded that deputies “play a special role in implement-

6. We do not address whether Sandhofer, Woodward, or Bland could be terminated for lack of political allegiance because, as we will discuss, they have not created genuine factual disputes regarding whether lack of political allegiance was a substantial basis for their non-reappointment.
less of their actual duties—are policymaking officials." *Id.* at 1166 (Motz, J., dissenting). The dissent contended that had a proper *Elrod–Branti* review been conducted, focusing on "analysis of the particular duties of each deputy," the result of the case would have been different. *Id.*

For its part, the majority flatly rejected the dissent's claim that the decision was not based on the duties of the deputies before the court. The majority stated:

We limit dismissals based on today's holding to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff. We issue this limitation to caution sheriffs that courts examine the job duties of the position, and not merely the title, of those dismissed. FN66 Because the deputies in the instant case were law enforcement officers, they are not protected by this limitation. FN67

FN66. See *Stott*, 916 F.2d at 142; *Zorzi v. County of Putnam*, 30 F.3d 885, 892 (7th Cir. 1994) (dispatchers not involved in law enforcement activities or policy, so political affiliation inappropriate job requirement).

The dissent manifests a misunderstanding of our holding. It applies only to those who meet the requirements of the rule as we state it, and does not extend to all 13,600 officers in North Carolina, as the dissent suggests. FN67. Amended Complaint, ¶ 19.

*Id.* at 1165 (majority opinion). Responding to the conclusion that the deputies' law enforcement duties made their political loyalty to the sheriff an appropriate requirement for the effective performance of the deputies' jobs, the dissent emphasized that the only relevant allegations in the plaintiffs' complaint were that the deputies' "job requirements consisted of performing ministerial law enforcement duties for which political affiliation is not an appropriate requirement" and that none of the plaintiffs "occupied a policymaking or confidential position." *Id.* at 1166 (Motz, J., dissenting) (internal quotation marks omitted).

That brings us to the question of how to read *Jenkins*. Despite a significant amount of language in the opinion seemingly indicating that all North Carolina deputies could be terminated for political reasons regardless of the specific duties of the particular deputy in question, and despite the dissent's allegation that the majority indeed held that all North Carolina deputies may be fired for political reasons, the majority explicitly stated that it analyzed the duties of the plaintiffs and not merely those of deputies generally. *See id.* at 1165 (majority opinion). In the end, the majority explained that it was the deputies' role as sworn law enforcement officers that was dispositive and suggests that the result might have been different had the deputies' duties consisted of working as dispatchers. *See id.* at 1165 & nn. 66–67. Accordingly, to be true to *Jenkins*, we too must consider whether requiring political loyalty was an appropriate requirement for the effective performance of the public employment of the deputies before us *in light of the duties of their particular positions*.

According to their formal job description, the deputies' duties and responsibilities were to "[p]rovide protection of jail personnel and the public," "[p]rovide safekeeping and welfare of prisoners," "[p]rotect[ ] ... society by prevent[ing] ... escapes," "[c]onduct security rounds," "[s]upervise inmate activities," "[p]rovide cleaning supplies to inmates to clean their cells," "[p]ass out razors on approved days," "[e]scort inmates throughout the jail as required," "[m]aintain floor log of daily inmate activities," "[e]nsure inmates are [fed]," "[r]un recreation and visitation as scheduled or authorized," "[a]nswer inmate correspondences and grievances," and "[s]upervise laundry detail." J.A. 602. None of the men had leadership responsibilities, nor were they confidants of the Sheriff.
These duties are essentially identical to those of the plaintiff in *Knight v. Vernon*. In that case, we considered whether the district court erred in granting summary judgment against a sheriff’s office employee on her First Amendment political firing claim on the basis that the employee could be lawfully terminated for political reasons. *See Knight*, 214 F.3d at 548. Unlike Carter, McCoy, and Dixon, Knight did not have the title of sheriff’s deputy, but Knight worked for a North Carolina sheriff’s department as a low-level jailer. *See id.* at 549, 550. Noting that “[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,” *see id.* at 549, we closely examined the duties of Knight’s job in applying the *Elrod–Branti* analysis at the summary judgment stage:

As a jailer Ms. Knight was responsible for the processing, supervision and care, and transportation of inmates. Ms. Knight’s processing duties included fingerprinting new inmates, obtaining their personal data (addresses, next of kin, etc.), marking and storing their personal belongings, routing them for physical examinations, and arranging for their initial baths and changes into clean clothing. Ms. Knight’s daily supervision and care duties involved monitoring inmates every half hour, distributing and logging their medications and supplies, serving them food, and managing their visitors. Occasionally, Ms. Knight filled in as a cook when help was short in the jail’s kitchen. Finally, Ms. Knight assisted in transporting inmates to prisons and medical facilities. *Id.* at 546. In holding that *Jenkins* did not allow the sheriff to terminate Knight for political reasons, we contrasted Knight’s duties with those of the deputy sheriffs in *Jenkins*. We noted that “[a] deputy is a sworn law enforcement officer [and thus] 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.” *Id.* at 550. We also noted that “[a] sworn deputy is the sheriff’s alter ego: he has powers conterminous with his principal, the elected sheriff.” *Id.* (internal quotation marks omitted). In contrast, we explained that the jailer’s authority “is much more circumscribed” and “[h]er training, which is much more limited than that of a deputy, is concentrated on matters of custodial care and supervision.” *Id.* We noted that “exercising the power of arrest is not one of the job duties of a jailer,” and Knight “was not out in the county engaging in law enforcement activities on behalf of the sheriff,” and she was not “a confidant of the sheriff.” *Id.* We further noted that she neither “advise[d] him on policy matters” nor was “involved in communicating the sheriff’s policies or positions to the public.” *Id.* Although we recognized that the job of jailer involves the exercise of some discretion, we concluded that “a jailer does not exercise the ‘significant discretion’ that the North Carolina deputies generally exercise. *Id.* at 551. Rather, because she “worked mostly at the jail performing ministerial duties,” she was “not entrusted with broad discretion,” and “[t]he sheriff did not rely on her for assistance in implementing his law enforcement platform.” *Id.* at 550. We therefore determined that the sheriff had not established as a matter of law that political loyalty was an appropriate requirement for Knight’s performance of her job as a jailer.

We conclude that the near identity between the duties of the deputy plaintiffs in this case and Knight’s duties warrants the same result here. Although Sheriff Roberts points to various differences between Knight and the plaintiffs here that he claims make this case more like *Jenkins*
and less like Knight, we conclude that none of them is sufficiently significant to justify a different outcome.

First, although the Sheriff correctly points out that Carter, McCoy, and Dixon were all sworn deputies, the oath that they took was simply to support the federal and Virginia constitutions and faithfully and impartially discharge their duties to the best of their ability. See Va.Code Ann. § 49–1; Thore v. Chesterfield Cnty. Bd. of Supervisors, 10 Va.App. 327, 391 S.E.2d 882, 883 (1990). No one contends that these men took a law enforcement officer’s oath, as the Jenkins plaintiffs did. See N.C. Gen.Stat. § 11–11. In any event, in Knight we specifically rejected the argument that the result in Knight would have been different even had Knight taken a law enforcement officer’s oath, noting that it is the specific duties of the public employees that must be the focus of the Elrod–Branti inquiry. See Knight, 214 F.3d at 551. Because Knight’s duties were “essentially custodial” and she, unlike the deputies in Jenkins, was not empowered to stand in for the sheriff on a broad front, we held that she could not be required to be politically loyal to the sheriff. Id.

Sheriff Roberts notes that the deputies in the present case, like those in Jenkins, were entitled to stand in for their sheriff in one way that Knight could not, namely, by making an arrest. It is true that in Virginia sheriff’s deputies are, like sheriffs, statutorily authorized to make arrests under a wide range of circumstances. See Va.Code Ann. § 19.2–81(A)(2). That all deputies have been granted general arrest powers by statute, however, does not mean that exercising those powers was an appreciable part of the duties of their particular positions. In fact, Carter, McCoy, and Dixon were trained as jailers, and it is undisputed that they did not take the “Basic Law Enforcement” course that the Virginia Department of Criminal Justice Ser-

In sum, we hold that at this stage of the litigation, the Sheriff has not demonstrated
that the duties of Carter, McCoy, and Dixon differed from Knight's duties in any significant way, and we conclude that Sheriff Roberts has not shown that their duties resembled those of "a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation [or political allegiance] is an equally appropriate requirement." Stott, 916 F.2d at 142. Accordingly, he also has not demonstrated that political allegiance was an appropriate requirement for the jailers' performance of their jobs. Accord DiRuzza v. County of Tehama, 206 F.3d 1304, 1310–11 (9th Cir.2000) (holding that sheriff did not establish application of Elrod–Branti exception as a matter of law in the case of a California deputy sheriff who worked as a jailer). Thus, we hold that the Sheriff was not entitled to summary judgment on the basis that he could terminate Carter, McCoy, and Dixon for their lack of political allegiance to him.

2. Causation

[8] We now turn to the issue of whether the Plaintiffs' lack of political allegiance to the Sheriff was a substantial basis for the Sheriff's decision not to reappoint them. See Wagner, 13 F.3d at 90. For reasons that we will explain, we conclude that Carter, McCoy, and Dixon have all at least created a genuine factual dispute regarding whether lack of political allegiance was a substantial basis for their non-reappointment, but that Sandhofer, Woodward, and Bland have not.

7. Both men also verbally expressed their support for Adams to several people, and although both had volunteered and worked vigorously for Roberts's past campaigns, they did not volunteer at all for Roberts in the 2009 election.

8. McCoy testified that he "was approached by ten or 15 people" who asked him why he would risk his job with the posting when he was only 18 months away from becoming eligible for retirement. J.A. 162. Indeed, McCoy eventually took his posting down.

9. Jones was named Ramona Larkins at the time.

Carter and McCoy

In the late summer of 2009, Carter and McCoy visited Adams's campaign Facebook page and made statements on the page indicating their support for his campaign. Specifically, Carter "liked" the page and "wrote and posted a message of encouragement" that he signed. J.A. 570. McCoy also "posted an entry on the page indicating [his] support for [Adams's] campaign." J.A. 586. Carter's and McCoy's Facebook actions became well-known in the Sheriff's Office as many were shocked because "they appeared not to be supporting the sheriff." J.A. 681. Colonel Bowden, who was the second most senior officer in the Sheriff's Office, learned of Carter's and McCoy's presence on Adams's Facebook Page and informed Sheriff Roberts.

In the late summer of 2009, Carter and Ramona Jones—also a Hampton sheriff's deputy—co-hosted a cookout ("the August cookout") attended by many Sheriff's Office employees, including Adams. The next day at work, Jones was approached by her supervisor, Lieutenant Crystal Cooke, who told Jones that she had heard that Adams had attended her cookout. Jones truthfully told Cooke that Carter had invited Adams. Shortly thereafter, then-Captain Kenneth Richardson approached Jones and asked her who had attended. She told him that Adams had been there, and Richardson "state[d] that the event had the appearance of a campaign event and said specifically that 'it does not look good.'" J.A. 702.].
Richardson, as she had told Cooke, that it was Carter who had invited Adams, and Richardson responded that Jones “needed to explain that to the Sheriff.” J.A. 702. Indeed, the Sheriff learned about the cook-out and that Adams had attended. Pictures showing Sandhofer and McCoy at the event were posted on Facebook by early October.

In early September, Sheriff Roberts addressed his employees’ support for Adams in speeches he gave during the various shift changes. He expressed his disapproval with the decision of some to support Adams’s candidacy on Facebook. He stated that he would be sheriff for as long as he wanted and thus that his train was the “long train.” J.A. 572 (internal quotation marks omitted). He indicated that Adams’s train was the “short train” and that those who openly supported Adams would lose their jobs. J.A. 572 (internal quotation marks omitted). Additionally, after the conclusion of the meeting that occurred before Carter’s shift change, the Sheriff angrily approached Carter and “ma[de] several intimidating statements.” J.A. 572. He then added, “You made your bed, and now you’re going to lie in it—after the election, you’re gone.” J.A. 572 (internal quotation marks omitted).

The Sheriff represented that his heated exchange with Carter after one of Roberts’s “long train” speeches pertained to Carter’s objections about disciplinary proceedings concerning Carter’s wife rather than to Carter’s support of Adams. In deed, the Sheriff testified that that conversation was the reason that he chose not to reappoint Carter. Carter flatly denied that Roberts made any reference to Carter’s wife during that conversation, however.11

If a jury credited Carter’s account of their heated exchange, however, it could reasonably conclude that Roberts was not telling the truth in an attempt to cover up his illegal retaliation. See Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (explaining that “[p]roof that the defendant’s explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive”). The Sheriff, after all, had specifically warned his employees not to support Adams through Facebook and had told Carter that his support for Adams would cost him his job. For these reasons, we conclude that a reasonable jury could find that Carter’s lack of political allegiance to the Sheriff was a substantial motivation for the Sheriff’s decision not to reappoint him.

Based on the evidence of Roberts’s strong animus toward those of his employees who supported Adams, a reasonable jury could also conclude that Roberts’s knowledge of McCoy’s support for Adams would have strongly motivated Roberts not to reappoint McCoy. Roberts claimed his primary reason for not reappointing McCoy was that McCoy had had “heated arguments with deputies when he was in

10. Carter’s wife was also a Sheriff’s Office employee.

11. According to Carter’s declaration, Carter worked for the Sheriff’s Office for more than 11 years, performed his job “in an exemplary manner,” and always received performance evaluations of “above average.” J.A. 568. Neither his first- nor his second-level supervisor indicated at any time prior to his termination that they had any concerns regarding his performance. Carter conceded that he had had several disciplinary actions taken against him for mistakes he made in allowing prisoners to be released prematurely. However, the only formal discipline in his record was more than five years old at the time he was not reappointed, and the Sheriff did not testify that those past disciplinary actions played any part in his decision not to reappoint Carter.
civil” and that Roberts “switched him up and brought him back to corrections.” J.A. 102. McCoy, however, stated that he had worked in the Sheriff’s Office for more than 21 years and always received “above average” or “outstanding” evaluations, and that at no time prior to his non-reappointment did his immediate supervisor or second-level supervisor indicate that they had any problems with his performance. In light of the Sheriff’s threat that supporters of Adams would lose their jobs and his specific statement of disapproval of employees being on Adams’s Facebook page, we conclude that a reasonable jury could conclude that McCoy’s lack of political allegiance to Roberts was a substantial motivation for the Sheriff’s decision not to reappoint him.

**Dixon**

Plaintiffs presented evidence that Dixon performed his job “in an exemplary manner” during his more than 13 years with the Sheriff’s Office, always earning performance evaluations of at least “above average” and earning a rating of “outstanding” in his last evaluation. At no time did his first- or second-level supervisor express concerns with his performance.

Dixon voiced his opposition to Sheriff Roberts’s candidacy on Election Day to Frances Pope, who was working the polls for Roberts’s campaign. On Dixon’s way out, referring to the Sheriff’s campaign material, he told Pope that she should “just throw that stuff away” (“the polling-place comment”). J.A. 581 (internal quotation marks omitted). Dixon spoke in a friendly, nonconfrontational tone and did not use any expletives. Dixon also had an Adams bumper sticker on his car that he was “pretty sure people saw.” J.A. 148.

12. The Sheriff testified that he also considered the fact that Dixon transferred multiple times between working in the jail and in civil

The Sheriff denies that Dixon was not reappointed because of his lack of political allegiance. Rather, the Sheriff represents that Dixon in fact was let go because he used profanity in making the polling-place comment, although the Sheriff does not indicate the source of his belief and admits that he never sought Dixon’s side of the story before replacing him. See Appellee’s brief at 10; J.A. 99 (stating that “[t]he Sheriff’s understanding” that Dixon said, “You can take this f—ing s— stuff, and throw it in the trash can.”). For his part, Dixon denies using any profanity in making the polling-place comment. We conclude that if a jury credited Dixon’s testimony, it could also reasonably find that the Sheriff knew Dixon had not used profanity and that his support for Adams, as revealed by the polling-place comment and bumper sticker, substantially motivated him not to reappoint Dixon. See Reeves, 530 U.S. at 147, 120 S.Ct. 2097.

**Sandhofer**

In contrast, we conclude that Plaintiffs have failed to create a genuine factual dispute regarding whether Sandhofer’s political disloyalty to Sheriff Roberts was a substantial basis for his non-reappointment. The Sheriff had used Sandhofer—who had experience working for a downtown marketing organization—for significant marketing efforts and fundraising in 2008. As a result, Colonel Bowden asked Sandhofer in 2009 to obtain prominent sign locations among downtown Hampton businesses in conjunction with the 2009 election. Sandhofer agreed to help the Sheriff in this way, even though he actually never followed through. Sandhofer also was ordered by Lieutenant Miranda Harding to work the polls on Election Day, but he

process after requesting to be a training officer but later deciding that he could not handle the pressures of that position.
declined on the basis that his “family comes first.” J.A. 169. Additionally, he verbally expressed his support for Adams to several people, as discreetly as possible, and he attended the August cookout and was depicted in pictures of the cookout posted on Facebook. Plaintiffs further point out that Sandhofer’s girlfriend drove him to work and to campaign debates in her car, which had an Adams bumper sticker affixed to it. Sergeant John Meyers “mentioned” the sticker to Sandhofer on at least one occasion. J.A. 591.

We conclude that this evidence is simply too thin to create a genuine factual dispute regarding whether Sandhofer’s lack of political allegiance to the Sheriff was a substantial basis for his non-reappointment. Sandhofer admitted attending a reception for the Sheriff’s campaign at the mayor’s house at the Sheriff’s request. And, he admitted agreeing to help the Sheriff locate signs for the 2009 election, although he never actually located any of the signs. Furthermore, while he refused to work the polls on Election Day, the reason he gave had nothing to do with supporting Adams. Without more, there simply is not sufficient evidence that the Sheriff identified Sandhofer as an Adams supporter, even assuming that the Sheriff believed his girlfriend was supporting Adams. And there was no reasonable basis for a jury to conclude that the Sheriff would have declined to reappoint Sandhofer based simply on his lack of affirmative assistance to the Sheriff’s 2009 campaign. We therefore conclude that the district court properly granted summary judgment to the Sheriff on Sandhofer’s claim.

Woodward

During her more than 11 years with the Sheriff’s Office, Woodward’s performance evaluations had always been “above average” or “outstanding,” J.A. 601 (internal quotation marks omitted). According to Woodward, “[i]t was very well known within the office that [she] was close to Jim Adams.” J.A. 600. In early 2009, Woodward’s former supervisor and mentor, Deborah Davis, became the treasurer of Adams’s campaign. Woodward also informed several of her coworkers that she supported Adams’s candidacy, although she generally tried to keep her support quiet to protect her job.

During Roberts’s prior campaigns, Woodward had worked “tirelessly” handing out flyers, working the polls, placing yard signs, attending campaign events, and selling and purchasing tickets. J.A. 599. In light of her support for Adams, however, she did none of those things in 2009, except for purchasing golf tournament tickets (because she felt coerced).

In the summer of 2009, Woodward noticed that her colleague, Lieutenant George Perkins, was circulating a petition to place the Sheriff’s name on the ballot. Woodward complained to Sergeant Sharon Mays, Sergeant Meyers, Perkins himself, and others, on the basis that Perkins was not a Hampton resident and only Hampton residents could circulate such petitions. She also learned that another non-resident was circulating petitions and she had various conversations with Mays about that as well.

In the end, however, we conclude that it would be mere speculation for a jury to conclude that Woodward was let go because of lack of political allegiance to Roberts. Outside of her petition complaints, there is no significant evidence that would support an inference that the Sheriff believed Woodward was supporting Adams. Woodward conceded that she shared her
preference for Adams only with people she thought would keep her feelings secret. And Woodward maintained that the petition complaints were not based on the fact that Roberts was the subject of the petitions but on the principle that they should not be circulated in the workplace by a non-Hampton resident. There is no evidence that the Sheriff or others did not take her complaints at face value or otherwise assumed that her true goal was to work against Roberts's campaign.

The Sheriff testified that the reason he did not reappoint Woodward and Bland was that he expected that the number of deputies he would be allocated by the Compensation Board would be reduced, based on the declining population of the Hampton City Jail. See Va.Code Ann. § 15.2-1609.1. Woodward and Bland counted against that allotment and the Sheriff maintains that he decided he needed to have deputies in Woodward's and Bland's positions. Although Woodward's and the Sheriff's accounts are in conflict concerning whether he ever offered Woodward the opportunity to become a deputy, we conclude that that conflict is simply not a sufficient basis for a reasonable inference that her lack of political allegiance to Roberts was a substantial motivation for her non-reappointment.

Bland

Finally, we determine that Plaintiffs failed to create a genuine factual issue concerning whether a lack of political allegiance was a substantial basis for the Sheriff's decision not to reappoint Bland. Bland had a financial position in the Sheriff's Office Administration Division. He had worked with the Sheriff's Department for more than nine years, performed “in an exemplary manner,” and received performance evaluations of “above average.” Bland had declined to provide significant volunteer assistance to the Sheriff's 2009 campaign after having provided many types of support for the Sheriff's past campaigns. He was also known to be very close to Deborah Davis, who had left the Sheriff's Office in 2008 to become Adams's campaign treasurer in early 2009.

However, Bland admitted purchasing raffle tickets for the Sheriff's fundraising golf tournament, and he also admitted helping to set up electronic equipment the night of the election. He further admitted that he did not actively support Adams's campaign in any way and that Woodward was the only person he even told of his intention to vote for Adams. Something more would be necessary in order to warrant a reasonable inference that Bland's lack of political allegiance to Sheriff Roberts was a substantial basis for the Sheriff's decision not to reappoint him.

B. Merits of Free-Speech Claims

The Plaintiffs next argue that the district court erred in granting summary judgment against them on their speech claims. We conclude that Carter, McCoy, and Dixon at least created genuine factual disputes regarding whether the Sheriff violated their free-speech rights, but that Woodward did not.

Carter

The first question to be addressed with regard to the speech claims is whether the conduct that the employee maintains precipitated his non-reappointment constituted speech at all. Carter's conduct consisted of his “liking” Adams's campaign page on Facebook. The district court concluded that “merely 'liking' a Facebook page is insufficient speech to merit constitutional protection” and that the record did not sufficiently describe what statement that he favored Adams.
McCoy made. *Bland*, 857 F.Supp.2d at 603. To consider whether this conduct amounted to speech, we first must understand, as a factual matter, what it means to “like” a Facebook page.

“Facebook is an online social network where members develop personalized web profiles to interact and share information with other members.” *Lane v. Facebook, Inc.*, 696 F.3d 811, 816 (9th Cir.2012). Members can share various types of information, including “news headlines, photographs, videos, personal stories, and activity updates.” *Id.* Daily more than 500 million Facebook members use the site and more than three billion “likes” and comments are posted. See Brief of Facebook, Inc. as Amicus Curiae, at 3.

Every Facebook user has a profile, which “typically includes, among other things, the User's name; 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 [interacts, known as 'friends']; and . . . a list of Facebook 'Pages' the User has Liked.” *Id.* at 4 (footnote omitted). “[B]usinesses, organizations and brands,” can also use “Pages” for similar purposes. What is a Facebook Page?, Facebook, http://www.facebook.com/help/281592001947683 (last visited Sept. 17, 2013).

When a user logs on to Facebook, his home page is the first thing that he typically sees. Included on a home page is a 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.” Brief of Facebook, Inc. as Amicus Curiae, at 5; see What is News Feed?, Facebook, http://www.facebook.com/help/327131014036297 (last visited Sept. 17, 2013). It “is a constantly updating list of stories from people and Pages that [the User] follow[s] on Facebook.” What is News Feed?, Facebook, http://www.facebook.com/help/327131014036297 (last visited Sept. 17, 2013).

“Liking” on Facebook is a way for Facebook users to share information with each other. The “like” button, which is represented by a thumbs-up icon, and the word “like” appear next to different types of Facebook content. Liking something on Facebook “is an easy way to let someone know that you enjoy it.” What does it mean to “Like” something?, Facebook, http://www.facebook.com/help/452446988120360 (last visited Sept. 17, 2013). Liking a Facebook Page “means you are connecting to that Page. When you connect to a Page, it will appear in your timeline and you will appear on the Page as a person who likes that Page. The Page will also be able to post content into your News Feed.” What's the difference between liking an item a friend posts and liking a Page?, Facebook, http://www.facebook.com/help/452446988120360 (last visited Sept. 17, 2013).

[9] Here, Carter visited the Jim Adams's campaign Facebook page (the “Campaign Page”), which was named “Jim Adams for Hampton Sheriff,” and he clicked the “like” button on the Campaign Page. When he did so, the Campaign Page's name and a photo of Adams—which an Adams campaign representative had selected as the Page's icon—were added to Carter's profile, which all Facebook users could view. On Carter's profile, the Campaign Page name served as a link to the Campaign Page. Carter's clicking on the “like” button also caused an announcement that Carter liked the Campaign Page to appear in the news feeds of Carter's friends. And it caused Carter's name and his profile photo to be added to the Cam-
Campaign Page’s “People [Who] Like This” list.

Once one understands the nature of what Carter did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech.\footnote{14} On the most basic level, clicking on the “like” button literally causes to be published the statement that the User “likes” something, which is itself a substantive statement. In the context of a political campaign’s Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.

Aside from the fact that liking the Campaign Page constituted pure speech, it also was symbolic expression. The distribution of the universally understood “thumbs up” symbol in association with Adams’s campaign page, like the actual text that liking the page produced, conveyed that Carter supported Adams’s candidacy. \cite{14} See \textit{Spence v. Washington}, 418 U.S. 405, 410–11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (per curiam) (holding that person engaged in expressive conduct when there was “[a]n intent to convey a particularized message . . . , and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it”); \textit{see also} \textit{Tobey v. Jones}, 706 F.3d 379, 388 n. 3 (4th Cir.2013).

In sum, liking a political candidate’s campaign page communicates the user’s approval of the candidate and supports the campaign by associating the user with it. In this way, it is the Internet equivalent of displaying a political sign in one’s front yard, which the Supreme Court has held is substantive speech. \cite{15} See \textit{City of Ladue v. Gilleo}, 512 U.S. 43, 54–56, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). Just as Carter’s placing an “Adams for Sheriff” sign in his front yard would have conveyed to those passing his home that he supported Adams’s campaign, Carter’s liking Adams’s Campaign Page conveyed that message to those viewing his profile or the Campaign Page.\footnote{15} In fact, it is hardly surprising that the record reflects that this is exactly how Carter’s action was understood. \cite{15} See J.A. 160 (McCoy’s testimony that in light of Carter’s liking Adams’s Campaign Page, “everybody was saying that . . . Carter is out of there because he supported Adams openly”); \textit{see also} J.A. 793 (Sheriff’s Office employee stating that Roberts had said that “certain employees were on the Facebook page of his opponent, Jim Adams, indicating their support of Adams for Sheriff”).

\footnote{14} The Supreme Court has rejected the notion that online speech is somehow not worthy of the same level of protection as other speech. \textit{See Reno v. ACLU}, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997); \textit{see also} \textit{Ashcroft v. ACLU}, 542 U.S. 656, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004).

\footnote{15} Indeed, in holding that an ordinance banning signs at residences except for those signs fitting within particular exceptions violated the plaintiff-resident’s free-speech rights, the \textit{Gilleo} Court highlighted several aspects of displaying political signs at one’s residence that apply as well to liking a Facebook campaign page:

Displaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text or picture by other means. Precisely because of their location, such signs provide information about the identity of the “speaker.”

Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. \textit{City of Ladue v. Gilleo}, 512 U.S. 43, 56–57, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994).
The second part of McVey’s first prong, concerning whether Carter was speaking as a private citizen on a matter of public concern, need not detain us long. The Sheriff does not dispute that Carter’s speech, if it was speech, was made in his capacity as a private citizen. Cf. Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006) (holding that employee does not speak as a private citizen when his speech is “pursuant to [his] official duties”). And, it is well established that an employee can speak as a private citizen in his workplace, even if the content of the speech is “related to the speaker’s job.” Id.; see Pickering, 391 U.S. 564–65, 88 S.Ct. 1731 (holding that letter to local newspaper from teacher concerning school board policies was protected speech). Further, the idea expressed in Carter’s speech—that he supported Adams in the 2009 election—clearly related to a matter of public concern. See Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 329, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (describing political speech as “central to the meaning and purpose of the First Amendment”); McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 346, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” (internal quotation marks omitted)).

Next, on the record before us, Carter’s interest in expressing support for his favored candidate outweighed the Sheriff’s interest in providing effective and efficient services to the public. Carter’s speech was political speech, which is entitled to the highest level of protection. See Meyer v. Grant, 486 U.S. 414, 422, 425, 108 S.Ct. 1886, 100 L.Ed.2d 425 (1988) (describing constitutional protection of “core political speech” as being “at its zenith” (internal quotation marks omitted)); see alsoConnick, 461 U.S. at 152, 103 S.Ct. 1684 (“We caution that a stronger showing [of disruption] may be necessary if the employee’s speech more substantially involved matters of public concern.”). Indeed, the public’s interest in Carter’s opinions regarding the election may have had particular value to the public in light of his status as a Sheriff’s Office employee. See, e.g., Waters v. Churchill, 511 U.S. 661, 674, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (plurality opinion) (“Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.”). In contrast, despite the Sheriff’s reference to the need for harmony and discipline in the Sheriff’s Office, nothing in the record in this case indicates that Carter’s Facebook support of Adams’s campaign did anything in particular to disrupt the office or would have made it more difficult for Carter, the Sheriff, or others to perform their work efficiently. See Goldstein v. Chestnut Ridge Volunteer Fire Co., 218 F.3d 337, 356 (4th Cir.2000) (holding that “generalized and unsubstantiated interests” “in maintaining morale and efficiency” within the fire department did not outweigh plaintiff’s speech interest). The Sheriff’s case in this regard is especially weak considering that he has failed to show that the jailers occupied any “confidential, policymaking, or public contact role” in the Sheriff’s Office. McVey, 157 F.3d at 278.

Finally, for the same reasons that we hold that Carter has created a genuine factual issue regarding whether he was terminated because of his lack of political allegiance to the Sheriff, we conclude that
Carter has created a genuine factual issue concerning whether his Facebook support for Adams was also a substantial factor. The Sheriff warned Carter that his support of Adams would cost him his job, and a jury reasonably could take the Sheriff at his word.

McCoy

Our application of the McVey test to McCoy’s speech claim is very similar to our application of it to Carter’s. McCoy presented evidence that he engaged in First Amendment speech when he “went on Jim Adams’ campaign Facebook page and posted an entry on the page indicating [his] support for his campaign.” J.A. 586; see also J.A. 156 (stating that he “went on [Adams’s] Facebook page” and “posted [his] picture . . . as a supporter”). Indeed, the evidence indicated that many in the Sheriff’s Office were “shocked” by the posting because it indicated that McCoy was “not . . . supporting the sheriff.” J.A. 681. The district court concluded that McCoy did not sufficiently allege that he engaged in speech because the record did not sufficiently describe what statement McCoy made. See Bland, 857 F.Supp.2d at 604.

Certainly a posting on a campaign’s Facebook Page indicating support for the candidate constitutes speech within the meaning of the First Amendment. 16 For the same reasons as applied to Carter’s speech, McCoy’s speech was made in his capacity as a private citizen on a matter of public concern, namely, whether Adams should be elected Hampton Sheriff. That the record does not reflect the exact words McCoy used to express his support for Adams’s campaign is immaterial as there is no dispute in the record that that was the message that McCoy conveyed. Additionally, although many were shocked that McCoy would so openly support Sheriff Roberts’s opponent, nothing in the record indicates that his speech created any sort of disruption or explains how the Sheriff’s interest in operating the Sheriff’s Office efficiently could outweigh McCoy’s interest in supporting the Sheriff’s opponent in the election. See Goldstein, 218 F.3d at 356.

Further, for the same reasons that we conclude that a reasonable jury could find that McCoy’s political disloyalty was a substantial motivation for the Sheriff’s decision not to reappoint him, such a jury could also find that McCoy’s (politically disloyal) speech was also a substantial motivation for his non-reappointment. With the Sheriff having specifically warned his employees not to support Adams through Facebook and having threatened that Adams supporters would not be reappointed, a jury could reasonably find that the Sheriff simply followed through with his threat by not reappointing McCoy.

Dixon

Dixon alleges he was not reappointed because he displayed an Adams bumper sticker on his car and because he made the polling-place comment. The district court concluded that there was no evidence that Roberts or other senior Sheriff’s Office employees had knowledge of his bumper sticker and that the polling-place comment was merely a personal grievance rather

16. At oral argument, the Sheriff argued for the first time that McCoy did not actually intend his statement of support to be posted on the Campaign Page, and thus that the message did not constitute speech. That McCoy may have intended his expression of support to be kept private rather than made public, however, does not deprive it of its status as speech. See, e.g., Rankin v. McPherson, 483 U.S. 378, 387, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (holding that constable’s office employee engaged in protected speech when she made a private political remark that was overheard by a third person she did not realize was in earshot).
than a statement touching on a matter of
public concern. See Bland, 857 F.Supp.2d
at 605.

Although the evidence that the Sheriff
or his senior officers knew of Dixon's
bumper sticker was thin, to say the least,
the Sheriff admits that he terminated Dixo-

n because of the polling-place comment.
And, the statement that Pope should "just
throw [her Roberts campaign materials]
away" clearly constituted speech on a mat-
ter of public concern—the merits of Rob-
erts's campaign—made in Dixon's capacity
as a private citizen. See McIntyre, 514
California, 403 U.S. 15, 18, 91 S.Ct. 1780,
29 L.Ed.2d 284 (1971) (concluding that
California "lack[ed] power to punish" the
wearing of a jacket bearing the plainly
visible words "F – –k the Draft" based on
"the underlying . . . evident position on the
inutility or immorality of the draft"). Dix-
on represented that he made the state-
ment in a nonconfrontational, friendly
manner, and no specific evidence in the
record indicated how his support for
Adams might have created a lack of har-
mony in the Hampton Sheriff's Office.

As for causation, the Sheriff does not
deny the fact that Dixon's polling-place
comment was the reason he was not reap-
pointed. The Sheriff simply maintained
that he believed Dixon used profanity in
making the comment—although he does
not explain the source of his belief. Were
a jury to credit Dixon's denial of that
charge, it could reasonably conclude that
what actually motivated the Sheriff not to
reappoint Dixon was the fact that Dixon
voiced his disapproval of the Sheriff's can-
didacy.

Woodward

Woodward's alleged protected speech
occurred when she complained about Lieu-
tenant George Perkins's circulation of a
petition in support of Sheriff Roberts on
the basis that Perkins was not a Hampton
resident. As we have already explained,
however, we conclude that it would be
speculative for a jury to conclude that
Woodward's complaint regarding the peti-
tion was based on anything other than the
reasons she voiced at the time, which were
unrelated to the question of whether she
supported Adams or Roberts in the elec-
tion. We therefore conclude she has not
created a genuine factual dispute regard-
ing whether her complaint was a substan-
tial motivation for her non-reappointment.

C. Eleventh Amendment Immunity

Plaintiffs next argue that the district
court erred in ruling that Eleventh
Amendment immunity would bar claims
advanced against the Sheriff in his official
capacity. We agree to the extent that the
Plaintiffs seek the remedy of reinsta-
ment.

[13, 14] The Eleventh Amendment to
the United States Constitution provides:
"The Judicial power of the United States
shall not be construed to extend to any
suit in law or equity, commenced or prose-
cuted against one of the United States by
Citizens of another State, or by Citizens or
Subjects of any Foreign State." Eleventh
Amendment immunity protects unwilling
states from suit in federal court. See Will
v. Michigan Dep't of State Police, 491 U.S.
58, 70–71, 109 S.Ct. 2304, 105 L.Ed.2d 45
(1989); Edelman v. Jordan, 415 U.S. 651,
662–63, 94 S.Ct. 1347, 39 L.Ed.2d 662
(1974).17 This immunity also protects

17. Although the language of the Eleventh
Amendment does not explicitly apply to suits
brought against a state by one of its own
citizens, the Amendment has been construed
to bar such suits. See Equity in Athletics, Inc.
v. Department of Educ., 639 F.3d 91, 107 n. 12
(4th Cir.2011).
“state agents and state instrumentalities,” *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429, 117 S.Ct. 900, 137 L.Ed.2d 55 (1997), meaning that it protects “arm[s] of the State” and State officials, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). When a judgment against a governmental entity would have to be paid from the State’s treasury, the governmental entity is an arm of the State for Eleventh Amendment purposes. See *Cash v. Granville Cnty. Bd. of Educ.*, 242 F.3d 219, 223 (4th Cir.2001). The Supreme Court, however, delineated an exception to the application of the Eleventh Amendment in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). That exception “permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law, on the rationale that such a suit is not a suit against the state for purposes of the Eleventh Amendment.” *McBurney v. Cuccinelli*, 616 F.3d 393, 399 (4th Cir.2010). The operation of the Eleventh Amendment in this case thus depends on whether Sheriff Roberts is an arm of the State and, if so, whether the *Ex parte Young* exception applies.

The district court determined that Virginia sheriffs are constitutional officers, see Va. Const. Art. VII § 4; Va.Code Ann. § 15.2–1609; *Jenkins v. Weatherholtz*, 909 F.2d 105, 107 (4th Cir.1990), and that sheriffs are arms of the State, see *Blankenship v. Warren Cnty.*, 918 F.Supp. 970, 973–74 (W.D.Va.1996). The district court also determined that “the State would be liable to pay adverse judgments won against the Sheriff in his official capacity.” *Blund*, 857 F.Supp.2d at 610. Thus, the court concluded, “a suit against the Sheriff in his official capacity is in fact a suit against the State.” *Id.* Finding no evidence of abrogation or waiver of immunity by the Commonwealth, the district court reasoned that “the Sheriff is immune from suit for claims against him in that capacity.” *Id.*

Plaintiffs do not dispute that the Commonwealth would be liable to pay any money judgment against the Sheriff. However, citing *Edelman*, 415 U.S. at 664–65, 94 S.Ct. 1347, Plaintiffs contend that Eleventh Amendment immunity does not apply to the claims against the Sheriff in his official capacity because Plaintiffs’ requests for reinstatement and lost pay are equitable claims to which the immunity does not apply.

[15] Because reinstatement is a form of prospective relief, the refusal to provide that relief when it is requested can constitute an ongoing violation of federal law such that the *Ex parte Young* exception applies. See *Coakley v. Welch*, 877 F.2d 304, 307 (4th Cir.1989); *State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 96 (2d Cir.2007). Plaintiffs are therefore correct that the Sheriff is not entitled to Eleventh Amendment immunity to the extent that they seek reinstatement. See *Coakley*, 877 F.2d at 307; *State Emps. Bargaining Agent Coal.*, 494 F.3d at 96. As we have explained, however, to the extent that the claims seek monetary relief, they are claims against an arm of the Commonwealth’s immunity. See *Lee–Thomas v. Prince George’s Cnty. Pub. Sch.*, 666 F.3d 244, 249 (4th Cir. 2012) (“‘Congress may abrogate the States’ Eleventh Amendment immunity when it both unequivocally intends to do so and acts pursuant to a valid grant of constitutional authority.’”) (quoting *Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001)).
State. See Cash, 242 F.3d at 223. Thus, to the extent that the claims seek monetary relief against the Sheriff in his official capacity, the district court correctly ruled that the Sheriff is entitled to Eleventh Amendment immunity.

D. Qualified Immunity

[16] The Sheriff argues that even if some of the Plaintiffs created genuine factual disputes concerning whether he violated their association or free-speech rights by not reappointing them, he is nevertheless entitled to qualified immunity to the extent that the claims are asserted against him in his individual capacity.

A government official who is sued in his individual capacity may invoke qualified immunity. See Ridpath, 447 F.3d at 306. “Qualified immunity protects government officials from civil damages in a § 1983 action insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Edwards v. City of Goldsboro, 178 F.3d 231, 250 (4th Cir.1999) (internal quotation marks omitted). In determining whether a defendant is entitled to qualified immunity, a court must decide (1) whether the defendant has violated a constitutional right of the plaintiff and (2) whether that right was clearly established at the time of the alleged misconduct. See Walker v. Prince George’s Cnty., 575 F.3d 426, 429 (4th Cir.2009). However, “judges of the district courts and the courts of appeals [are] permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

In analyzing whether the defendant has violated a constitutional right of the plaintiff, the court should identify the right “at a high level of particularity.” Edwards, 178 F.3d at 251. For a plaintiff to defeat a claim of qualified immunity, the contours of the constitutional right “must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002) (internal quotation marks omitted).

We conclude that the Sheriff is entitled to qualified immunity concerning Carter’s, McCoy’s, and Dixon’s claims because in December 2009 a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons, including speech indicating the deputies’ support for the Sheriff’s political opponent.

Simply put, Jenkins sent very mixed signals. Although we conclude today for the reasons discussed earlier that Jenkins is best read as analyzing the duties of the particular deputies before the court, much of the opinion’s language seemed to indicate that a North Carolina sheriff could terminate his deputies for political reasons regardless of the duties of their particular positions. Truthfully, the Jenkins majority opinion reads almost like two separate opinions that are in tension with one another. All of the majority’s analysis up to the opinion’s final page concerns deputies generally or North Carolina deputies, and references particular duties of deputies without indicating that the plaintiffs had those duties, see, e.g., 119 F.3d at 1162 (“The sheriff is likely to include at least some deputies in his core group of advisors. Deputies on patrol work autonomously, exercising significant discretion in performing their jobs.”) (footnote omitted)). This analysis leads up to the broad conclusion that “North Carolina deputy sheriffs may be lawfully terminated for political reasons under the Elrod–Branti exception
to prohibited political terminations.” *Id.* at 1164. The majority rejected our earlier decision in *Jones v. Dodson*, 727 F.2d 1329 (4th Cir.1984), where we concluded that no deputy could ever be a policymaker and held instead that “district courts are to engage in a *Stott*-type analysis, examining the specific position at issue, as we have done here today.” *Jenkins*, 119 F.3d at 1164. The majority later announced an even broader “holding” possibly not even limited to North Carolina sheriffs when it declared that “newly elected or re-elected sheriffs may dismiss deputies either because of party affiliation or campaign activity.” *Id.*

As if this language were not already strong support for a broader reading of *Jenkins*, as we have pointed out, the dissent in *Jenkins* read it that way as well, accusing the majority of “hold[ing] that all deputy sheriffs in North Carolina—regardless of their actual duties—are policymaking officials.” *Id.* at 1166 (Motz, J., dissenting); see also *id.* (“This all-encompassing holding is made without any inquiry into the actual job duties of the deputies before us.”); *id.* (“The majority . . . engages in no analysis of the particular duties of each deputy.”); *id.* (“[T]he majority . . . finds that all North Carolina deputy sheriffs are policymakers—without ever considering the positions held by each of the deputies at issue or their specific job duties.”).

Additionally, *Knight v. Vernon*, while important to our decision regarding the merits of Carter’s, McCoy’s, and Dixon’s constitutional claims, did not clearly establish that the broader reading of *Jenkins* was incorrect. Although Knight worked in a sheriff’s office, she was not a deputy. *See Knight*, 214 F.3d at 546. It is true that the *Knight* majority opined that Knight’s sheriff would not have had the right to fire her for political reasons even if she had taken the oath of a law enforce-
ment officer (like the plaintiffs in *Jenkins* took and like the *Knight* dissent concluded Knight took). *See id.* at 551; *id.* at 555 (Widener, J., concurring and dissenting). But the *Knight* majority’s explanation for why it was immaterial whether Knight had taken the law enforcement officer oath could itself be reasonably taken as support for the broad reading of *Jenkins*. The *Knight* majority stated:

As we emphasized in *Jenkins*, we “examine the job duties of the position,” 119 F.3d at 1165, and Ms. Knight’s duties as a jailer were essentially custodial. *She simply lacked the special status of a deputy sheriff, who is empowered to stand in for the sheriff on a broad front.* *Id.* at 551 (emphasis added). A sheriff reasonably reading *Jenkins* as painting all deputies with a broad brush could well have viewed *Knight* as doing the same, or, at the very least, not weighing in on the issue. *See also id.* at 550 (“The responsibilities of a jailer, such as Ms. Knight, are routine and limited in comparison to those of a deputy sheriff, who may be fired for his political affiliation.”); *id.* (“A jailer is not the sheriff’s ‘second self’ in the sense that a deputy is.”).

The broader reading of *Jenkins* is also in line with a statement from another of our opinions, which was issued after *Knight*. In *Pike v. Osborne*, 301 F.3d 182 (4th Cir.2002), we held that, on a claim that a sheriff terminated a dispatcher for political affiliation reasons, the sheriff was entitled to qualified immunity because in December 1999 it was not clearly established that a sheriff in Virginia could not lawfully terminate, for political affiliation reasons, a dispatcher who was privy to confidential information. *See Pike*, 301 F.3d at 186 (Hamilton, J., concurring in the judgment); *id.* (Broadwater, J., concurring in the judgment) (adopting Judge Hamilton’s reasoning). Judge Hamilton
began his analysis in that case with the statement, “The law of this circuit is clear that sheriffs in Virginia have the right to lawfully terminate their deputies for political affiliation reasons.” Id. (citing Jenkins). He then proceeded to explain why the law was nevertheless not clear regarding whether a dispatcher with access to confidential information, who was not a deputy, could be terminated for political affiliation reasons. See id. 19

For the reasons we explained in reviewing the merits of the Elrod–Branti issue, we believe that this language, while consistent with the Jenkins dissent’s characterization of Jenkins’s reasoning, is an overstatement in light of the Jenkins majority’s specific rejection of the dissent’s characterization of its analysis. Nevertheless, considering the conflicting signals that Jenkins and Pike sent, we conclude that a reasonable sheriff in December 2009 could have believed that he was authorized to terminate any of his deputies for political reasons.20

If we were deciding what the law was in December 2009 regarding the legality of a sheriff firing a deputy for political reasons, we would agree with our colleague in dissent that the law was that a sheriff could not fire for political reasons a deputy sheriff with the limited duties of a jailer. Where we believe we differ in our assessment of this case is in whether that law was clearly established and would have been so recognized not by a judge trained in the law, but by a reasonable sheriff.

For the reasons stated previously, we believe we have sent mixed signals as to when a sheriff could fire a deputy for political reasons and we have been unclear as to when he could and when he could not. Some parts of our en banc decision in Jenkins indicate he could do so and other parts would prohibit it. The dissent in Jenkins expressed its own confusion as to what the holding of Jenkins was and language in our cases since, as well as those from other courts, have interpreted the holding in Jenkins broadly and consistent with the Sheriff’s. In short, we understand why a sheriff would not find the law in this situation clear, particularly given that he is a lay person.

We do not expect sheriffs to be judges and to have the training to sort through every intricacy of case law that is hardly a model of clarity. See Lawyer v. City of Council Bluffs, 361 F.3d 1099, 1108 (8th Cir.2004) (holding that defendants were entitled to qualified immunity because “[p]olice officers are not expected to parse code language as though they were participating in a law school seminar”); Lassiter v. Alabama A & M Univ. Bd. of Trustees, 28 F.3d 1146, 1152 n. 8 (11th Cir.1994) (“Even if some legal expert would have then concluded that a hearing was required, defendants would still be due qualified immunity if reasonable university officials would not have known about it.”), overruled on other grounds by Hope v. Pelzer, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). Rather, in consider-

19. Other courts have, at times, also described Jenkins’s holding broadly. See, e.g., Hall v. Tollett, 128 F.3d 418, 428 (6th Cir.1997) (stating that Jenkins “held that political affiliation is an appropriate requirement for deputy sheriffs”); Fields v. County of Beaufort, 699 F.Supp.2d 756, 764 (D.S.C.2010) (“The Fourth Circuit determined that the office of deputy is that of a policymaker, and therefore, the deputies were lawfully terminated for political reasons.”).

20. We emphasize that even a sheriff who read the specific holding of Jenkins as limited to North Carolina deputies involved in law enforcement could still have reasonably concluded that, if we were squarely presented with the issue, we would hold that a sheriff could terminate any of his deputies for political reasons regardless of their particular duties.
ing whether constitutional rights were clearly established for qualified-immunity purposes, we view the issue from “the layman’s perspective,” Ross v. Reed, 719 F.2d 689, 696 n. 8 (4th Cir.1983), recognizing that “[p]articularly with regard to legal conclusions, lay officers obviously cannot be expected to perform at the level achievable by those trained in the law,” Kroll v. United States Capitol Police, 847 F.2d 899, 906 (D.C.Cir.1988) (Robinson, J., concurring in the judgment) (footnote omitted).

[17] We note that in cases in which the Elrod–Branti exception applies, and an employer therefore does not violate his employee’s association rights by terminating him for political disloyalty, the employer also does not violate his employee’s free speech rights by terminating him for speech displaying that political disloyalty. See Jenkins, 119 F.3d at 1164 (holding that because pleadings established that Elrod–Branti exception applied, deputies failed to state a First Amendment speech retaliation claim that deputies were dismissed for campaigning against the sheriff). Thus, a reasonable sheriff in December 2009 who believed that the Elrod–Branti exception applied to his deputies could have also reasonably believed that he could choose not to reappoint them for their speech indicating their political disloyalty to him. And Carter’s and McCoy’s Facebook activity and Dixon’s bumper sticker and polling-place comment certainly fall into that category. For this reason, we conclude that the Sheriff was entitled to qualified immunity concerning the claims of Carter, McCoy, and Dixon.22

E. Conclusion

In sum, as to the claims of Sandhofer, Woodward, and Bland, we conclude the district court properly analyzed the merits of the claims, and we therefore affirm the grant of summary judgment in favor of the Sheriff. As to the claims of Carter, McCoy, and Dixon, the district court erred by concluding that the Plaintiffs failed to create a genuine dispute of material fact regarding whether the Sheriff violated their First Amendment rights. Nevertheless, the district court properly ruled that the Sheriff was entitled to qualified immunity on Carter’s, McCoy’s, and Dixon’s claims seeking money damages against the Sheriff in his individual capacity, and that the Sheriff was entitled to Eleventh Amendment immunity against those claims to the extent they seek monetary relief against him in his official capacity. The Sheriff is not entitled to Eleventh Amendment immunity, however, on Carter’s, McCoy’s, and Dixon’s claims to the extent the remedy sought is reinstatement.

III.

Accordingly, for the foregoing reasons, we reverse the grant of summary judgment to the Sheriff regarding Carter’s, McCoy’s, and Dixon’s reinstatement claims, and we remand these claims to the district court for further proceedings. We

21. “[O]nly 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, difficult to apply, and not yet well-defined.” DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir.1995) (internal quotation marks omitted); see also McVey v. Stacy, 157 F.3d 271, 277 (4th Cir.1998).

22. Plaintiffs maintain that the Sheriff is not entitled to qualified immunity because the Sheriff’s testimony demonstrated that he actually realizes that he cannot fire his employees on the basis of their political opposition to him. However, qualified immunity depends not on what the actual sheriff knew at the time of his deposition but on what a hypothetical, objectively reasonable sheriff would have known in December 2009.
ELLEN LIPTON HOLLANDER, District Judge, concurring in part and dissenting in part:

I concur in Chief Judge Traxler’s excellent opinion, with one exception. The majority concludes that, at the relevant time, “a reasonable sheriff could have believed he had the right to choose not to reappoint his sworn deputies for political reasons,” Maj. Op. at 391, and, on this basis, it determines that Sheriff Roberts is protected by qualified immunity with respect to his discharge of Carter, Dixon, and McCoy. In my view, when these deputies were discharged in December 2009, the law was clearly established that a sheriff’s deputy with the job duties of a jailer could not be fired on the basis of political affiliation. Therefore, I respectfully disagree with the majority’s ruling as to qualified immunity.

In general, “the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments.” Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality); see Branti v. Finkel, 445 U.S. 507, 516–17, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (recognizing, generally, that “the First Amendment prohibits the dismissal of a public employee solely because of his private political beliefs”). Based on what is known as the Elrod–Branti doctrine, “public employees who allege that they were discharged . . . solely because of their parti-

san political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments.” Elrod, 427 U.S. at 349, 96 S.Ct. 2673. This case concerns the scope of “a narrow exception” to that baseline rule, Maj. Op. at 374, which frames the qualified immunity analysis.

Pursuant to the exception to the Elrod–Branti doctrine, dismissal based on political affiliation is lawful if “the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” Branti, 445 U.S. at 518, 100 S.Ct. 1287. The Supreme Court’s formulation of the doctrine clearly puts the onus on the employer to establish that a particular employee comes within the exception to the rule barring discharge of a public employee based on political affiliation. The majority correctly concludes that, in the light most favorable to plaintiffs, they were dismissed in violation of their rights under the First Amendment.1 This, in turn, requires consideration of Sheriff Roberts’ defense of qualified immunity.

“Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” Pearson v. Callahan, 555 U.S. 223, 231, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009). The qualified immunity analysis involves two inquiries: first, whether the facts alleged, “[t]aken in the light most favorable to the party asserting the injury, terminate his employees for political disloyalty, he may also terminate them for speech that constitutes such disloyalty.” Maj. Op. at 375 n. 5. Accordingly, the qualified immunity analysis applies equally to the free expression and political affiliation claims of these three deputies.

---

1. As the majority observes, both the free expression and political affiliation claims of Carter, McCoy, and Dixon stand or fall on the question of whether those plaintiffs come within the exception to the Elrod–Branti rule because, “in cases in which the Elrod–Branti exception applies, and an employer thus can
show the officer's conduct violated a constitutional [or statutory] right,” Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); and second, whether the right at issue “was clearly established in the specific context of the case—that is, [whether] it was clear to a reasonable officer that the conduct in which he allegedly engaged was unlawful in the situation he confronted.” Merchant v. Bauer, 677 F.3d 656, 662 (4th Cir.) (citation omitted), cert. denied, — U.S. ——, 133 S.Ct. 789, 184 L.Ed.2d 582 (2012). The “two inquiries . . . may be assessed in either sequence.” Id. at 661–62.

“To be clearly established, a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.’ In other words, ‘existing precedent must have placed the statutory or constitutional question beyond debate.’” Reichle v. Howards, — U.S. ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012) (quoting Ashcroft v. al-Kidd, 563 U.S. ——, 131 S.Ct. 2074, 2078, 2083, 179 L.Ed.2d 1149 (2011)) (some internal quotation marks and citations omitted). The issue is “assessed in light of the legal rules that were ‘clearly established’ at the time” of the disputed conduct. Messerschmidt v. Millender, — U.S. ——, 132 S.Ct. 1235, 1245, 182 L.Ed.2d 47 (2012) (citation and some internal quotation marks omitted). Accordingly, we must consider the state of the law in December 2009, when Sheriff Roberts discharged Carter, Dixon, and McCoy.

As to the first prong of the inquiry, which evaluates the merits of the claim of constitutional violation, the majority determines that, in the light most favorable to plaintiffs, Sheriff Roberts improperly dismissed them. In reaching that conclusion, the majority engages in a careful analysis of Jenkins v. Medford, 119 F.3d 1156 (4th Cir.1997) (en banc), cert. denied, 522 U.S. 1090, 118 S.Ct. 881, 139 L.Ed.2d 869 (1998), and Knight v. Vernon, 214 F.3d 544 (4th Cir.2000). In my view, these same cases are dispositive as to the second prong of the qualified immunity inquiry. Jenkins and Knight clearly established that the Elrod–Branti doctrine requires consideration of a deputy's actual job responsibilities, rather than the title of the position.

The Supreme Court’s formulation of the doctrine, of course, is paramount. In Elrod, a newly elected Democratic sheriff discharged several Republican employees of the Sheriff's Office “solely because they did not support and were not members of the Democratic Party . . . .” 427 U.S. at 350–51, 96 S.Ct. 2673. One of the discharged employees was “Chief Deputy of the Process Division and supervised all departments of the Sheriff’s Office” at a certain location; another employee was a courthouse “bailiff and security guard”; a third employee was a process server in the office. Id. On First Amendment grounds, the employees sued in federal court to enjoin their termination. Three justices of the Supreme Court, joined by two concurring justices, held that the district court should have granted the injunction. See id. at 373, 96 S.Ct. 2673. The three-justice plurality opined that “the practice of patronage dismissals is unconstitutional” because “any contribution of patronage dismissals to the democratic process does not suffice to override their severe encroachment on First Amendment freedoms.” Id. at 373, 96 S.Ct. 2673.

The two concurring justices articulated an exception to that general principle, viewing the case as presenting only a “single substantive question”: “whether a non-policymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the
sole ground of his political beliefs.” Id. at 375, 96 S.Ct. 2673 (Stewart, J., concurring) (emphasis added). The concurring justices “agree[d] with the plurality” that such an employee could not be dismissed on the basis of political affiliation. Id. at 375, 96 S.Ct. 2673 (Stewart, J., concurring) (emphasis added).  

Four years later, in Branti, supra, 445 U.S. 507, 100 S.Ct. 1287, a majority of the Court reaffirmed Elrod’s holding, in the context of the imminent firing of two Republican assistant public defenders by a Democratic public defender. See id. at 508–09, 100 S.Ct. 1287. In so doing, the Branti Court reformulated the Elrod concurrence’s exception to the prohibition of dismissals on the basis of political affiliation for “policymaking” or “confidential” employees. The Branti Court said: “[T]he ultimate inquiry is not whether the label ‘policymaker’ or ‘confidential’ fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.” Id. at 518, 100 S.Ct. 1287. It concluded that the assistant public defenders did not fall into the exception to the general rule barring termination on the basis of political affiliation, even though, in some respects, they were involved in policymaking or privy to confidential information. Id. at 519–20, 100 S.Ct. 1287.  

Consistent with Elrod and Branti, this circuit’s case law has long required courts to “examine the particular responsibilities of the position” to determine whether a given public employee comes within the exception to the rule against patronage dismissals. Maj. Op. at 375 (quoting Stott v. Haworth, 916 F.2d 134, 142 (4th Cir. 1990)). In Stott, the court articulated a two-part test to guide the analysis. The first part requires examination of “‘whether the position at issue, no matter how policy-influencing or confidential it may be, relates to partisan political interests . . . [or] concerns.’” Stott, 916 F.2d at 141 (citations and some internal quotation marks omitted). If the position does “‘involve government decision-making on issues where there is room for policy disagreement or implementation,’” the second “‘step is to examine 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 141–42 (citation omitted). The court recognized political affiliation as an appropriate job requirement “‘when there is a rational connection between shared ideology and job performance.’” Id. at 142 (citation omitted).

This circuit’s Elrod–Branti case law has continued to adhere to Stott’s focus on the job responsibilities of a given position. See, e.g., Fields v. Prater, 566 F.3d 381, 386–87 (4th Cir.2009) (applying Stott analysis); Nader v. Blair, 549 F.3d 953, 959–62 (4th Cir.2008) (same). Commenting on the test endorsed by Stott, the court said in Jen-
kins, 119 F.3d at 1162: “Our cases have moved . . . to position-specific analyses.”

The majority’s conclusion that, at the relevant time, the law as to deputy sheriffs was not clearly established is based largely on its belief that Jenkins sent “very mixed signals” as to the status of a sheriff’s deputy under the Elrod–Branti doctrine. Maj. Op. at 391. Jenkins, which involved the termination of ten North Carolina sheriff’s deputies, contains instances in which the court used broad language that, according to the majority here, arguably suggested that a Sheriff could terminate a deputy for political reasons, without regard to actual duties. Id. But, the Jenkins majority took pains to define the scope of its holding and to resolve any “tension” created by its language. Id. at 391–92.

The Jenkins majority stated that, “in North Carolina, the office of deputy sheriff is that of a policymaker, and . . . deputy sheriffs are the alter ego of the sheriff generally, for whose conduct he is liable,” and concluded from this “that such North Carolina deputy sheriffs may be lawfully terminated for political reasons under the Elrod–Branti exception to prohibited political terminations.” Jenkins, 119 F.3d at 1164. The Jenkins majority also said: “We hold that newly elected or reelected sheriffs may dismiss deputies because of party affiliation or campaign activity.” Id.

These statements cannot be read in isolation, however. The Jenkins majority was engaged in overruling the court’s earlier decision in Jones v. Dodson, 727 F.2d 1329 (4th Cir.1984), which had held that deputy sheriffs could not be fired on the basis of political affiliation, “no matter what the size of the office, or the specific position of power involved, or the customary intimacy of the associations within the office, or the undoubted need for mutual trust and confidence within any law enforcement agency.” Id. at 1338. The Jenkins Court announced, 119 F.3d at 1164: “We disagree with Dodson to the extent it suggests that no deputy sheriff can ever be a policymaker.”

The dissent in Jenkins maintained that the majority “refus[ed] to engage in the proper Elrod–Branti analysis . . . .” Id. at 1171 (Motz, J., dissenting). Pointing to the broad, categorical language employed by the Jenkins majority, the dissent reasoned that the majority had found that “all (more than 4,600 in 1988) North Carolina deputy sheriffs are policymakers,” thereby “call[ing] into question whether the numerous North Carolina state troopers (more than 1,100 in 1988) and police officers (more than 7,900 in 1988) are also ‘policymakers’ who can be dismissed at will by each new political regime.” Id. (emphasis in original).

In response, the Jenkins majority expressly rejected the dissent’s construction of its holding, explaining that its holding was “limit[ed]” to “those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff.” Id. at 1165 (emphasis added). Further, the Jenkins majority insisted that its holding “applies only to those who meet the requirements of the rule as we state it,” id. at 1165 n. 66, and did “not extend to all 13,600 officers in North Carolina, as the dissent suggests.” Id. It reasoned that the “deputies in the instant case” fell within the Elrod–Branti exception “[b]ecause” they were “law enforcement officers.” Id. at 1165 (emphasis added).

Of import here, the Jenkins majority directed that “the district courts are to engage in a Stott-type analysis, examining the specific position at issue . . . .” Id. at 1164 (emphasis added). Moreover, the Jenkins majority directly admonished sheriffs within the Fourth Circuit, stating: “We issue this limitation to caution sheriffs that courts examine the job duties of the position, and not merely the title, of
those dismissed.” Id. at 1165 (emphasis added). This directive is particularly salient, given that qualified immunity is predicated on the notion that “a reasonably competent public official should know the law governing his conduct.” Harlow v. Fitzgerald, 457 U.S. 800, 818–19, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); accord Trulock v. Freeh, 275 F.3d 391, 400 (4th Cir. 2001), cert. denied, 537 U.S. 1045, 123 S.Ct. 621, 154 L.Ed.2d 517 (2002).

Notably, the majority here acknowledges “the Jenkins majority’s specific rejection of the dissent’s characterization of its analysis.” Maj. Op. at 393. But, even assuming that Jenkins left the state of circuit precedent unclear as to the application of the Elrod–Branti doctrine to deputy sheriffs, the court’s subsequent decision in Knight v. Vernon, supra, 214 F.3d 544, laid to rest any ambiguity with respect to sheriff’s deputies serving as jailers.

In Knight, the district court had relied on Jenkins in granting summary judgment to a sheriff who fired a jailer, based on the district court’s conclusion that the role of a jailer is similar to the role of a deputy. See Knight v. Vernon, 23 F.Supp.2d 634, 646 (M.D.N.C.1998), rev’d in part, aff’d in part on other grounds, 214 F.3d 544 (4th Cir.2000). This court disagreed, thereby clarifying any possible confusion as to the proper construction of Jenkins.

The court expressly held that “a sheriff cannot insist on political loyalty as a job requirement for a county jailer....” 214 F.3d at 548. It reasoned that “political allegiance to [the sheriff] was not an appropriate requirement for the performance of [the] job [of] jailer,” id. at 550, and this would be so even if the jailer had taken the oath of a deputy sheriff. Id. at 551.4 In its analysis, the majority reiterated that the “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.” Id. at 549 (emphasis added).

Focusing on the particular job duties of a jailer, the Knight majority emphasized the “circumscribed,” “routine,” and “limited” responsibilities of the position, in contrast to those of a sheriff’s deputy with “the general power of arrest.” Id. at 550. It noted that “exercising the power of arrest is not one of the job duties of a jailer. Her duties are simply to supervise and care for inmates in the county jail.” Id.

The Knight majority also observed: “Ms. Knight was not out in the county engaging in law enforcement activities on behalf of the sheriff. She was not a confidant of the sheriff, and she did not advise him on policy matters. Nor was she involved in communicating the sheriff’s policies or positions to the public.” Id.

In its analysis of the merits, the majority here acknowledges that the job duties of Carter, McCoy, and Dixon were “essentially identical to those of the plaintiff in Knight v. Vernon.” Maj. Op. at 377–78. It goes on to say, in the context of their termination, that “the near identity between the duties of the deputy plaintiffs in this case and Knight’s duties warrants the same result here.” Id. at 378. I readily agree with the majority that there is no cognizable distinction for purposes of the Elrod–Branti doctrine between the jailer in Knight and the jailers in this case. As I see it, that should end the qualified immunity inquiry.

To be sure, the jailers here were sworn deputy sheriffs. But, they did not exercise

4. According to the Knight majority, the record was clear that Knight never took a law enforcement officer’s oath. Knight, 214 F.3d at 546. The dissent disagreed. See id. at 555 (Widener, J., dissenting). But, of significance here, the majority determined, in the alternative, that “even if Ms. Knight did take such an oath, it would not change our decision.” Id. at 551 (majority).
law enforcement responsibilities (or, at least, have raised a genuine factual dispute as to whether they did). The district court asserted that, because the “officers in this case were sworn, uniformed deputies,” they had “the power of arrest.” *Bland v. Roberts*, 857 F.Supp.2d 599, 609 (E.D.Va. 2012). But, as the majority observes, see Maj. Op. at 379, the deputies here could not lawfully exercise the arrest power, except in extraordinary circumstances, because they had been trained as jailers rather than as law enforcement officers, and the arrest power was not an appreciable aspect of their duties. Indeed, the undisputed record evidence is that no deputy in the Sheriff’s Department had made an arrest in the preceding sixteen years.

Moreover, as the majority points out, the record is clear that, although the jailers in this case took an oath, they did not take a law enforcement officer’s oath. See Maj. Op. at 378–79. This renders the finding of qualified immunity weaker still, because the *Knight* Court concluded that even a jailer who does take a law enforcement officer’s oath cannot be discharged on the basis of political affiliation. See *Knight*, 214 F.3d at 551.

In contrasting the role of a “jailer” with that of a “deputy sheriff, who may be fired for his political affiliation,” *id.* at 550, the *Knight* Court was referring to the type of deputy discussed “in *Jenkins*: a deputy who “is a sworn law enforcement officer” and who “has the general power of arrest, a power that may be exercised in North Carolina [and Virginia] only by an officer who receives extensive training in the enforcement of criminal law.” *Id.* A reasonable sheriff reading *Knight* would realize that such a description of a “deputy” did not encompass Carter, McCoy, and Dixon, who served as jailers, and would have heeded the court’s warning in both *Knight* and *Jenkins* that “courts examine the job duties of the position, and not merely the title, of those dismissed.” *Knight*, 214 F.3d at 549 (quoting *Jenkins*, 119 F.3d at 1165) (emphasis in *Knight*).

In support of its view that the pertinent law was not clearly established when plaintiffs were discharged in December 2009, the majority places unwarranted emphasis on *Pike v. Osborne*, 301 F.3d 182 (4th Cir.2002). In that case, the court held that a sheriff was entitled to qualified immunity in connection with the termination in 1999 (i.e., before *Knight* was decided) of two dispatchers, based on their political affiliation. In a concurrence, one member of the panel concluded that the law was not clearly established “on the point of whether sheriffs in Virginia can lawfully terminate for political affiliation reasons dispatchers with privity to confidential information.” *Pike*, 301 F.3d at 186 (Hamilton, J., concurring) (emphasis added). The concurrence prefaced its discussion of the sheriff’s entitlement to qualified immunity with a statement upon which the majority here relies: the “law in this circuit is clear that sheriffs in Virginia have the right to lawfully terminate their deputies for political affiliation reasons.” *Id.* at 186 (citing *Jenkins*).

But, this assertion was clearly dicta, because *Pike* did not involve sheriff’s deputies. And, privity to confidential informa-

---

5. The opinion, although labeled a concurrence, was joined by one of the other two judges on the panel.

6. “Dictum is ‘statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it.’” *Pittston Co. v. United States*, 199 F.3d 694, 703 (4th Cir. 1999) (citation omitted); accord *New Cingular Wireless PCS, LLC v. Finley*, 674 F.3d 225, 241 (4th Cir.2012).
tion, upon which Pike’s holding turned, is not at issue here. The majority acknowledges that the Pike concurrence overstated the holding of Jenkins. Maj. Op. at 393. As of December 2009, Jenkins, as well as Stott and Knight, were part of the clearly established law of this circuit. In my view, it sets a troubling precedent if this circuit’s clearly established law can be undone by dicta.

Stott emphasized the importance of analyzing job duties in cases such as this one. Speaking en banc, the Jenkins Court expressly admonished sheriffs that “courts examine the job duties of the position, and not merely the title, of those dismissed.” Jenkins, 119 F.3d at 1165 (emphasis added). And, Knight reinforced that point, characterizing it as the “central message of Jenkins.” Knight, 214 F.3d at 549. Knight also made clear that a sheriff may not terminate a jailer for political reasons, even if the jailer took an oath as a law enforcement officer. See Knight, 214 F.3d at 551. Pike did not alter any of this.

The salient facts of this case are so close to the facts in Knight that any reasonable sheriff would have predicted that both cases would yield the same result. To the extent that there is any distinction between Knight and this case, it concerns only the title of the positions held by the employees. Yet, it was clearly established that the title itself is of no legal significance. Therefore, Sheriff Roberts should have known that he could not discharge his jailers on the basis of their political affiliation.

The majority is correct in stating that, in considering whether the law was clearly established for purposes of qualified immunity, we look to the perspective of a layperson, not a lawyer. See Maj. Op. at 393–94. And, as the Supreme Court recognized in Hope v. Pelzer, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), the “contours” of the constitutional right “‘must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right.’” (Citation omitted). Yet, the Supreme Court also underscored that the “very action in question” need not have “‘previously been held unlawful’” if, “in the light of pre-existing law the unlawfulness [is] apparent.” Id. (citations omitted). See also Wilson v. Kittoe, 337 F.3d 392, 403 (4th Cir. 2003) (qualified immunity may be denied even in the absence of “‘a case holding the defendant’s identical conduct to be unlawful . . . .’”) (citation omitted).

“Qualified immunity extends to protect officials ‘who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful.’” Williams v. Ozmint, 716 F.3d 801, 805 (4th Cir. 2013) (quoting Henry v. Purnell, 652 F.3d 524, 531 (4th Cir.) (en banc), cert. denied, — U.S. —, 132 S.Ct. 781, 181 L.Ed.2d 488 (2011)); accord Durham v. Horner, 690 F.3d 183, 188 (4th Cir. 2012). It is intended to “protect[] public officials from ‘bad guesses in gray areas.’” Durham, 690 F.3d at 190 (quoting Maciariello v. Summer, 973 F.2d 295, 298 (4th Cir. 1992), cert. denied, 506 U.S. 1080, 113 S.Ct. 1048, 122 L.Ed.2d 356 (1993)). There were no gray areas here.

In 1997, this court delivered an unequivocally clear message to lay sheriffs. Directly addressing sheriffs, the Jenkins Court announced: “We . . . caution sheriffs that courts examine the job duties of the position, and not merely the title, of those dismissed.” Jenkins, 119 F.3d at 1165. Any person capable of serving as a sheriff surely would have understood that directive, which was subsequently reiterated in Knight, and would have grasped what all the members of this panel agree was “the law . . . in December 2009 regarding the legality of a sheriff firing a

In sum, Sheriff Roberts’ dismissal of Carter, McCoy, and Dixon on the basis of their political allegiance, if ultimately proven, cannot be excused on the basis of qualified immunity. Therefore, I respectfully dissent from the portion of the majority opinion that upholds the finding of qualified immunity for Sheriff Roberts with respect to the First Amendment claims lodged by Carter, McCoy, and Dixon.


v.

Kenneth SALAZAR, Secretary, Department of Interior, also known as Ken Salazar; United States Department of Interior; Bureau of Safety and Environmental Enforcement; Michael R. Bromwich, In His Official Capacity as Director, Bureau of Safety and Environmental Enforcement, Defendants–Appellants.

7. The majority has correctly disregarded Sheriff Roberts’ subjective understanding of the law in applying the objective analysis called for by the qualified immunity doctrine. See Maj. Op. at 394 n. 22. It is worth noting, however, that there is no indication that Sheriff Roberts was laboring under a misapprehension of the law. At his deposition, Roberts stated that he did not believe he was entitled to fire the plaintiffs “for political reasons.” JA 96. Instead, Roberts disputed plaintiffs’ claim that he fired them for political reasons. As the court unanimously concludes, see Maj. Op. at 380–83, there are genuine disputes of material fact as to the basis for Roberts’ termination of Carter, McCoy, and Dixon.

No. 11–30936.

United States Court of Appeals, Fifth Circuit.

April 9, 2013.


Appeal from the United States District Court for the Eastern District of Louisiana.

Before WIENER, ELROD, and SOUTHWICK, Circuit Judges.

ON REQUEST FOR POLL ON REHEARING EN BANC

PER CURIAM:

The court having polled at the request of a member of the court (see Internal Operating Procedure accompanying 5th Cir. R. 35, “Requesting a Poll on Court’s Own Motion”), and a majority of the judges who are in regular active service and not disqualified not having voted in favor (see
The 30 best film-to-musical adaptations

We rank the 30 top musicals that made the leap from movie screens to Broadway and Off Broadway stages

By Adam Feldman and David Cote

Posted: Friday August 14 2015

Musicals (http://www.timeout.com/newyork/theater/find-every-musical-on-broadway-right-now) adapted from movies (not to be confused with musical movies (http://www.timeout.com/newyork/theater/best-musical-movies)) are a common sight on Broadway these days. Some purists treat this trend as nigh apocalyptic, but classic shows have always been adapted from other sources: books, plays and even, yes, films. We’ve combed the history of Broadway to devise this list of the 30 all-time best movie-based musicals, with trailers for the original films tacked on as a bonus. Our criteria have been, but relevant factors included: staying faithful or making improvements to the source, cleverly translating a story from the language of cinema to one of song.

Our site uses cookies. By continuing to use this site you are agreeing to our cookie policy (https://www.timeout.com/newyork/privacy-policy).
musicals; and working on its own terms as theater. Some shows that might seem to belong on this list couldn’t technically qualify—such as *La Cage aux Folles* (http://www.timeout.com/newyork/theater/la-cage-aux-folles) (based on Jean Poiret’s play) or *The Light in the Piazza* (based on Elizabeth Spencer’s novel)—while others just barely missed the cut. What are your favorite movie-theater hybrids?

RECOMMENDED: Find every musical on Broadway (http://www.timeout.com/newyork/theater/find-every-musical-on-broadway-right-now) right now
Silence! The Musical (2005)

Goofy, spoofy adaptations of films that have no business being musicals—Jurassic Park, Debbie Does Dallas, The Evil Dead, etc.—are a staple of the Fringe Festival and other scrappy showcases. Among the best of them was this silly-smart takeoff on The Silence of the Lambs, with a book by [title of show]'s Hunter Bell and starring the hilarious Jenn Harris as sibilant-impaired FBI agent Clarice Starling.—Adam Feldman
Seven Brides for Seven Brothers (1982)

A wholesome rustic musical predicated on dubious sexual mores—the plot centers on a family of hicks who are civilized by the gals they have kidnapped to marry—this tuneful adaptation of the 1954 movie lasted just five performances on Broadway. But subsequent rewrites have made it favorite of regional and community theaters. —Adam Feldman
Monty Python's Spamalot (2005)

Eric Idle "lovingly ripped off" the classic 1975 comedy *Monty Python and the Holy Grail* by taking a couple of favorite Python tunes—"Knights of t' Round Table" from *Holy Grail* and "Always Look on the Bright Side of Life* from *The Life of Brian*—and spinning a show around them (with additional songs by him and John DuPrez). Although not as funny or anarchic as the Python original, *Spamalot* was catnip for the fanboys. —Dave Cote
Aladdin (2014)

The genie voiced by Robin Williams in Disney’s 1992 animated smash had Broadway in his DNA: His look was inspired by the drawings of Al Hirschfeld. Although that quality could not be captured onstage, the 2014 musical did an admirable job of translating the genie’s hyperactiveanten into musical-theater flair, especially in the mega-showstopper (http://www.timeout.com/newyork/theater/the-10-biggest-musical-numbers-on-broadway-right-now) “Friend Like Me.”—Adam Feldman

Doing justice to Vincente Minnelli’s 1951 movie musical was never going to be easy. But director and ballet master Christopher Wheeldon assembled an impressive creative team: playwright Craig Lucas added post-WWII psychological grit, and Bob Crowley’s scenery was gorgeous. Add to that Wheeldon’s lovely steps to George Gershwin’s swoony music, and you could easily forget the film for a couple of hours. —David Cote
Newsies (2012)

Disney's original live-action musical, about a strike by New York newsboys in 1899, was a critical and commercial flop in 1992, even earning five Razzie nominations—but in next two decades, it earned an enthusiastic cult following. The Broadway version, successfully retooled and dynamically choreographed, starred Jeremy Jordan in the role originated by Christian Bale. —Adam Feldman
Carnival! (1961)

Like most shows involving puppetry, Bob Merrill and Michael Stewart’s adaptation of the Leslie Caron vehicle *Lili* (1953) requires a sensitive hand. This portrait of a pretty young orphan and a bitter, disabled carnie who hides his feelings for her behind his puppets can be a charmer when done right though, as it proved in its 2002 Encores! concert staging, with Anne Hathaway as a lulu of a Lili.—*Adam Feldman*
Kinky Boots (2013)

Harvey Fierstein, who wrote the book for *La Cage Aux Folles* in 1983, had another big drag-queen hit on Broadway 30 years later with this feel-good tale of a drag queen who saves a failing English shoe factory. Pop idol and first-time musical-theater composer Cyndi Lauper cobbled up a batch of bouncy toe-tappers, and became the first solo woman to win a Tony Award for Best Score. —Adam Feldman
Dirty Rotten Scoundrels (2005)

Composer-lyricist David Yazbek’s second film-to-musical project adapted the 1988 caper-comedy starring Steve Martin and Michael Caine. Taking his cue from the story’s Riviera setting, Yazbek wrote a bunch of bouncy, cocktail-hour numbers that borrowed from Europop, swinging big band, and brassy show tunes. Henry Mancini’s theme to The Pink Panther seemed woven into the DNA of the score. Norbert Leo Butz easily stole the show in the Martin role, bringing the house down with the ode to greed, “Great Big Stuff.” —David Cote
The 30 best film-to-musical adaptations, ranked

Ethan Hawke gets his Russian on at Classic Stage Company's Ivanov

Theater in New York: 50 reasons to love NYC theater (slide show)

Review: The Wundelstei (and Other Difficult Roles for Young People)

Theater in New York: Sh-K-Boom Records playlist (slide show)

Review: Motel Cherry, part of Clubbed Thumb's Summerworks 2012

About us (http://www.timeout.com/about)

Contact us (http://www.timeout.com/newyork/contact)

Time Out products


Our site uses cookies. By continuing to use this site you are agreeing to our cookie policy (https://www.timeout.com/newyork/privacy-policy).
New York State
Department of Labor

New York Laws
Relating to Talent Agencies

Employment Agency Law

Article 11 of the General Business Law
Article 37, the Arts and Cultural Affairs Law
Dept. of Consumer Affairs Title 6, Chapter M: Employment Agencies

Prepared and Distributed by:
Association of Talent Agents

www.agentassociation.com

2018
### Contents

**General Business Law - Article 11 Employment Agencies**

<table>
<thead>
<tr>
<th>Section</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 170</td>
<td>Application of Article</td>
</tr>
<tr>
<td>Section 171</td>
<td>Definitions</td>
</tr>
<tr>
<td>Section 172</td>
<td>License Required</td>
</tr>
<tr>
<td>Section 173</td>
<td>Application for License</td>
</tr>
<tr>
<td>Section 174</td>
<td>Procedure Upon Application; Grant of License</td>
</tr>
<tr>
<td>Section 175</td>
<td>Form and Contents of License</td>
</tr>
<tr>
<td>Section 176</td>
<td>Assignment or Transfer of License: Change of Location; Additional Locations</td>
</tr>
<tr>
<td>Section 177</td>
<td>Bonds and License Fees</td>
</tr>
<tr>
<td>Section 178</td>
<td>Action on Bond</td>
</tr>
<tr>
<td>Section 179</td>
<td>Registers and Other Records to be Kept</td>
</tr>
<tr>
<td>Section 181</td>
<td>Contracts, Statements of Terms and Conditions, and Receipts</td>
</tr>
<tr>
<td>Section 182</td>
<td>Cards to be Furnished Nurses; Registry Records</td>
</tr>
<tr>
<td>Section 184</td>
<td>Recruitment of Domestic or Household Employees who are Residents of Other States; Findings and Policy</td>
</tr>
<tr>
<td>Section 184-a</td>
<td>Recruitment of Domestic or Household Employees from Outside the Continental United States</td>
</tr>
<tr>
<td>Section 185</td>
<td>Fees</td>
</tr>
<tr>
<td>Section 185-a</td>
<td>Domestic dayworkers who are transported to the place of employment</td>
</tr>
<tr>
<td>Section 186</td>
<td>Return of Fees</td>
</tr>
<tr>
<td>Section 187</td>
<td>Additional Prohibitions</td>
</tr>
<tr>
<td>Section 188</td>
<td>Copies of Law to be Posted</td>
</tr>
<tr>
<td>Section 189</td>
<td>Enforcement of Provisions of this Article</td>
</tr>
<tr>
<td>Section 190</td>
<td>Penalties for Violations</td>
</tr>
<tr>
<td>Section 191</td>
<td>Definition</td>
</tr>
<tr>
<td>Section 192</td>
<td>Prohibited Activities</td>
</tr>
<tr>
<td>Section 193</td>
<td>Penalties for Violation</td>
</tr>
<tr>
<td>Section 194</td>
<td>Employment Agency Fees; Reimbursement from Employee to Employer</td>
</tr>
</tbody>
</table>

**Arts and Cultural Affairs Law - Article 37**

| Section 37.01 | Definitions | 25 |
| Section 37.03 | Theatrical Employment; Contracts | 26 |
| Section 37.05 | Theatrical Employment; Financial Investigations and Security | 26 |
| Section 37.07 | Performing artists; ads for availability of employment | 26 |
| Section 37.09 | Protection of aerial performers from accidental falls | 27 |
| Section 37.11 | Prevention of personal injuries at carnivals, fairs and amusement parks | 27 |

**Dept. of Consumer Affairs Title 6, Chapter M: Employment Agencies**

| Section 5-241 | Records | 28 |
| 5-242 | Applications for License – Corporation | 28 |
| 5-243 | Trade Name and Partnership Certificates | 28 |
| 5-244 | Fingerprinting | 28 |
| 5-245 | Premises | 28 |
| 5-246 | Referral Cards | 29 |
| 5-247 | Recruitment of Domestic or Household Employees from Without the State | 29 |
| 5-248 | Prohibited Practices | 29 |
| 5-249 | Definitions of Terms | 30 |
| 5-250 | Display of Sign | 30 |
| 5-251 | Display of License | 30 |
| 5-252 | Notice of Hearing and Subpoena Duces Tecum | 31 |
| 5-253 | Change of Address | 31 |
| 5-254 | Judgements | 31 |
| 5-255 | Response to Consumer Complaints | 31 |
| 5-256 | Proof of Surety Bond | 31 |
| 5-257 | Lost or Multilated Licenses | 31 |
| 5-258 | Late Renewal Fees | 32 |
General Business Law - Article 11 Employment Agencies

§ 170. Application of article.

This article shall apply to all employment agencies in the state.

§ 171. Definitions.

Whenever used in this article:

1. "Commissioner" means the industrial commissioner of the state of New York, except that in the application of this article to the city of New York the term "commissioner" means the commissioner of consumer affairs of such city.

2. a. "Employment agency" means any person (as hereinafter defined) who, for a fee, procures or attempts to procure:

   (1) Employment or engagements for persons seeking employment or engagements, or

   (2) Employees for employers seeking the services of employees.

   b. "Employment agency" shall include any person engaged in the practice of law who regularly and as part of a pattern of conduct, directly or indirectly, recruits, supplies, or attempts or offers to recruit or supply, an employee who resides outside the continental United States (as defined in section one hundred eighty-four-a of this article) for employment in this state and who receives a fee in connection with the arrangement for the admission into this country of such workers for employment.

   c. "Employment agency" shall include any person who, for a fee, renders vocational guidance or counselling services and who directly or indirectly:

       (1) Procures or attempts to procure or represents that he can procure employment or engagements for persons seeking employment or engagements;

       (2) Represents that he has access, or has the capacity to gain access, to jobs not otherwise available to those not purchasing his services; or

       (3) Provides information or service of any kind purporting to promote, lead to or result in employment for the applicant with any employer other than himself.

   d. "Employment agency" shall include any nurses' registry and any theatrical employment agency (as hereinafter defined).

   e. "Employment agency" shall not include:

       (1) any employment bureau conducted by a duly incorporated bar association, hospital, association of registered professional nurses, registered medical institution, or by a duly incorporated association or society of professional engineers, or by a duly incorporated association or society of land surveyors, or by a duly incorporated association or society of registered architects; (2) any speakers' bureau as defined in subdivision eleven hereof; (3) any organization operated by or under the exclusive control of a bonafide nonprofit educational,
religious, charitable or eleemosynary institution; (4) any person, firm, corporation or organization defined and regulated by sections one hundred ninety-one through one hundred ninety-three of this chapter.

3. "Fee" means anything of value, including any money or other valuable consideration charged, collected, received, paid or promised for any service, or act rendered or to be rendered by an employment agency, including but not limited to money received by such agency or its emigrant agent which is more than the amount paid by it for transportation, transfer of baggage, or board and lodging on behalf of any applicant for employment.

4. "Agency manager" means the person designated by the applicant for a license who is responsible for the direction and operation of the placement activities of the agency at the premises covered by the license.

5. "Placement employee" shall mean any agency manager, director, counsellor, interviewer, or any other person employed by an employment agency who spends a substantial part of his time interviewing, counselling or conferring with job applicants or employers for the purpose of placing or procuring job applicants, but shall not include employees of an employment agency who are primarily engaged in clerical occupations.

6. "Nurses’ registry" means any employment agency, bureau, office or other place which procures or attempts to procure employment or engagements for nurses licensed pursuant to article one hundred thirty-nine of the education law as a registered professional nurse or licensed practical nurse.

7. "Person" means any individual, company, society, association, corporation, manager, contractor, subcontractor, partnership, bureau, agency, service, office or the agent or employee of the foregoing.

8. "Theatrical employment agency" means any person (as defined in subdivision seven of this section) who procures or attempts to procure employment or engagements for an artist, but such term does not include the business of managing entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.

8-a. "Artist" shall mean actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

9. "Theatrical engagement" means any engagement or employment of an artist.

10. "Emigrant agent" shall mean any person, on behalf of an employment agency who, for a fee, procures or attempts to procure employment for persons outside the state or outside the continental United States seeking such employment, or employees from outside the state or outside the continental United States for employers seeking the services of such employees.
11. "Speakers' bureau" means any person whose principal business is to provide lecture business management and promotional services on behalf of lecturers or speakers and procures on behalf of a lecturer or speaker, speaking engagements to appear in lecture programs established by an individual or institutional sponsor and who charges a fee, directly or indirectly, to such lecturer or speaker.

Whenever used in this article words in the singular shall include the plural.

§ 172. License required.

No person shall open, keep, maintain, own, operate or carry on any employment agency unless such person shall have first procured a license therefor as provided in this article. Such license shall be issued by the commissioner of labor, except that if the employment agency is to be conducted in the city of New York such license shall be issued by the commissioner of consumer affairs of such city. Such license shall be posted in a conspicuous place in said agency.

§ 173. Application for license.

1. An application for such license shall be made to the commissioner of labor, except that if the employment agency is to be conducted in the city of New York the application for such license shall be made to the commissioner of consumer affairs of such city. If the employment agency is owned by an individual such application shall be made by such individual; if it is owned by a partnership such application shall be made by all partners; if it is owned by an association or society, such application shall be made by the president and treasurer thereof, by whatever title designated; if it is owned by a corporation, such application shall be made by all its officers and, if the stock of the corporation is publicly traded, by all stockholders holding ten percent or more of the stock of such corporation. A conformed or photostatic copy of the minutes showing the election of such officers shall be attached to such application.

If the applicant will conduct business under a trade name or if the applicant is a partnership, the application for a license shall be accompanied by a copy of the trade name or partnership certificate duly certified by the clerk of the county in whose office said certificate is filed. Such trade name shall not be similar or identical to that of any existing licensed agency.

2. a. Such application shall be written and in the form prescribed by the commissioner and shall state truthfully the name and address of the applicant; the name under which the employment agency is to be conducted; the street and number of the building or place where the business is to be conducted; the business or occupations engaged in by the applicant theretofore; the name and address of the individual who will be responsible for the direction and operation of the placement activities of the agency, whether such individual be the applicant or another; the length of time such individual has spent as a placement employee; a description of the duties of such individual when so engaged; the name and present address of the last employer to employ such individual as a placement employee; and such other information as may be prescribed by the commissioner. If such individual is not the applicant, the application for a license shall be accompanied by an application for an agency manager permit by the individual who will be responsible for the direction and operation of the placement activities of the agency. An application for an agency manager permit shall be on such form as prescribed by the commissioner.

b. The application for a license shall be accompanied by samples or accurate facsimiles of
each and every form which the applicant for a license will require applicants for employment to execute, and such forms must be approved by the commissioner before a license may be issued. The commissioner shall approve any such forms which fairly and clearly represent contractual terms and conditions between the proposed employment agency and applicants for employment, such as are permitted by this article. The commissioner shall make all forms required pursuant to this article available to employment agencies in languages other than English, including any other language that the commissioner determines, in his or her discretion, based on the size of the New York population that speaks each language and any other factor that the commissioner deems relevant. An employment agency shall not be penalized for errors or omissions in the non-English portions of any forms provided by the commissioner.

c. If the applicant for a license intends to recruit persons who reside in a state outside this state for employment as domestic or household employees, or to recruit persons from outside the continental United States for domestic or household employment, or is to provide or arrange for lodging of applicants for employment or other persons doing business with the agency, he shall so state in the application for a license, and give the address where such lodging will be provided. Such application shall be accompanied by the statements of at least two reputable residents of the state, subscribed and affirmed by such residents as true under the penalties of perjury, except that where the agency is to be conducted in New York city, the statements shall be of at least two reputable persons who reside or do business in such city, to the effect that the applicant is a person of good moral character.

§ 174. Procedure upon application; grant of license.

1. Upon the receipt of an application for a license, the commissioner shall cause the name and address of the applicant, the name under which the employment agency is to be conducted, and the street and number of the place where the agency is to be conducted, to be posted on the commissioner's website, as well as in a conspicuous place in his public office. Such agency shall be used exclusively as an employment agency and for no other purpose, except as hereinafter provided. The commissioner shall investigate or cause to be investigated the character and responsibility of the applicant and agency manager and shall examine or cause to be examined the premises designated in such application as the place in which it is proposed to conduct such agency.

The commissioner shall require all applicants for licenses and agency managers to be fingerprinted. Such fingerprints shall be submitted to the division of criminal justice services for a state criminal history record check, as defined in subdivision one of section three thousand thirty-five of the education law, and may be submitted to the federal bureau of investigation for a national criminal history record check. The criminal history information, if any, received by the commissioner shall be considered in accordance with the provisions of article twenty-three-A of the correction law and subdivisions fifteen and sixteen of section two hundred ninety-six of the executive law. A reasonable time before making a determination on the application pursuant to this subdivision, the commissioner shall provide the applicant with a copy of the applicant's criminal history information, if any. Where such criminal history information is provided, the commissioner shall also provide a copy of article twenty-three-A of the correction law, and inform such applicant of his or her right to seek correction of any incorrect information contained in such criminal history information pursuant to the regulations and procedures established by the division of criminal justice services.

2. Any person may file, within one week after such application is so posted, a written protest against the issuance of such license. Such protest shall be in writing and signed by the person
filing the same or his authorized agent or attorney, and shall state reasons why the said license should not be granted. Upon the filing of such protest the commissioner shall appoint a time and place for the hearing of such application, and shall give at least five days' notice of such time and place to the applicant and the person filing such protest. The commissioner may administer oaths, subpoena witnesses and take testimony in respect to the matters contained in such application and protests or complaints of any character for violation of this article, and may receive evidence in the form of affidavits pertaining to such matters. If it shall appear upon such hearing or from the inspection, examination or investigation made by the commissioner that the applicant or agency manager is not a person of good character or responsibility; or that he or the agency manager has not had at least two years' experience as a placement employee, vocational counsellor or in related activities, or other satisfactory business experience which similarly tend to establish the competence of such individual to direct and operate the placement activities of the agency; or that the place where such agency is to be conducted is not a suitable place therefor; or that the applicant has not complied with the provisions of this article; the said application shall be denied and a license shall not be granted. Each application should be granted or refused within thirty days from the date of its filing.

3. Any license heretofore issued shall run to the first Tuesday of May next following the date thereof and no later, unless sooner revoked by the commissioner. On and after May first, nineteen hundred seventy-six, licenses shall run to May first, nineteen hundred seventy-eight; thereafter to May first of every second year. A separate license shall be required for each branch of any agency.

4. No license shall be granted to a person to conduct the business of an employment agency in rooms used for living purposes or where boarders or lodgers are kept or where meals are served or where persons sleep or in connection with a building or premises where intoxicating liquors are sold to be consumed on the premises, excepting cafes and restaurants in office buildings. No license shall be granted to a person to conduct the business of an employment agency where the name of the employment agency directly or indirectly expresses or connotes any limitation, specification or discrimination as to race, creed, color, age, sex, national origin, disability or marital status, and the lack of intent on the part of the applicant for the license to make any such limitation, specification or discrimination shall be immaterial, except that any presently licensed employment agency bearing a name which directly or indirectly expresses or connotes any such limitation, specification or discrimination may continue to use its present name and may have its license renewed using its present name, provided that it display under such name, wherever it appears, a statement to the effect that its services are rendered without limitation, specification or discrimination as to race, creed, color, age, sex, national origin, disability or marital status.

§ 175. Form and contents of license.

1. Every license shall contain the name of the person licensed, a designation of the city, town or village, street and number of the place in which the person licensed is authorized to carry on the said employment agency, and the number and date of such license. If the licensee is a corporation, the license shall be issued in the name of the corporation and the names of the president and treasurer individually and as officers. All other officers of the corporation and all stockholders of a corporation whose stock is not publicly traded holding ten percent or more of the stock of such corporation shall be deemed licensees.

2. It shall be the duty of the licensee to notify promptly the commissioner of any changes of the persons licensed or deemed to be licensees, and of any material change in the ownership or operation of the agency.
§ 176. Assignment or transfer of license; change of location; additional locations.

A license granted as provided in this article shall not be valid for any person other than the person to whom it is issued or any place other than that designated in the license and shall not be assigned or transferred without the consent of the commissioner. Applications for such consent shall be made in the same manner as an application for a license, and all the provisions of sections one hundred seventy-three and one hundred seventy-four shall apply to applications for such consent. The location of an employment agency shall not be changed without the consent of the commissioner, and such change of location shall be indorsed upon the license. A person who has obtained an employment agency license in accordance with the provisions of this article, may apply for an additional license to conduct an additional employment agency, in accordance with the provisions of section one hundred seventy-three. The manner of application, and the conditions and terms applicable to the issuance of such license shall be the same as for an initial or original license except that the said license shall not extend beyond the termination date of the original license. An additional bond shall be furnished to the commissioner issuing the additional license, and the terms of said bond shall be such as to make it payable as well to the people of the state of New York or of the city of New York, as the case may be.

§ 177. Bonds and license fees.

1. Every person licensed under the provisions of this article to carry on the business of an employment agency shall pay to the commissioner a license fee in accordance with the following schedule before such license is issued. The minimum fee for said license shall be five hundred dollars, and for an agency operating with more than four placement employees, seven hundred dollars, provided, however, that if the license is to run less than one year, the fee shall be two hundred fifty dollars and three hundred fifty dollars respectively, and if the license is to run less than six months, the fee shall be one hundred twenty-five dollars and one hundred seventy-five dollars respectively. For the purpose of determining the license fee which an employment agency shall pay, the applicant for such license shall state in his application to the commissioner the average number of placement employees employed by the applicant's employment agency during the preceding calendar year; or, in the event that the applicant has not previously conducted an employment agency under the provisions of this article, he or she shall state the average number of placement employees which he or she reasonably expects will be employed by the employment agency during the calendar year in which the license is issued. If the application for a license is denied or withdrawn, one-half of the license fee provided herein shall be returned to the applicant. He or she shall also deposit before such license is issued, with the commissioner, a bond in the penal sum of five thousand dollars with two or more sureties or a duly authorized surety company, to be approved by the commissioner, provided, however, that if the applicant will engage in the recruitment of domestic or household employees from outside the continental United States, or will conduct a modeling agency the bond shall be in the penal sum of ten thousand dollars.

2. The bond executed as provided in subdivision one of this section shall be payable to the people of the state of New York or of the city of New York, as the case may be, and shall be conditioned that the person applying for the license will comply with this article, and shall pay all damages occasioned to any person by reason of any misstatement, misrepresentation, fraud or deceit, or any unlawful act or omission of any licensed person, his agents or employees, while acting within the scope of their employment, made, committed or omitted in the business conducted under such license, or caused by any other violation of this article in carrying on the business for which such license is granted. The bond also shall be conditioned that the person...
applying for the license shall pay the commissioner all fines imposed pursuant to section one hundred eighty-nine of this article.

3. If at any time the surety or sureties become financially irresponsible in the judgment of the commissioner or insolvent the licensed person shall, upon notice from the commissioner, file a new bond, subject to the provisions of this section. The failure to file a new bond, within ten days after such notice, in the discretion of the commissioner, shall operate as a revocation of such license and the license shall be thereupon returned to the commissioner.

§ 178. Action on bond.
All claims or suits brought in any court against any licensed person may be brought in the name of the person damaged upon the bond deposited by such licensed person as provided in section one hundred seventy-seven and may be transferred and assigned as other claims for damages in civil suits. The amount of damages claimed by plaintiff, and not the penalty named in the bond, shall determine the jurisdiction of the court in which the action is brought. The commissioner may institute a suit against the bond on behalf of any person damaged. Where such licensed person has departed from the state with intent to defraud his creditors or to avoid the service of a summons in an action brought under this section, service shall be made upon the surety in the manner provided for service of a summons. A copy of such summons shall be mailed to the last known post office address of the residence of the licensed person and the place where he conducted such employment agency, as shown by the records of the commissioner.

§ 179. Registers and other records to be kept.
It shall be the duty of every licensed person to keep a register, approved by the commissioner, in which shall be entered, in the English language, the date of the application for employment, the date the applicant started work and the name and address of every applicant from whom a fee or deposit is charged, the amount of the fee or deposit and the service for which it is received or charged. Such licensed person shall also enter in same or in a separate register, approved by the commissioner, in the English language, the name and address of every employer from whom a fee is received or charged or to whom the licensed person refers an applicant who has paid or is charged a fee, the date of such employer's request or assent that applicants be furnished, the kind of position for which applicants are requested, the names of the applicants sent from whom a fee or deposit is received or charged with the designation of the one employed, the amount of the fee or deposit charged, and the rate of salary or wages agreed upon. It shall also be the duty of every licensed person to keep complete and accurate written records in the English language of all receipts and income received or derived directly from the operation of his employment agency, and to keep records concerning job orders. No such licensed person, his agent or employees, shall make any false entry in such records. It shall be the duty of every licensed person to communicate orally or in writing with at least one of the persons mentioned as references for every applicant for work in private families, or employed in a fiduciary capacity, and the result of such investigation shall be kept on file in such agency for a period of at three years. Every register and all records kept pursuant to the requirements of this article shall be retained on the premises of the agency concerned for three years following the date on which the last entry thereon was made.

§ 181. Contracts, statements of terms and conditions, and receipts.
It shall be the duty of every employment agency to give to each applicant for employment:

1. A true copy of every contract executed between such agency and such applicant, which shall have printed on it or attached to it a statement setting forth in a clear and concise manner the provisions of sections one hundred eighty-five and one hundred eighty-six of this article.
2. For class "C" theatrical employment:
(a) Such contract in blank shall be first approved by the commissioner and his/her determination shall be reviewable by certiorari. Each contract shall include the gross commission or fees to be paid by the artist to the theatrical employment agency consistent with Section 185 of the General Business Law attached hereto. Each such contract shall also include the name, address, phone number and license number of the theatrical employment agency in addition to the name of the artist, the type of services covered by the contract, and all terms and conditions associated with the payment of such commission or fees. The theatrical employment agency shall keep on file a copy of each contract entered into with an artist and provide a copy of each contract to the artist.
(b) Separate from the contract, the agency shall provide to the artist, at the time of each audition or interview for specific employment, information as to the name and address of the person to whom the artist is to apply for such employment, the service to be performed, the anticipated rate of compensation, where such compensation is known prior to the audition or interview, and any other material terms and conditions of such employment that are known by the agency prior to the audition or interview. Such information may be provided by electronic communication.

3. For all other employment, including class "A" and "A-1" employment, each contract shall include, but not be limited to, the following: information as to the name and address of the person to whom the applicant is to apply for such employment, the name, the address, the mailing address, and the telephone number of the employer; the address or addresses of employment, the kind of service to be performed; the anticipated rate of wages or compensation; the anticipated hours of work per day and number of days to be worked per week; the agency’s fee for the applicant based on such anticipated wages or compensation; any provision to the employee, and costs associated with that provision including housing, health insurance, healthcare, sick leave, holidays and retirement benefits; whether such employment is permanent or temporary, the anticipated period of employment, the name and address of the person authorizing the hiring of such applicant; and the cost of transportation if the services are required outside of the city, town or village where such agency is located. If the job is a conditionally fee-paid job, the conditions under which the applicant will be required to pay a fee shall be clearly set forth in a separate agreement in ten-point type signed by the job applicant.

4. (a) This paragraph shall apply to all classes of employment except for class "C" theatrical employment. The employment agency shall provide to each applicant, a separate document accompanying each contract summarizing the terms and conditions of the contract. This document shall be entitled "terms and conditions" and shall include the language that the document is not a contract and that such document is not legally binding. The terms and conditions shall be provided in plain and commonly understood terms and language which shall aid the job applicant in understanding the transaction and such document shall limit the use of technical terms whenever possible.
(b) The terms and conditions shall conform to any templates established by the commissioner and be made available to employment agencies in such manner as determined by the commissioner. In developing such templates, the commissioner shall afford the public an opportunity to submit comments on such templates.
(c) The commissioner may promulgate rules and regulations necessary to carry out the provisions of this section.
(d) An employment agency shall not be penalized for errors or omissions in the non-English portions of any templates provided by the commissioner.

5. A receipt for any fee, deposit, consideration, or payment which such agency receives from such applicant, which shall have printed or written on it the name of the applicant, the name and
address of the employment agency, the date and amount of such fee, deposit, consideration or payment or portion thereof for which the receipt is given, the purpose for which it was paid, and the signature of the person receiving such payment. If the applicant for employment has been recruited from outside the state for domestic or household employment the receipt shall have printed on it, or attached to it, a copy of section one hundred eighty-four of this article. Except as provided for class “C” theatrical employment, the receipt shall also include, immediately above the place for signature of the person receiving payment, set off in a box and printed in bold capital letters, the following statement: "An employment agency may not charge you, the job applicant, a fee before referring you to a job that you accept. If you pay a fee before accepting a job or pay a fee that otherwise violates the law, you may demand a refund, which shall be repaid within seven days". For class “C” employment such receipt shall state: “A theatrical employment agency may not charge you, the artist, a fee before referring you to a job that you accept. A theatrical employment agency may charge you, the artist, a fee after an agency represents you in the negotiation or renegotiation of an original or pre-existing employment contract. If you pay a fee that otherwise violates the law, you may demand a refund, which shall be repaid within seven days.”

6. The completed original or duplicate-original copy of each such contract, statement of terms and conditions, receipts, and any other documents given to the applicant shall be retained by every employment agency for three years following the date on which the contract is executed or the payment is made, and shall be made available for inspection by the commissioner or his or her duly authorized agent or inspector, upon his or her request. Notwithstanding the other provisions of such contracts, the monetary consideration to be paid by the applicant shall not exceed the fee ceiling provided in subdivision eight of section one hundred eighty-five of this article.

§ 182. Cards to be furnished nurses; registry records.
A nurses’ registry shall send out to practice nursing only persons duly licensed pursuant to article one hundred thirty-nine of the education law as a registered professional nurse or licensed practical nurse. Every nurses’ registry, before sending a person out to practice nursing, shall investigate such person's educational qualifications and verify such person's licensure and current registration. At least two current written references shall be required of such person. The record of such investigation and verification shall be kept on file in the registry.

Every nurses’ registry that sends out any such person shall at such time give to such person and send to the employer of such person a card stating (1) such person's name, address and salary, (2) whether such person is a registered professional nurse or licensed practical nurse, (3) the number of the current registration certificate issued to such person by the education department, and (4) a statement that the record of such person’s educational qualifications and experience in the practice of nursing is on file in such registry and that a copy thereof will be sent to such employer on request. A copy of such card shall be kept on file in the registry.

The record of investigation and verification and the card-copy required by this section to be kept on file shall be open to inspection by any duly authorized agent of the university of the state of New York, and every nurses’ registry shall furnish a complete list of its registrants on request of such agent.

§ 184. Recruitment of domestic or household employees who are residents of other states; findings and policy.
The acute shortage of domestic or household employees in this state has led to extensive recruitment of such employees from other states in the continental United States. Social, economic and community problems occur in the process of recruiting and relocating unskilled employees from outside the state for such household employment. It is hereby declared to be the public policy of the state to encourage the recruitment of such employees from outside the state.
only under circumstances and conditions which will safeguard and protect the interests of such employees, their employers and the public at large. Incident to such recruiting are factors and considerations which do not exist in the recruitment of workers from within the state which impose certain responsibilities upon employment agencies engaged in such recruiting. Likewise, such employment agencies incur costs in the recruiting and placement of employees from without the state which are not entailed in recruiting residents of the state. Therefore, in order to provide sound and responsible practices and procedures for such recruitment and adequate regulation thereof, the following provisions of this section are deemed to be in the interest of the public safety and welfare.

1. No employment agency, directly or indirectly, shall accept applications from persons who reside in a state outside New York, procure or offer to procure employment of persons as domestic or household employees who are residing in states outside of this state previous to their application for employment, except as provided in this section and in the applicable provisions of other sections of this article. As used in this section, the term “state” applies to the forty-eight states on this continent, and the District of Columbia, but does not include the state of Alaska.

2. An employment agency which engages in such recruitment, offer or procurement as described in subdivision one, directly or indirectly, shall furnish to the commissioner a written list containing the name and address of all emigrant agents from whom it accepts job applicants. If such emigrant agents are required to be licensed in the places in which they are recruiting employees, no employment agency, directly or indirectly, shall accept applicants from persons other than duly licensed emigrant agents.

3. No employment agency shall, directly or indirectly, procure or offer to procure domestic or household employment for a person who is under the age of eighteen years and resides outside of the state.

4. If an employment agency engages in the recruitment of domestic or household employees from outside of the state, it shall:
   
   (a) Enter into its register the following information, in addition to the register entries prescribed in section one hundred seventy-nine of this article: (1) the last home address and birth date of all applicants for such employment whom the employment agency is responsible for bringing into New York state; (2) the name and address of the emigrant agent, if any, through whom such applicant was obtained; (3) the name and address of all persons to whom the employment agency has made payments in connection with the recruitment of the applicant and amounts of such payments; (4) the total charges made by the agency to the applicant include, to be separately designated: (A) agency fee; (B) any charges for transportation, and (C) any other charges in connection with placement.
   
   (b) Respecting applicants from out of the state for whom the agency is responsible, directly or indirectly, for bringing into New York state, the agency shall have the following additional obligations: (1) direct that the transportation of such applicants shall be by duly licensed common carrier for passengers where transportation to New York is arranged for or authorized, directly or indirectly, by the employment agency; (2) provide solely at agency expense suitable lodging and meals for the applicant if he or she is not placed in employment the day he or she arrives at the office of the employment agency, from the time he or she reports at such agency until he or she is placed, or is returned to the place from which he or she was recruited, or is given the option of returning to such place as provided in part (3) hereof, and provide solely at the agency’s expense meals and lodging for the applicant at any time the applicant is not employed during the thirty-day period following the day the applicant arrives at the office of the employment agency unless the applicant unreasonably refuses to accept comparable employment offered by the agency; (3) provide the return fair and reasonable allowance for one day’s meals to the applicant or employee should the employment terminate within thirty days and such applicant or employee is without employment, or should no placement be made, and the employee desires to return to the place from which he was recruited. The bond
pursuant to section one hundred seventy-seven of this article shall secure performance of the aforementioned undertaking and that required by provision (2) above and the provisions of section one hundred seventy-eight concerning actions on bonds shall be applicable thereto; (4) give an applicant before being brought to this state a written statement on a form approved by the commissioner showing the nature and duties of the job for which the applicant is recruited, the anticipated wages, the amount of the agency fee based on such wages, the amount for transportation that the applicant will have to repay if such amount has been advanced by the agency, and the amount of any other advances or charges. The statement also shall indicate when such amounts are payable to the agency. A copy of such statement shall be kept on file by the agency, and the copy shall have indicated on it when and by whom the original statement was given to the applicant; (5) communicate from New York state with the reference with which the agency is required to check, and no worker shall be induced, encouraged, invited or requested to come to New York state for employment unless communication shall have been made at least one day prior thereto; and (6) not require an applicant to pay the agency fee and any advances or charges at a rate greater than in four equal installments payable at the end of the first, second, third, and fourth weeks following the employment, notwithstanding the provisions of subdivisions two and three of section one hundred eighty-five, or any other provision of this chapter.

5. Notwithstanding the maximum fee schedule provided for in section one hundred eighty-five of this article, the maximum fee to be charged a job applicant for placement in employment under this section shall not exceed, as a percentage of the first full month’s salary or wages the following:

where no meals or lodging are provided .......................... 15 %
where one meal per work day is provided ...................... 18 %
where two meals per work day are provided ................. 21 %
where three meals per work day and lodging are provided and
where the first full month’s salary or wages is:
less than $130 ........................................................... 26 %
at least $130 but less than $150 ................................ 28 %
at least $150 or more ........................................... 30 %

5. Subsequent placement. If employment terminates within thirty days, and the agency is responsible for the placement of the employee with another employer within such thirty-day period, the agency may charge the maximum fee provided by subdivision four of this section. If such subsequent placement is made after such thirty-day period, the fee provisions of section one hundred eighty-five shall apply.

§ 184-a. Recruitment of domestic or household employees from outside the continental United States.

1. Purposes. The recruitment of domestic or household employees from outside the continental United States involves special problems and special services not encompassed in other sections of this article. This section is enacted to establish adequate regulation and to provide responsible practices and procedures for such recruitment and is in the interests of employers, employees, employment agencies and the public.

2. Application. a. The provisions of this section, and the applicable provisions of other sections of this article, shall apply to an employment agency which directly or indirectly recruits, supplies, or offers to recruit or supply, or participates in any manner in the recruitment or supply of any person who resides outside the continental United States for employment within the continental United States as a domestic or household employee. The provisions of sections one hundred eighty-four and one hundred eighty-five, and of subdivisions two, three, and four of section one
hundred eighty-six of this article, are excluded from the application of this section.

b. The term "continental United States" as used in this section means the forty-eight states on this continent and the District of Columbia, but does not include the state of Alaska.

3. Responsibilities. a. No such agency shall directly or indirectly supply or participate in the supply of any person who is under the age of eighteen years at the time of his emigration to the United States.

b. Such agency shall have the following additional responsibilities:

1. Confirm the statements in the employee's application for employment relating to the age and references given, and fully and accurately inform the employer before the employer agrees to employ the applicant, of the applicant's statements relating to his qualifications, age, experience, references and related matters.

2. Provide the applicant for employment with a statement of job conditions in a form approved by the commissioner. The statement shall fully and accurately describe the nature and terms of employment, including wages, hours of work, agency fee and the advances, if any, which are specifically authorized by this section. Such statement shall also clearly indicate when the applicant will be required to pay such fee, and advances. The statement shall be in the English language, and if the applicant's native language is other than English, the statement shall also be in such language. This statement shall be mailed to the applicant prior to the time the applicant signs an employment agreement. The agency shall keep on file a duplicate copy of such statement, which shall have indicated on it when and by whom it was mailed to the applicant, and the certificate of mailing shall be attached thereto.

3. Reduce to writing any contractual agreement with the employer or with the employee.

4. If the agency arranges for the employee's travel, it shall provide that the transportation be by common carrier. The agency shall meet or arrange for the employer to meet the employee at the port of arrival.

5. a. Provide the employee with suitable meals and lodging solely at agency expense from the time the employee arrives until the beginning of employment, or at any time within ninety days after arrival, upon notice that the employee is without employment.

b. If the employer discharges the employee without giving the agency advance notice of at least three business days, the agency may charge the employer the actual cost of providing suitable meals and lodging incurred because of the failure to give such notice, but in no event for more than five consecutive calendar days. Such charge, however, may not be made where unusual circumstances would create an undue burden on the employer to provide meals and lodging to the employee after the discharge of the employee.

c. If the employee unreasonably refuses to accept comparable employment offered by the agency, the obligation provided by this paragraph shall terminate.

6. If within ninety days after arrival the employee (a) has become disabled and is unable to continue work as evidenced by a certificate from a doctor designated by the consulate of the country of his nationality; and (b) is in financial distress and wishes to return to the country from which he came, the agency shall provide return fare and a reasonable allowance for meals while traveling.

7. If the employee is hospitalized within ninety days after arrival, and the employee is in financial distress and unable to meet the cost of hospitalization, the agency shall be responsible for reasonable hospitalization costs incurred during such ninety-day period, provided, however, that this responsibility shall be deemed to be met if the agency provides a basic twenty-one day hospitalization insurance policy approved by the commissioner. This provision shall in no way prevent an agency from requiring the employer to agree to provide the same basic twenty-one day hospitalization insurance policy for the employee, but the employee may not be required to pay the premium for such policy covering the first ninety days. Any person or organization damaged by the failure of an agency to comply with this paragraph or with paragraphs (5) and (6) of this subdivision may bring an action on the agency bond as provided in this article.
Comply with all of the applicable laws and regulations of the country from which the employee is recruited.

If prior to the arrival of the employee in the United States, either the employee or the employer cancels the employment agreement, the agency shall notify in writing the central immigration office of the New York state department of labor within ten days of receiving notice of the cancellation.

4. Fees and disbursements.
   a. Circumstances permitting fees. Such agency shall not charge or accept a fee or other consideration unless in accordance with the terms of a written contract, the form which has been approved by the commissioner, and unless the agency has been responsible for the employment of the employee.
   b. Maximum fee. (1) The total maximum fee that such agency may charge for any placement shall not exceed eleven percent of the employee’s agreed or anticipated first full year’s wages, and of this total maximum fee not more than twenty-five percent may be charged the employee. Nothing herein shall be construed as prohibiting an agency from making an agreement with an employer under which the employer agrees to pay the total maximum fee provided by this subdivision, but in such event, no fee shall be charged the employee.
      (2) If the agreement between the employer and employee provides for an additional wage payment on completion of the contract of employment, and if such additional payment is payable to the employee on a monthly pro-rata basis in the event that the employment terminates for any reason before the completion of the contract, such additional payment may be considered part of the employee’s first full year’s wages.
      (3) If an employee is provided meals or lodging, the value of such meals or lodging shall not be included in determining the employee’s first full year’s wages.
   c. Deposits or advance fee. An agency may require an employer to pay a deposit or advance the fee before an employee is employed, and such deposit or advance shall be offset against the fee charged the employer.
   d. Employer’s cancellation fee. The agency shall be entitled to a fee from the employer not exceeding twenty-five dollars if the employer cancels his job order before the acceptance of the job offer by the employee. If the cancellation occurs after such acceptance and before certification for alien employment by the appropriate governmental agency, the fee shall not exceed fifty dollars. If the cancellation occurs after such acceptance and after such certification, the fee shall not exceed seventy-five dollars. No cancellation fee, however, shall be payable if within a reasonable time after the employer placed his job order the agency failed to make reasonable efforts to supply a job applicant to the employer.
   e. Employee’s payments; when payable. The agency fee charged to the employee and any advances made to the employee for transportation, visa fee and medical examination, and such other advances as are specifically authorized by the commissioner, shall be payable at a rate not greater than six equal installments, at the end of each of the first six months of employment. If the employer, on behalf of the employee, advances the employee’s agency fee or other authorized costs, the contract between the employer and the agency shall provide that the employee is not required to repay the employer the money advanced at a rate greater than such six equal monthly installments.
   f. Termination of employment.
      (1) Notwithstanding any other provision of this section, if the employment terminates for any reason within ninety days, the following fees may be charged the employer and may be charged the employee:
         (a) Fifty percent of the maximum fee provided by paragraph b of this subdivision, and
         (b) If the employment terminates after thirty days, an additional fee computed by prorating the remaining fifty percent of the maximum fee on the basis of the number of days worked during such sixty-day period.
(2) If after termination, subsequent placements are made by the agency to such employer or of such employee, the total termination fees payable by such employer and such employee shall not exceed the maximum fees provided by paragraph b of this subdivision for the initial placement.

  g. Subsequent placement with another employer. If employment terminates within ninety days and the agency is responsible for the placement of the employee with another employer within such ninety-day period, the maximum fee that the agency may charge for such subsequent placement shall be the fee provided by paragraph b of this subdivision. If such subsequent placement is made after such ninety-day period, the fee provisions of section one hundred eighty-five of this article shall apply to such placement, notwithstanding subdivision two of this section.

  h. Employee’s refusal of employment. Notwithstanding any other provision of this section, if the employee after arrival in this country, refuses to accept the employment for which he was recruited or another comparable position offered by the agency, he shall pay an agency fee of not to exceed twenty-five dollars, and shall remain personally responsible to his employer for any and all advances made in his behalf.

  i. Limitations and charges. Except for the advances specifically provided in paragraph e. of this subdivision, an agency shall not directly or indirectly make any charge or require any advances whatever. Such prohibited charges include, but are not limited to attorney’s fees and finance charges.

  5. Emigrant agent. a. Such agency shall furnish to the commissioner the names and addresses of all emigrant agents it utilizes. Only a duly licensed emigrant agency may be utilized, directly or indirectly, by the employment agency if such emigrant agent is required to be licensed in the place where he is recruiting employees.

   b. Any fee paid to an emigrant agent shall be considered part of the maximum fee which an agency may charge as provided by this section.

  6. Registers. In addition to the entries prescribed in section one hundred seventy-nine of this article, such agency shall enter in its register the following information: (a) the last home address and birth date of all applicants for employment who were recruited by the agency; (b) the name and address of the emigrant agent, if any, through whom such applicant was obtained; (c) the fee, if any, paid to the emigrant agent by the agency, job applicant or employer which shall be separately stated; (d) the charges or advances made to the job applicant for agency fee, transportation and visa fee, and such charges or advances shall be separately listed and the total indicated; and (e) the manner in which the employee’s age and references were confirmed.

  7. Recordkeeping. Such agency shall retain for inspection: (a) copies of all forms prepared or received on behalf of an employee and submitted to any governmental agency in connection with immigration requirements; and (b) copies of executed contracts between the agency and the employer and between the agency and the employee. The copies shall be retained on the premises of the agency for three years.

§ 185. Fees.
1. Circumstances permitting fee.
An employment agency shall not charge or accept a fee or other consideration unless in accordance with the terms of a written contract with a job applicant and after such agency has been responsible for referring such job applicant to an employer or such employer to a job applicant and where as a result thereof such job applicant has been employed by such employer, except for class “C” employment: (a) after an agency has been responsible for referring an artist to an employer or such employer to an artist and where as a result thereof such artist has been employed by such employer; or (b) after an agency represents an artist in the negotiation or renegotiation of an original or pre-existing employment contract and where as a result thereof the artist enters into a negotiated or renegotiated employment contract. For class “C” employment pursuant to this paragraph, an employment agency shall provide an artist with a statement setting forth in a clear and concise manner the provisions of this section and
section one hundred eighty-six of this article. The maximum fees provided for herein for all types of placements or employment may be charged to the job applicant and a similar fee may be charged to the employer provided, however, that with regard to placements in class "B" employment, a fee of up to one and one-half times the fee charged to the job applicant may be charged to the employer. By agreement with an employment agency, the employer may voluntarily assume payment of the job applicant's fee. The fees charged to employers by any licensed person conducting an employment agency for rendering services in connection with, or for providing employment in classes "A", "A-1" and "B", as hereinafter defined in subdivision four of this section where the applicant is not charged a fee shall be determined by agreement between the employer and the employment agency. No fee shall be charged or accepted for the registration of applicants for employees or employment.

2. Size of fee; payment schedule.
The gross fee charged to the job applicant and the gross fee charged to the employer each shall not exceed the amounts enumerated in the schedules set forth in this section, for any single employment or engagement, except as hereinabove provided; and such fees shall be subject to the provisions of section one hundred eighty-six of this article. Except as otherwise provided herein, and except for class "C" employment, an employment agency shall not require an applicant while employed in the continental United States, and paid weekly to pay any fee at a rate greater than in ten equal weekly installments each of which shall be payable at the end of each of the first ten weeks of employment, or if paid less frequently, in five equal installments, each of which shall be payable at the end of the first five pay periods following his employment, or within a period of ten weeks, whichever period is longer. An employer’s fee shall be due and payable at the time the applicant begins employment, unless otherwise determined by agreement between the employer and the agency.

3. Deposits, advance fees. An employment agency shall not require or accept a deposit or advance fee from any applicant.

4. Types of employment. For the purpose of placing a ceiling over the fees charged by persons conducting employment agencies, types of employment shall be classified as follows:
   - Class "A"--domestics, household employees, unskilled or untrained manual workers and laborers, including agricultural workers;
   - Class "A1"--non-professional trained or skilled industrial workers or mechanics;
   - Class "B"--commercial, clerical, executive, administrative and professional employment, all employment outside the continental United States, and all other employment not included in classes "A", "A1", "C" and "D";
   - Class "C"--theatrical engagements;
   - Class "D"--nursing engagements as defined in article one hundred thirty-nine of the education law.

5. Fee ceiling: For a placement in class "A" employment the gross fee, including the deposit if any, shall not exceed, in percentage of the first full month’s salary or wages, the following:

   - where no meals or lodging are provided ......................... 10 %
   - where one meal per working day is provided ................... 12 %
   - where two meals per working day are provided ............... 14 %
   - where three meals and lodging per working day are provided.... 18 %

Where all parties to the employment agreement understand or agree at the time the employment is entered into that it shall be for a period shorter than one month, the gross fee shall not exceed ten per cent, twelve per cent, fourteen per cent or eighteen per cent respectively of the salary or wages actually paid.

6. Fee ceiling: For a placement in Class "A1" employment the gross fee shall not exceed one week’s wages where all parties to the employment agreement understand or agree at the time the
employment is entered into that it shall be for a period for ten weeks or more. Where all parties to
the employment contract agree and understand at the time the employment contract is
entered into that it shall be for a period shorter than ten weeks, the gross fee shall not exceed
ten per cent of the wages or salary actually received.

7. Fee ceiling: For a placement in Class "B" employment the gross fee shall not exceed, in
percentage of the first full month's salary or wages, the following:

where such first full month's salary or wages is
less than $750 ................................................... 25 %
at least $ 750 but less than $ 950 ......................... 35 %
at least $ 950 but less than $1150 ....................... 40 %
at least $1150 but less than $1350 ..................... 45 %
at least $1350 but less than $1500 ...................... 50 %
at least $1500 but less than $1650 ...................... 55 %
at least $1650 or more ...................................... 60 %

Provided however, that where the placement is for employment in which the applicant will be paid
on a straight commission basis or on the basis of a drawing account plus commissions, the gross
fee shall be based on percentages in the above schedule applied to an amount equivalent to one-
twelfth of the estimated first year's earnings, as estimated by the employer. Where all parties to
the employment contract agree and understand at the time the employment contract is entered
into that it shall be for a period shorter than four months the gross fee shall not exceed fifty
percent of the fee prescribed in the schedule in this subdivision or ten percent of the wages or
salary actually received, whichever is less.

8. Fee ceiling: For a placement in class "C" employment the gross fee shall not exceed, for a
single engagement, ten per cent of the compensation payable to the applicant, except that for
employment or engagements for orchestras and for employment or engagements in the opera
and concert fields such fees shall not exceed twenty per cent of the compensation.

9. Fee ceiling: For a placement in class "D" employment the gross fee shall not exceed, for a
single engagement, the following:

   (1) for private nursing duty, five per cent of the salary or wages received each week through
the first ten weeks of that engagement only, and such fee shall be due and payable at the end of
each such week;

   (2) for any other nursing duty, the amount of the first week's salary or wages unless the first
year's computed salary or wages to be derived for at least one year's employment is twenty-
five hundred dollars or more, in which event the gross fee shall not exceed, in percentage of
such salary or wages, the following:

where such first year's salary or wages is
at least $2500 but less than $3000 ......................... 2 1/2 %
at least $3000 but less than $3500 ...................... 3 %
at least $3500 but less than $4000 ...................... 3 1/2 %
at least $4000 but less than $4500 ...................... 4 %
at least $4500 but less than $5000 ...................... 4 1/2 %
$5000 or more ............................................... 5 %

10. Notwithstanding any other provision of law to the contrary, no fee may be charged or
collected for services rendered by an employment agency not licensed pursuant to section one
hundred seventy-two of this article at the time such services were rendered. In an action to
collect a fee, the court shall void all or any part of an agreement or contract with an employment
agency that did not have a valid license at the time the contract was entered into or services were
rendered; however, such contract shall not be considered void if a court finds a good faith effort
§185-a. Domestic dayworkers who are transported to the place of employment.

1. Purposes. The lack of adequate local transportation in certain suburban and urban communities of the state has caused employment agencies to provide transportation to daily domestic workers, to and from their places of employment. This service rendered by the employment agencies has resulted in assured and continued employment on a regular basis for domestic workers who do not wish to sleep-in and for continuous and certain household employees for householders desiring day domestic workers only. This section is enacted to provide adequate compensation for such services, to encourage their continuation and to establish adequate regulations.

2. Application. a. The provisions of this section, and the applicable provisions of other sections of this article, shall apply to an employment agency which makes placements of domestic workers in households where the domestic employee is supplied with at least one meal, and where the agency transports the domestic worker to and from the employment agency or a location selected by the employment agency by a vehicle under the sole control and operation of the employment agency, all at no charge to the domestic employee.

b. The term placement as used in this section means a single day's employment pursuant to the employment agreement.

3. Responsibilities. a. Every employment agency making placements pursuant to the provisions of this section shall transport employees to householders in a vehicle under the sole control and operation of the employment agency. Such vehicle shall be operated in compliance with applicable laws governing occupancy, insurance and safety.

b. Such agency shall be responsible for the transportation of the employee to the point of origination at the conclusion of the working day. If the point of origination shall be other than the office of the employment agency or the home of the employee, notice thereof shall be given to the commissioner for his approval prior to its utilization.

4. Maximum fee. a. Notwithstanding any other provision of this article, the maximum fee that may be charged by such agency for a placement of this type of employment shall be charged to the employer only, and shall not exceed an amount based on the daily wage paid to the employee, the following:

Where such daily wage is
at least $11.00 but less than $12.00 ......................... $4.00
at least $12.00 but less than $13.00 ......................... $4.25
at least $13.00 but less than $14.00 ......................... $4.50
at least $14.00 but less than $15.00 ......................... $4.75
at least $15.00 but less than $16.00 ......................... $5.00

For each additional dollar of daily wage beginning at $16.00, an additional fee of 25 cents may be charged; for each dollar of daily wage less than $11.00 the fee shall be reduced by 25 cents. The value of meals shall not be included in determining the employee’s wages.

b. No charge shall be made to either employee or householder for any transportation provided hereunder.

c. Notwithstanding any other provision of this article a written contract with either the domestic employee or employer shall not be required in order for the agency to charge or collect a fee.

5. Registers. Such agency shall enter in the same or separate registers approved by the commissioner, the following information, instead of the register entries prescribed in section one hundred seventy-nine of this article.

(1) The name, address and date of first application for employment of each domestic worker, and the name and address of at least one of the former employers or persons to
whom such applicant is known;

2. The name and address of every employer from whom a fee is received or charged, the name of each domestic employee employed by the employer, the date of employment, the fee charged or received from the employer and the rate of wages or salary agreed upon.

6. Statement of job conditions. Each agency shall give each employee and employer a statement of job conditions in a form approved by the commissioner. The statement to the employee shall fully and accurately describe the nature and terms of employment, including wages, numbers of hours of work, responsibility of the agency for transportation, and the responsibility of the employer for the payment of the fee and to provide the employee with one meal. The statement to the employer shall include the foregoing, and in addition the agency fee and the responsibility of the employer to provide the employee with one meal. Such statement as aforesaid shall be given prior to the first placement by the agency and need not be repeated unless changed.

§ 186. Return of fees.
1. Excessive fee: Any employment agency which collects, receives or retains a fee or other payment contrary to or in excess of the provisions of this article, shall return the fee or the excess portion thereof within seven days after receiving a demand therefor.

2. Failure to report: If a job applicant accepts employment and thereafter fails to report for work, the gross fee charged to such applicant shall not exceed twenty-five per cent of the maximum fee allowed by section one hundred eighty-five of this article. If a job applicant accepts employment and fails to report for work, no fee shall be charged to the employer.

3. Termination without employee’s fault. If a job applicant accepts employment and reports for work, and thereafter such employment is terminated without fault of the employee, the gross fee charged to such employee and to the employer each shall not exceed ten percent of the salary or wages received by such employee, and in no event shall such fee exceed the maximum fee allowed by section one hundred eighty-five of this article. However, if such employee is a domestic or household employee recruited from a state outside of this state the fee of the employer shall not exceed thirty-three and one-third percent of the wages or salary actually earned.

4. Termination under all other circumstances: If a job applicant accepts employment and reports for work, and thereafter such employment is terminated under any other circumstances, the gross fee charged to such employee and the employer each shall not exceed fifty per cent of the salary or wages received by such employee, and in no event shall such fee exceed the maximum fee allowed by section one hundred eighty-five of this article.

§ 187. Additional prohibitions.
An employment agency shall not engage in any of the following activities or conduct:

1. Induce or attempt to induce any employee to terminate his employment in order to obtain other employment through such agency, provided, however, that this provision shall not apply to an employee not placed in employment by the employment agency who is offered an executive administrative or professional position where the first year's compensation is $12,000.00 or more or procure or attempt to procure the discharge of any person from his employment.

2. Publish or cause to be published any false, fraudulent or misleading information, representation, promise, notice or advertisement.

3. Advertise in newspapers or otherwise, or use letterheads or receipts or other written or printed matter, unless such advertising or other matter contains the name and address of the employment agency, the word "agency" and the agency’s license number.

4. Direct an applicant to an employer for the purpose of obtaining employment without having first obtained a bona fide order therefor; however, a qualified applicant may be directed to an employer who has previously requested that he regularly be accorded interviews with applicants
of certain qualifications if a confirmation of the order is sent to the employer. Likewise an employment agency may attempt to sell the services of an applicant to an employer from whom no job order has been received as long as this fact is told to the applicant before he is directed to the employer. Any applicant who is referred to an employer contrary to the provisions of this subdivision without obtaining employment thereby, shall be reimbursed by the employment agency for all ordinary and necessary travel expenses incurred by the applicant as a result of such referral, within twenty-four hours of making a demand therefor.

(5) Send or cause to be sent any person to any employer where the employment agency knows, or reasonably should have known, that the prospective employment is or would be in violation of state or federal laws governing minimum wages or child labor, or in violation of article sixty-five of the education law relating to compulsory education or article four of the labor law, or, that a labor dispute is in progress, without notifying the applicant of such fact, and delivering to him a clear written statement that a labor dispute exists at the place of such employment, or make any referral to an employment or occupation prohibited by law.

(6) Send or cause to be sent any person to any place which the employment agency knows or reasonably should have known is maintained for immoral or illicit purposes; nor knowingly permit persons of bad character, prostitutes, gamblers, procurers or intoxicated persons to frequent such agency.

(7) Compel any person to enter such agency for any purpose by the use of force.

(8) Engage in any business on the premises of the employment agency other than the business of operating an employment agency, except as owner, manager, employee or agent, the business of furnishing services to employers through the employment of temporary employees.

(9) Receive or accept any valuable thing or gift as a fee or in lieu thereof, nor divide or share, either directly or indirectly, the fees herein allowed, with contractors, subcontractors, employers or their agents, foremen or any one in their employ, or if the contractors, subcontractors or employers be a corporation, any of the officers, directors or employees of the same to whom applicants for employment are sent.

(10) Require applicants for employees or employment to subscribe to any publication or incidental service or contribute to the cost of advertising.

(11) Make or cause to be made or use any name, sign or advertising device bearing a name which may be similar to or may reasonably be confused with the name of a federal, state, city, county or other government agency.

(12) Refuse to return on demand of an applicant any baggage or personal property belonging to such applicant.

(13) Charge an applicant any fee for a placement in a job which the agency advertised or represented to the job applicant to be a fee-paid job.

(14) Refer an applicant to a specified bank or credit organization for purposes of obtaining a loan.

§ 188. Copies of law to be posted.
1. Every licensed person shall post in a conspicuous place in the main room of such agency sections one hundred seventy-eight, one hundred eighty-one, one hundred eighty-five, and one hundred eighty-six, of this article. Such poster shall also contain the name and address of the commissioner charged with the enforcement of this article in the place where the agency is located.

2. The commissioner, in conjunction with the director of the office for new Americans, shall develop, establish and implement a public awareness campaign regarding the rights of job seekers. Such public awareness campaign shall be made available to the public by any means deemed appropriate by the commissioner and the director of the office for new Americans. Any materials developed and disseminated to job seekers according to this subdivision must also be
§ 189. Enforcement of provisions of this article.

1. This article, article nineteen-B of the labor law and sections 37.01, 37.03 and 37.05 of the arts and cultural affairs law shall be enforced by the commissioner of labor, except that in the city of New York this article and such sections shall be enforced by the commissioner of consumer affairs of such city. In addition to the powers of the commissioner, the attorney general may enforce the provisions of this article to the extent permitted under section sixty-three of the executive law.

2. To effectuate the purposes of this article, article nineteen-B of the labor law and sections 37.01, 37.03 and 37.05 of the arts and cultural affairs law, the commissioner or any duly authorized agent or inspector designated by such commissioner, shall have authority to inspect the premises, registers, contract forms, completed contracts, statements of terms and conditions, receipt books, application forms, referral forms, reference forms, reference reports and financial records of fees charged and refunds made of each employment agency, and any other record that the employment agency is required to maintain pursuant to this article, which are essential to the operation of such agency, and of each applicant for an employment agency license, as frequently as necessary to ensure compliance with this article and such sections. In no event shall any employment agency be inspected less frequently than once every eighteen months. Inspections may consist of in-person visits to employment agencies or the review of records as described in this subdivision or both. The commissioner shall also have authority to subpoena records and witnesses or otherwise to conduct investigations of any employer or other person where he or she has reasonable grounds for believing that such employer or person is violating or has conspired or is conspiring with an employment agency to violate this article or such sections.

3. To effectuate the purposes of this article, the commissioner may make reasonable administrative rules within the standards set in this article. Before such rules shall be issued, the commissioner shall conduct a public hearing, giving due notice thereof to all interested parties. No rule shall become effective until fifteen days after it has been filed in the office of the department of state, if it is a rule of the industrial commissioner, or in the office of the clerk of the city of New York, if it is a rule of the commissioner of licenses of such city, and copies thereof shall be furnished to all employment agencies affected at least fifteen days prior to the effective date of such rule.

4. Complaints against any such licensed or unlicensed person may be made orally or in writing to the commissioner, or be sent in an affidavit form without appearing in person, and may be made by recognized employment agencies, trade associations, or others. The commissioner may hold a hearing on a complaint with the powers provided by section one hundred seventy-four of this article. If a hearing is held, reasonable notice thereof, not less than five days, shall be given in writing to said person by serving upon the person either personally, by mail, or by leaving the same with the person in charge of his office, a concise statement of the facts constituting the complaint, and the hearing shall commence before the commissioner with reasonable speed but in no event later than two weeks from the date of the filing of the complaint. The commissioner when investigating any matters pertaining to the granting, issuing, transferring, renewing, revoking, suspending or cancelling of any license is authorized in his discretion to take such testimony as may be necessary on which to base official action. When taking such testimony he may subpoena witnesses and also direct the production before him of necessary and material books and papers. A daily calendar of all hearings shall be kept by the commissioner and shall be posted in a conspicuous place in his public office for at least one day before the date of such hearings. The commissioner shall render this decision within thirty days from the time the matter
is finally submitted to him. The commissioner shall keep a record of all such complaints and hearings. The office of new Americans shall, pursuant to section ninety-four-b of the executive law, receive complaints and where appropriate refer such complaints to the attorney general or other federal, state or local agency authorized by law to take action on such complaint.

5. Upon a finding that the licensed person or his agent, employee or anyone acting on his behalf is guilty of violating any provision of this article or is not a person of good character and responsibility, the commissioner may suspend or revoke the license of such licensed person. Any employment agency found to have violated any provision of this article shall be subject, for the first offense, to a civil penalty not to exceed one thousand dollars per violation, and, for each subsequent offense within six years of such previous offense, to a civil penalty, not to exceed five thousand dollars per violation. Upon notice of violation of this article or when it is determined that there has been a violation of this article by an employment agency, the commissioner may provide the employment agency with a specific time period for such employment agency to cure or correct such violation or take other ameliorative action as directed by the commissioner, the successful completion of which shall prevent the imposition of penalties on the employment agency for such violation. Whenever such commissioner shall suspend or revoke the license of any employment agency, or shall levy a fine against any agency, said determination shall be subject to judicial review in proceedings brought pursuant to article seventy-eight of the civil practice law and rules. Whenever an employment agency's license is revoked, another license or agency manager permit shall not be issued within three years from the date of such revocation to said licensed person or his agency manager or to any person with whom the licensee has been associated in the business of furnishing employment or engagements. Deputy commissioners, or other officials designated to act on behalf of the commissioner, may conduct hearings and act upon applications for licenses, and revoke or suspend such licenses, or levy fines against an employment agency.

6. If any provisions of this article or the application thereof to any person or circumstances is held unconstitutional, the remainder of the article and the application of that provision to other persons and circumstances shall not be affected thereby.

§ 190. Penalties for violations.
Any person who violates and the officers of a corporation and stockholders holding ten percent or more of the stock of a corporation which is not publicly traded, who knowingly permit the corporation to violate sections one hundred seventy-two, one hundred seventy-three, one hundred seventy-six, one hundred eighty-four, one hundred eighty-four-a, one hundred eighty-five, one hundred eighty-five-a, one hundred eighty-six, or one hundred eighty-seven of this article shall be guilty of a misdemeanor and upon conviction shall be subject to a fine not to exceed two thousand five hundred dollars per violation, or imprisonment for not more than one year, or both, by any court of competent jurisdiction. The violation of any other provision of this article shall be punishable by a fine not to exceed five hundred dollars or imprisonment for not more than thirty days. Criminal proceedings based upon violations of these sections shall be instituted by the commissioner and may be instituted by any persons aggrieved by such violations.

§ 191. Definition.
Whenever used in this article: "employer fee paid employment agency" means any person who on behalf of employers procures or attempts to procure employees for "Class B" employment (as defined in section one hundred eighty-five of this article) and who in no instance charges a fee directly, or indirectly, to persons seeking such employment even though a fee may be charged to employers seeking the services of such employees, and who engages in no activity
constituting the operation of an employment agency as defined in section one hundred seventy-one of this chapter and who in no instance enters into any arrangement through which the employer fee paid employment agency receives remuneration or any other thing of value from any person, firm or corporation which collects fees from applicants.

§ 192. Prohibited activities.
An employer fee paid employment agency shall not engage in any of the following activities or conduct:

1. Direct an applicant to an employer for the purpose of obtaining employment without having first obtained a bona fide order therefor; however, a qualified applicant may be directed to an employer who has previously requested that it regularly be accorded interviews with applicants of certain qualifications if a confirmation of the order is sent to the employer. Likewise an agency may attempt to sell the services of an applicant to an employer from which no job order has been received as long as this fact is told the applicant before the applicant is directed to the employer. Any applicant who is referred to an employer contrary to the provisions of this subdivision without obtaining employment thereby, shall be reimbursed by the agency for all ordinary and necessary travel expenses incurred by the applicant as a result of such referral, within twenty-four hours of making a demand therefor.

2. Send or cause to be sent any person to any employer where the agency knows, or reasonably should have known, that the prospective employment is or would be in violation of state or federal laws governing minimum wages or child labor, or in violation of article sixty-five of the education law relating to compulsory education or article four of the labor law, or, that a labor dispute is in progress, without notifying the applicant of such fact, and delivering to him or her a clear written statement that a labor dispute exists at the place of such employment, or make any referral to an employment or occupation prohibited by law.

3. Require applicants for employment to subscribe to any publication or incidental service or contribute to the cost of advertising.

4. Make or cause to be made or use any name, sign or advertising device bearing a name which may be similar to or may reasonably be confused with the name of a federal, state, city, county or other government agency.

§ 193. Penalties for violation.
Any person violating the provisions of section one hundred ninety-two of this article shall be guilty of a class A misdemeanor and shall be subject to a fine not to exceed one thousand dollars or imprisonment for not more than one year or both. Criminal proceedings based upon violations may be instituted by the commissioner or may be instituted by any person aggrieved by such violation.

§ 194. Employment agency fees; reimbursement from employee to employer prohibited.
1. As used in this section:
   (a) "Commissioner" means the commissioner of labor.
   (b) "Employer" means an individual, partnership, association, corporation, legal representative, trustee, receiver, trustee in bankruptcy or common carrier by rail, motor, water, air or express company doing business or operating within the state. The term "employer" shall not include a governmental agency.
   (c) "Employee" means any person employed for hire by any employer in any employment.
2. No employer or its agent shall require, request, suggest or knowingly permit any employee of such employer to reimburse the employer for the cost of a fee paid by the employer to an employment agency or to an employer fee paid employment agency or to make any other
payment on account of the employee’s termination or resignation from employment.
3. (a) If the commissioner determines that an employer or its agent has violated a provision
of this section, the commissioner shall issue to the employer an order which shall describe the
alleged violation. In addition to directing reimbursement to the employee and requiring the further
payment to the employee of a sum in the amount equal to payment requested or received from
that employee, such order may direct payment to the commissioner for deposit in the treasury of
the state of a further sum as a civil penalty not to exceed five hundred dollars.
   (b) Any order issued under paragraph (a) of this subdivision shall be deemed a final order of
the commissioner and not subject to review by any court or agency unless within thirty days
following service of the order the employer files a petition with the industrial board of appeals for a
review of the order.
   (c) Provided that no proceeding for administrative or judicial review pursuant to this chapter
shall then be pending and that the time for initiation of such proceeding shall have expired, the
commissioner may file with the county clerk of the county where the employer resides or has a
place of business the order of the commissioner, or the decision of the industrial board of
appeals containing the amount found to be due including the civil penalty, if any. The filing of
such order or decision shall have the full force and effect of a judgment duly docketed in the office
of such clerk. The order or decision may be enforced by and in the name of the commissioner in
the same manner, and with like effect as that prescribed by the civil practice law and rules for the
enforcement of a money judgment.
   (d) The civil penalty provided for in this section shall be in addition to and may be imposed with
any other remedy or penalty provided for in this chapter.
4. No agreement by an employee or prospective employee to reimburse an employer for the cost
of a fee of an employment agency or an employer fee paid employment agency or to become
liable to the employer for any payment on account of the employee's termination or resignation
from employment shall be enforceable.

Arts and Cultural Affairs Law - Article 37

§ 37.01. Definitions

As used in sections 37.03 and 37.05 of this article:

1. "Person" means any individual, company, society, association, corporation, manager,
contractor, subcontractor, partnership, bureau, agency, service, office or the agent or
employee of the foregoing.

2. "Fee" means anything of value, including any money or other valuable consideration
charged, collected, received, paid or promised for any service, or act rendered or to be
rendered by an employment agency, including but not limited to money received by such
agency or its emigrant agent which is more than the amount paid by it for transportation,
transfer of baggage, or board and lodging on behalf of any applicant for employment.

3. "Theatrical employment agency" means any person (as defined in subdivision one hereof)
who procures or attempts to procure employment or engagements for an artist, but such term
does not include the business of managing entertainments, exhibitions or performances, or the
artists or attractions constituting the same, where such business only incidentally involves the
seeking of employment therefor.
   4. "Theatrical engagement" means any engagement or employment of an artist in
employment described in subdivision three of this section.
5. "Artist" shall mean actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises.

§ 37.03. Theatrical Employment; Contracts. Contracts between a theatrical employment agency and an artist shall include the gross commission or fees to be paid by the artist to the theatrical employment agency consistent with Section 185 of the General Business Law attached hereto.

Such contracts shall contain no other conditions and provisions except such as are equitable between the parties thereto and do not constitute an unreasonable restriction of business. In addition, such contracts in blank shall be first approved by the commissioner and his/her determination shall be reviewable by certiorari.

Each such contract shall also include the name, address, phone number and license number of the theatrical employment agency in addition to the name of the artist, the type of services covered by the contract, and all terms and conditions associated with the payment of such commission or fees. The theatrical employment agency shall keep on file a copy of each contract entered into with an artist and provide a copy of each contract to the artist.

Separately from the contract, the agency shall provide to the artist, at the time of each audition or interview for specific employment, information as to the name and address of the person to whom the artist is to apply for such employment, the service to be performed, the anticipated rate of compensation, where such compensation is known prior to the audition or interview, and any other material terms and conditions of such employment that are known by the agency prior to the audition or interview. Such information may be provided by electronic communication.

§ 37.05. Theatrical Employment; Financial Investigations and Security

A theatrical employment agent shall investigate whether or not any employer (person, firm or corporation) who is offering employment to an applicant for employment, has defaulted in the payment of salaries, fees or other compensation to any performer or group of performers or has left stranded any performing companies or individuals or groups, during the five years preceding the date of the application. An agent shall not procure or undertake to procure employment or engagements on the part of any performer or groups of performers for an employer who has failed to pay salaries, fees or other compensation, or who has left stranded any performer or groups of performers or any performing companies or individuals during the five years preceding the date of the application, unless such employer (person, firm or corporation) shall provide sufficient security for the direct benefit of the performer or performers and in an amount ample to pay the performer or performers their full compensation for the specified employment or engagement designated in the employment or engagement contract. The provisions of this section shall not apply to employment or engagements in modeling.

§ 37.07. Performing artists; ads for availability of employment.

1. It shall be unlawful for any person, firm, corporation, association, or agent or employee thereof, holding itself out to the public by any designation indicating a connection with show business including, but not limited to, talent agent, talent scout, personal manager, artist manager, impresario, casting director, public relations advisor or consultant, promotion advisor or consultant, to (a) Make, publish, disseminate, circulate or place before the public or cause directly or indirectly to be made, published, disseminated, circulated or placed before the public in this state an advertisement, solicitation, announcement, notice or statement which represents that such person, firm, corporation or association has employment available or is able to secure any employment in the field of show business, including, but not limited to,
theatre, motion pictures, radio, television, phonograph records, commercials, opera, concerts, dance, modeling or any other entertainments, exhibitions or performances when an advance fee of any nature is a condition to such employment; or (b) Accept from a member of the public any fee, retainer, salary, advance payment or other compensation of any nature in return for services or otherwise, other than (i) repayment for advances or expenses actually incurred for or on behalf of such member of the public, or (ii) agreed commissions, royalties or similar compensation based upon payments received by or on behalf of such member of the public as a result of his employment in the field of show business.

2. Whenever there shall be a violation of this section, an application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction to issue an injunction, and upon notice to the defendant of not less than five days, to enjoin and restrain the continuance of such violations; and if it shall appear to the satisfaction of the court or justice that the defendant has, in fact, violated this section, an injunction may be issued by such court or justice, enjoining and restraining any further violation, without requiring proof that any person has, in fact, been injured or damaged thereby. In any such proceeding, the court may make allowances to the attorney general as provided in paragraph six of subdivision (a) of section eighty-three hundred three of the civil practice law and rules, and direct restitution. In connection with any such proposed application, the attorney general is authorized to take proof and make a determination of the relevant facts and to issue subpoenas in accordance with the civil practice law and rules.

§ 37.09. Protection of aerial performers from accidental falls.

1. No person shall participate in any public performance or exhibition on a trapeze, tightrope, wire, rings, ropes, poles, or other aerial apparatus which requires skill, timing or balance and which creates a substantial risk to himself or others of serious injury from falling, unless there shall be provided for such performance a safety belt, life-net, or other safety device of similar purpose suitably constructed and placed to arrest or cushion his fall and minimize the risk of such injury. No owner, agent, lessee, manager or other person in charge of a circus, carnival, fair, theatre, moving-picture house, public hall, or other public place of assembly, resort or amusement, shall permit any person to take part in a performance specified herein without providing such safety device. Any such aerial performance or exhibition without such safety device in which the height of possible fall is more than twenty feet, shall be presumed to create a substantial risk of serious injury.

2. The commissioner of labor may make rules supplementary to this section designating safety devices of an approved type, strength and location and otherwise effectuating the purposes hereof. The commissioner may also grant variations pursuant to the provisions of section thirty of the labor law. Violations of this section shall be punishable as provided in section two hundred thirteen of the labor law for violations thereunder.

3. In acting upon an application for a variation, the board may take into consideration the availability, in whole or part, of practicable safety devices for a particular type of performance or exhibition and the history and nature of the accidents incurred in such performance or exhibition. The provisions of subdivision one of this section and the rules of the board issued pursuant to this section shall be inapplicable to any performance or exhibition concerning which a variation has been issued to the extent specified in such variation.

§ 37.11. Prevention of personal injuries at carnivals, fairs and amusement parks.

The commissioner of labor may make rules guarding against personal injuries in the assembly, disassembly and use of amusement devices and temporary structures at carnivals, fairs and amusement parks to persons employed at or to persons attending the carnivals, fairs and amusement parks where the carnivals, fairs and amusement parks are located outside the city of New York, and where the carnivals, fairs and amusement parks are located within the city of New York, the department of buildings of the city of New York may make and enforce such rules.
5-241 Records. It shall be the duty of each licensed agency to keep its financial records on a monthly or quarterly basis and such records shall be brought up to date not later than (30) days after the expiration of such period. All such records shall be kept at the principal place of business for a period of three (3) years and shall be made available for inspection during normal business hours to the Commissioner of Consumer Affairs of the city of New York, or his duly authorized representatives.

5-242 Applications for License – Corporation. (a) A corporate applicant for a license shall list on the original application, or a renewal application, the names and addresses of all its officers and all stockholders holding ten percent (10%) or more of the stock of said corporation. A true and certified copy of the minutes electing such officers shall be attached to the application.

(b) The licensee shall notify the Department of Consumer Affairs within thirty (30) days in writing of any change of its officers or principal stockholders. In the event of a change of officers a true and certified copy of the minutes shall be attached to such notification.

5-243 Trade Name and Partnership Certificates. (a) If the applicant conducts business under a trade name or if the applicant is a partnership, then the application for a license must be accompanied by a copy of the trade name or partnership certificate duly certified by the Clerk of the County in whose office said certificate is filed.

(b) Such trade name shall not be similar or identical to that of any existing licensed agency.

5-244 Fingerprinting. (a) Every applicants for a license, if he is a natural person, shall be fingerprinted in the office of the Department and the fingerprints shall be filed with and made part of the original application.

(b) If the applicant is a partnership each member thereof shall be fingerprinted and the fingerprints shall be filed with and made a part of the original application. In the event of a change in the members of a partnership, each new member shall appear at the office of the Department within thirty (30) days after such change, be fingerprinted, and the fingerprints shall be filed with and made a part of the application.

(c) If the applicant is a corporation, all the officers and all stockholders holding ten percent (10%) or more of the stock of the corporation shall be fingerprinted, and the fingerprints shall be filed with and made part of the original application. In the event of any change of officers or stockholders of any corporate licensee, such new officers or stockholders shall appear at the office of the Department within thirty (30) days after such change, be fingerprinted, and the fingerprints shall be filed and made part of the licensee’s application.

(d) Whenever an applicant for a license does not have the required two years’ experience, then the manager so designated shall be fingerprinted and the fingerprints shall be filed with and made a part of the original application.

5-245 Premises. (a) An agency may share premises, provided that the sharing is with an unrelated entity or with an entity permitted by New York General Business Law Paragraph 187(8). The agency shall not directly or indirectly suggest to an applicant that he or she purchase the services or products of the entity sharing the premises. For purposes of this section, “unrelated” shall mean that no exchange of the proceeds or sharing of profits in any form takes place between the agency and the entity, and that they do not have any officers,
directors, partners, shareholders, principals, managers, executives, administrators, salespersons, or job-placement counselors in common.

(b) Every room of an employment agency shall be properly and adequately lighted and ventilated.

(c) The premises of every licensed agency shall be kept in a suitable and sanitary condition.

(d) Every employment agency shall be provided with running water and suitable and adequate washing facilities. Where both males and females are employed or dealt with in such agency, separate facilities shall be provided for each sex.

5-246 Referral Cards. (a) Whenever a licensed agency refers an applicant for a position to an employer where it reasonably knows or should have known that a labor dispute is in progress, then it shall be the duty of the licensee to deliver to the applicant a statement in large and bold lettering, to the effect that the employees in such place of employment are engaged or involved in a labor dispute.

(b) Whenever a licensed agency shall refer an applicant for employment to an employer who has agreed to pay to the agency the fee for the employee, or where the agency has agreed not to charge said applicant a fee for such referral, then the referral card shall clearly set forth the terms under which the employer has agreed to pay the fee for the applicant or the terms under which the applicant shall not be required to pay the fee.

5-247 Recruitment of Domestic or Household Employees from Without the State.

(a) No employment agency shall recruit domestic or household employees outside the State of New York as provided in Paragraph 184 of the General Business Law without notifying the Commissioner of Consumer Affairs of the City of New York in writing.

(b) Every employment agency engaged in such recruitment shall keep on file in its principal place of business for a period of three (3) years a written record indicating or setting forth the name and address of the premises where such applicant is lodged and receipt, signed by the applicant, setting forth the number of meals and the date and place where such meals were served to the applicant.

5-248 Prohibited Practices. (a) No employment agency shall discriminate against any individual because of his age, race, creed, color, national origin, religion, or sex, in receiving, classifying, disposing or otherwise acting upon applications for its services, in referring an applicant or applicants to an employer or employers or with respect to any guidance, training or apprenticeship program.

(b) No employment agency shall:

(1) print or circulate or cause to be printed or circulated any statement, advertisement or publication, or

(2) use any form of application for employment, or

(3) use any business name, trade name or display name, or

(4) make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to age, race, creed, color, national origin, religion, or sex, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

(c) No employment agency engaged in securing or obtaining positions for applicants in the modeling field shall directly or indirectly refer any applicant to a particular school or course for modeling, nor induce, suggest, or encourage choice of such school or course.
Definitions of GBL, Paragraph 171. Terms. As used in Paragraph 171 of GBL, Article 11, the following terms shall have the meanings indicated:

**Applicant.** “Applicant” means a person seeking employment.

**Employment Agency.**
(1) “Employment Agency” shall include all persons who, for a fee, render vocational guidance or counseling services, and who directly or indirectly represent, by any means, that:
   (i) they obtain or attempt to obtain employment for an applicant; or
   (ii) they will or may arrange interviews with employers for an applicant, or
   (iii) they have or may make contacts with employers which may improve an applicant’s chances to obtain employment, or
   (iv) they have knowledge of job openings or positions which is not available to the public, or
   (v) they have knowledge of job openings or positions which cannot be obtained with reasonable effort from other sources, or
   (vi) they maintain or sell a list or lists of job openings or positions unless all of the information contained in the list or lists appears in, and is part of, a newspaper or other publication in general circulation, and this fact is disclosed to consumers.

(2) “Employment Agency” also shall include all persons who, for a fee, render vocational guidance or counseling services, and who directly or indirectly represent, by any means, that:
   (i) they provide information about job search techniques or job search strategies; or
   (ii) they assist an applicant in any attempt to present to employers the availability or qualifications, or both, of the applicant for a position or class of positions. Such representations include, but are not limited to, representations that they “market” or “promote” applicants.

**Person.** “Person” means any individual, company, society, association, corporation, manager, contractor, subcontractor, partnership, bureau, agency, service, office, or the agent or employee of the foregoing.

**Vocational Guidance or Counseling Services.** “Vocational Guidance or Counseling Services” means services which consist of one or more oral presentations and which:
(1) provide information concerning the qualifications generally required for one or more positions or class of positions; or
(2) assess, or attempt to assess, the suitability of a person seeking employment for one or more positions or class of positions; or
(3) provide information concerning the availability of one or more positions or class of positions.

5-250 Display of Sign. Every licensee must post conspicuously at his or her place of business a sign, at least 12 inches by 18 inches in dimension with letters at least 1-inch high, reading as follows:

“The Department of Consumer Affairs of the City of New York has issued the following license(s) to this business:
   Licensee: [name appearing on licenses(s)]
   License Title(s): [type(s) of license(s) held]
   License No(s): [corresponding number(s) of license(s) held]

The Department of Consumer Affairs is located at (Insert the Department’s current address). Phone No.: (insert the Department’s current phone number).”

5-251 Display of License. Every licensee must post conspicuously his or her license at the licensee’s place of business. A licensee may post a copy of the license at the licensee’s place
of business only if the original is available at such place of business for inspection by any person.

**5-252 Notice of Hearing and Subpoena Duces Tecum.** A licensee must appear in person at the Department to answer a notice of hearing or a subpoena duces tecum served upon that licensee. If the licensee is an individual, he or she must appear; if a partnership, one of its general partners must appear; and if a corporation, one of its officers must appear. A notice of hearing or subpoena duces tecum may be served by ordinary mail addressed to the licensee’s place of business. They may also be served by ordinary mail addressed to the residence of an individual licensee; the residence of a general partner of a partnership licensee; or the residence of an officer or principal stockholder of a corporate licensee.

**5-253 Change of Address.** A licensee shall notify the Department in writing of any change of address within 10 days of the change. This requirement applies to the address of the licensed business, and to the resident addresses of: individual licensees, all partners or partnership licensees, and the officers and principal stockholders of corporate licensees.

**5-254 Judgments.** A licensee or license applicant must satisfy any outstanding judgment against him or her that has been obtained by a consumer and that relates to activities for which a license is required:
(a) within thirty (30) days from the date of entry of the judgment; or
(b) if the judgment has been stayed or appealed, within thirty (30) days from the date the stay is lifted or the appeal decided; or
(c) according to a payment schedule the parties agree upon.

**5-255 Response to Consumer Complaints.** A licensee or license applicant must respond in writing to the Department about any consumer complaint sent to the licensee or applicant by the Department. The response must be made within 20 days of the date the complaint is sent to the licensee or applicant and must set forth the licensee’s or applicant’s position regarding the transaction which is the subject of the complaint, including the facts which the licensee or applicant believes justify its position. The licensee or applicant must respond to subsequent communications from the Department concerning the complaint within 10 days after receiving a communication.

**5-256 Proof of Surety Bond.** No license or renewal shall be issued unless the licensee or applicant submits proof that every bond required by the Department for the license is in effect and does not expire prior to the end of the licensing period. Except where otherwise provided, all such bonds must allow any person aggrieved by the bondholder’s breach of the conditions of the bond to proceed against the bond.

**5-257 Lost or Mutilated Licenses.**

Lost license. A licensee shall immediately report, in an affidavit, the loss of a license issued to him or her by the Department, requesting the issuance of a new license. Replacement licenses are issued at the discretion of the Department.

(b) Mutilated license. Should a license issued by the Department to any licensee become mutilated or otherwise illegible, the holder of the license shall promptly surrender it to the Department and request the issuance of a new license. The request shall be made upon a form provided by the Department.

(c) Fee. A fee of fifteen dollars ($15) shall be charged for the issuance of a replacement license. This fee shall be paid when the affidavit for a lost license is filed or when a mutilated or otherwise illegible license is surrendered and a request for the issuance of a new license is filed. This fee will be refunded should the Department decide not to issue the replacement license.
5-258 Late Renewal Fee. Any licensee who files for a license renewal more than one (1) month, but not less than three (3) months, after the expiration date of the license must pay to the Department, in addition to any other fees or penalties provided by law, the sum of $20 or 20 percent of the licensee fee, whichever is greater.

Any licensee who files for a license renewal more than three (3) months after the expiration date of the license must pay to the Department, in addition to any other fees or penalties provided by law, the sum of $50 or 30 percent of the license fee, whichever is greater.
Ari Emanuel and Patrick Whitesell Unleashed: WME-IMG's Strategy, IPO Plans, China and the Doubters

by Matthew Belloni
March 30, 2016, 7:55am PDT
Fresh from a $5.5 billion valuation and a brash buying spree, the agency’s co-CEOs open up on rival CAA (they’re "freaking out"), Netflix ("a monopoly"?) Ben Affleck’s future as Batman, Trump vs. Hillary, and critics of their $2.4 billion bet on sports and fashion: "They’re all f—ing scared of their own goddamn shadow."

*A version of this story first appeared in the April 8 issue of The Hollywood Reporter magazine. To receive the magazine, click here to subscribe.*

It's lunchtime on Feb. 29, the Monday after the Oscars, yet the ground-floor restaurant in the Beverly Hills headquarters of William Morris Endeavor has been completely cleared out. Well, almost. Sliding into a booth at Jack & Ben's, the eatery
named for their fathers, are co-CEOs Ari Emanuel and Patrick Whitesell. They have closed the place to sit with The
Hollywood Reporter for their first extensive interview since
WME's brash $2.4 billion cash purchase of the sports and
fashion powerhouse IMG was completed in May 2014.

Both men were up late, especially Whitesell, who joined
longtime clients Ben Affleck and Matt Damon at Guy Oseary's
after-after-afterparty until well past 4 a.m. But their energy
and enthusiasm still are apparent, as are the roles they
immediately fall into — Emanuel the unfiltered streetfighter
agent who, with four colleagues, famously packed up his ICM
office in the middle of the night 21 years ago and founded
Endeavor; Whitesell his complementary opposite, a
gentlemanly Iowan who stepped into the co-CEO role when
Endeavor engineered a takeover of the venerable William
Morris Agency in 2009. As the Hollywood talent shops WME,
Creative Artists Agency and, to a lesser extent, United Talent
Agency, have raced to diversify and grow in recent years,
WME's massive (and massively leveraged) bet on IMG by far is
the industry's most watched play. If Emanuel and Whitesell
succeed — and new financial data suggest they're on the
right track — they will have reinvented a 10 percent
commission business into a global, pan-disciplinary
entertainment superpower that, importantly, owns a
significant chunk of content as well as represents its creators.

Much has been written about Emanuel, 55, and Whitesell, 51
(especially Emanuel, brother of Chicago Mayor Rahm and top
oncologist Zeke, confidant of President Obama and
inspiration for Entourage's Ari Gold), but the duo has
remained relatively quiet as they have undertaken the
difficult task of merging two companies and fixing problems
they inherited at IMG. Under owner Teddy Forstmann, who
died in 2011, IMG had grown into a worldwide player
touching sports (it represents such athletes as tennis star
Novak Djokovic, skier Lindsey Vonn and Super Bowl quarterback Cam Newton and owns or operates major golf and tennis events around the world; media rights (IMG cuts TV deals for European soccer leagues, Wimbledon and NASCAR); licensing (IMG College reps about 200 U.S. collegiate institutions, and its licensing group helps exploit brands as diverse as Formula One and Playboy); and fashion (IMG Models guides Gisele Bundchen and Gigi Hadid, and IMG runs 32 Fashion Weeks worldwide). But the company essentially was a collection of disparate assets — some of them, such as the lucrative college business, challenged by aggressive competitors.

WME, aided by its majority owner, the Silicon Valley private-equity power Silver Lake Partners, had outbid rivals by paying $300 million more than the next bidder. Adding to the pressure to deliver, WME and Silver Lake, whose managing director Egon Durban remains the primary conduit for Emanuel and Whitesell, took on significant bank debt led by JP Morgan and Barclays, based on what many believed to be wildly ambitious revenue projections and cost-cutting goals for the company. After the deal closed, IMG CEO Michael Dolan was shown the door, and several high-level executives followed. Many suggested Emanuel and Whitesell were in over their well-coiffed heads.
“Patrick and I have always had an idea that distribution is going to disrupt our business. Television, books, the movie business, music — for content creators, the value proposition is going to increase. So in our move from Endeavor to WME, WME to IMG, you’ve seen the expansion of our list of things that create content,” says Emanuel.

READ MORE
WME-IMG Gets $250 Million Softbank Investment at $5.5 Billion Valuation

But now, 21 months into the merger, there are signs that the reinvention is bearing fruit. On March 23, Japanese telecommunications giant Softbank revealed a $250 million investment in WME-IMG that valued the 5,000-employee company at $5.5 billion. (By contrast, when Silver Lake first
bought a 30 percent stake in WME in 2010, the agency was valued at about $800 million.) A company source tells THR another blue chip investor is nearing a deal, and when WME-IMG reports its 2015 financials to its lenders in early April, it will show revenue and profits are up considerably from 2014. Management EBITDA, the company’s internal measure of profitability, is up more than 30 percent year-over-year, says the source, to $405 million versus $303 million in 2014.

Emanuel and Whitesell have used the Silver Lake money to acquire or team with a whopping 12 businesses, branching into areas including Professional Bull Riders, an e-sports league with Turner and buying former client Donald Trump's Miss Universe Organization. Emanuel, who has taken the lead on the fashion and international businesses, and Whitesell, whose focus is sports, also are executing an aggressive strategy of integrating the formerly siloed divisions. "One of the smartest things Ari and Patrick did was to incentivize collaboration," notes Mark Shapiro, the former ESPN and Dick Clark Productions executive who was brought in last year as IMG's chief content officer. "You're incentivized to push business to other areas of the company." IMG senior vp talent Carlos Fleming says he saw an immediate impact on client Newton. "Cam has an affinity for the youth market," says Fleming. "Within 30 days, we had meetings with networks, and within another 30 days, we had sold 20 episodes of a show he'll host and executive produce for Nickelodeon."

The new WME-IMG's mix of clients and cultures was on display at its annual Oscar party, thrown at a $25 million Bel Air mansion. Along with nominees Damon, Brie Larson and Rachel McAdams, Newton chatted with a pot-smoking Wiz Khalifa as Serena Williams and Maria Sharapova mingled near Sports Illustrated swimsuit model Ashley Graham. The company spent millions on a January retreat at Carlsbad's La
Costa resort that, when THR visited, resembled an elaborate TED conference (albeit one where The Killers performed among trucked-in carnival rides). Professor Rob Knight discussed the science of gut microbes, and rapper Killer Mike plugged his friendship with Bernie Sanders. Karl Rove, who debated Trump's and Hillary Clinton's presidential chances with David Axelrod, cracked from the stage: "Ari, you ought to think about a celebrity election division. All kinds of cross-branding opportunities."

Despite the new duties and required globe-trotting, Emanuel and Whitesell still represent such A-list clients as Ryan Reynolds, Denzel Washington and Jake Gyllenhaal for Whitesell and Charlize Theron, Mark Wahlberg, Dwayne Johnson and Oprah Winfrey (for Emanuel). [Note: For more WME clients, see Footnote 1 at end of story.] Rival agents maintain the duo is overextended, but Emanuel, who often rises at 4 a.m. ("When I get in my office at 7:30 in New York, he’s the only one I can call — and he’s in L.A.," says CBS chairman Leslie Moonves), still keeps up a regimen of what can be 300 short calls a day to clients and buyers. "Ari is often calling just to say, 'Can I help? All good? You need anything?" They're fierce advocates for their clients, but they are also cheerleaders for the industry," says HBO CEO Richard Plepler. Adds Universal filmed entertainment chairman Jeff Shell, "I haven't seen one iota of degradation since they've taken over IMG."

The cult of personality around "Ari and Patrick," as they're called in the halls, only seems to have grown with their purview. Few CEOs of $5.5 billion companies would prank a rival (in this case, CAA in 2013) by papering Los Angeles with posters reading "CAAN'T." Moonves invited Emanuel to Augusta for The Masters last spring. When their CBS bungalow didn't carry the L.A. Lakers game, Emanuel barged into a neighbor's hut, signed up for the $149 NBA Season
Pass and watched half a Lakers game before leaving to go to sleep. "He took out three $50 bills and left them for the people living there," recalls Moonves.

That bravado popped up several times during THR's interview with the pair, in which they discussed a possible IPO, their China strategy, Affleck's future as Batman and, of course, Trump (Emanuel and Whitesell got on the phone separately for follow-up questions). An edited transcript follows.

“We have created the greatest platform of resources for artists, period,” says Whitesell. “It's going to be harder for agencies who don't have that to compete for those type of clients who have an appetite for that.” They were photographed March 14 at Siren Orange Studio in Los Angeles.
You've already got a financial backer in Silver Lake, why take on another investor?

PATRICK WHITESELL There's going to be more M&A opportunity, not less. So we thought having more capital would be good. Everybody always talks about [the company] going public or not. We don't ever want to be in a position where we feel forced, like we have to or need to go.

And why Softbank?

WHITESELL We feel like their footprint in Asia — I can't go into a lot, but essentially what they want to do with content in that part of the world given their massive mobile footprint there — is really strategic. Ari and I know Nikesh [Arora, Softbank president and COO] from his Google days, so we have a good relationship with him. His Rolodex, relationships, expertise and judgment would be good.

Do you feel a bit vindicated by the $5.5 billion valuation after so much was written about you guys overpaying?

ARI EMANUEL Yes. Most people are critical of people's moves if they didn't get something, whether it be WPP or CVC or any of these people that didn't get the asset. Everybody will say you overpaid. Patrick and I had a complete idea of what we thought we could create and how [IMG] fit into the pieces and where the world was going. If you created this platform, the ramifications across all our businesses would help the client, whether the client be Aaron Sorkin or Charlize or Wimbledon. It's actually come true a lot faster than Patrick and I had envisioned, probably about two years faster. [But] I don't pat myself on the back. Maybe it's being from an
immigrant family [Emanuel's father, Dr. Benjamin Emanuel, a pediatrician, was born in Jerusalem], we always had to keep on going and worry and make sure you're thinking ahead of the game.

**After all these years, you still feel family pressure to succeed?**

**EMANUEL** Listen, I put my own amount of pressure on myself. Whether psychologically that comes from my parents or my upbringing —

**And your brothers.**

**EMANUEL** I put a lot of pressure on myself.

**Patrick hinted at further M&A deals you are pursuing. Can you say some of the areas you are interested in?**

**EMANUEL** We're not going to lay out our playbook for everybody to read.

**And what about those who believe you overpaid and took on too much debt?**

**EMANUEL** We now have a platform that enables our clients to go any which way they want. And you can't replicate it so easily. So for potentially an 18-month period of $300 million too much — I have to ask you this: *(To Whitesell)* Are you going anywhere?

**WHITESELL** No.

**EMANUEL** I'm not going anywhere. So, in the long run, it's kind of a meaningless issue. *[Both Emanuel and Whitesell have 10-year employment contracts with WME-IMG.]*
WHITESELL They said that [to Disney's Bob Iger] about
["overpaying" for] Marvel, they said that about Pixar, right?
And Lucasfilm, too. What do you do with the asset once you
have it? Our longer-term horizon is, what is it going to be in
the next five, 10 years and what can it grow to do? We were
really comfortable with the price. But at the end of the day,
time will prove whether or not we were right.

EMANUEL Our partners, Silver Lake — the last time I
checked, the only people that are important to me are Patrick
and them. They were cool [with the price], and I think
Patrick's cool. So we're all cool. I'm not really worried about
WPP or CAA or UTA — who cares?

“Ari [left] is truly one of a kind. Aggressive, never fully satisfied,
tenacious and smart — all qualities that make a real leader,”
says Rupert Murdoch. Adds Jeff Shell: “Their brains seem to be in sync. I rarely tell something to Ari that Patrick doesn’t seem to know 10 seconds later.”

Explain how the relationship with Silver Lake works. If you identify something like Professional Bull Riders that you want to buy, do you go to Egon and ask for approval?

WHITESELL The three of us make a decision, yeah. Bull Riding fit the general thesis. We have a whole M&A team that does the exhaustive research, the analysis, and then we figure out, "OK, what do we think we can grow it to?" And then the three of us, if we agree, we go do it.

What’s something you haven’t agreed on?

WHITESELL Have we had one yet?

EMANUEL No.

You grew up as agents, now you’re off meeting with college football groups trying to salvage these IMG deals. Do —

EMANUEL — first of all, I don't appreciate the word "salvage." I'm not kidding you. I don’t.

Others have written that the college business is one of your biggest challenges. Do you —

EMANUEL — a lot of people have written that we paid too much, and they'll be proven wrong. A lot of people have written a lot of things because that's how you sell papers. When we did the analysis, the word "salvage" wasn't in any of it. We just had to work through contracts and work through processes. One of the great things about the company is nobody's afraid of hard work. Nobody's afraid of a whole
team chipping in and trying to figure out if there's a problem somewhere, where you've got to work through issues. [See Footnote 2 for IMG College's reach and issues.]

Emanuel with Vogue's Anna Wintour at 2016 New York Fashion Week.

What do you see as the biggest challenge in making this company work?

WHITESELL You've got to have great people. The business we're in is mostly people and the relationships that come with those people. With IMG, we've had a real positive influence on that culture. It's no secret they were in a tough spot; the CEO died, and they were for sale for two years. That's a hard place to work, so a lot of our success has been just making IMG a better place to work.

But what have been the specific target areas for you in working through issues?

EMANUEL We had to revitalize fashion, which we've done. We brought out the [Fashion Week] app, we brought out our digital [initiative]. We made the events better. We brought
new sponsors in. We bought Made. [In adding Made, IMG absorbed a Fashion Week rival and boosted its footprint in the events space.] We rolled in the makeup artists. The minute we bought [New York Fashion Week], three advertisers pulled out, right? It was a major problem. So we had a whole strategy about it. We now have an OTT channel, we have our app, we have our digital strategy, they're now all going to come together.

**WHITESELL** People said similar things when we merged with William Morris: How are you going to make an agency work, they've got all these issues? Part of leadership is actually getting in and fixing it, getting the culture right, getting the right people. We think we're pretty good at that. Every part of our business at WME has grown since the IMG acquisition. IMG had challenges as far as how it was organized, how it was run, not the underlying assets. When Teddy had it, he was a private-equity guy, and he ran it as an investor, right? Looking to sell it. We run it as an operator. You fundamentally structure it and run the company differently. And we have a long-term horizon because we're not intending to ever sell it. The second thing about IMG is, some of the challenges were what we saw as the opportunity. IMG College was three companies put together. They hadn't quite thought that through cohesively. They made a decision to take Fashion Week and move it to Lincoln Center and basically were damaging the brand. So we had to go back and rebuild it. For us, it's no different than when you sign an actor who's had three bombs in a row. There was no company like it in the world with the collection of assets and resources and relationships —

**EMANUEL** Globally.

**WHITESELL** We don’t compete with anybody in more than 20 percent of our business. That’s an incredible operating
leverage. We'll compete with the talent agencies in two or three businesses. We'll compete with certain media rights-buying companies internationally. But that diversity is super powerful. Ari and I always said if we didn't buy IMG and we wanted to duplicate it, how would you do it? And we couldn't figure out the pieces that you buy.

How do you maintain A-list clients when you're in places like Jacksonville or Tallahassee meeting with a college sports program? What happens when Ben Affleck or Matt Damon needs something?

WHITESELL Well, the proof's in the pudding. Since we bought IMG, we signed Jake Gyllenhaal, Ryan Reynolds — and what's happened to their careers? It's hard to sit here without being boastful about it. Ari and I still love being agents.

EMANUEL I'm just going to pick one — I'll pick a couple, if you don't mind. Steven Spielberg, he had no [television] shows on the air. We signed him [Spielberg signed with WME for television; he remains with CAA for film], he's got seven. Bob Zemeckis couldn't get The Walk [made] and couldn't get his [upcoming] Brad Pitt movie, and we're starting his television business. Oprah — you can ask her how it's going. It's going pretty well. Simon Cowell — I just left a two-day meeting in London, and everything is going on now with him within seven seconds, and on the movie side, too.
From left: Whitesell with Affleck and Damon in 1999, a year after they won a best original screenplay Oscar.

READ MORE
A Month in the Life of Hollywood Superagents: Models, Premieres and Bro-Hugs With Ben Affleck

Are you still able to do your hundreds of calls a day with clients?

EMANUEL I'm doing a lot of calls. And the great thing is, now [CAA's] Richard Lovett is calling those people. (Laughs.) If I just put up Mark Wahlberg and Charlize Theron and their movie and television business compared to (sarcastic) the incredible movie and television business that [CAA has] done with Will Smith and the incredible television business they've done with Brad Pitt — [CAA's] freaking out right now.

WHITESELL It's a cheap line to say, "You're off doing these meetings and what if so-and-so calls." Ari and I, it's much more a chief executive relationship. I guess it would be like Bob Iger used to do programming with ABC and now —
But Bob Iger's direct reports at Disney can't fire him. If Aaron Sorkin can't get you on the phone, he's pissed.

EMANUEL But he can.

WHITESELL With the representation thing, it's a cheap shot because people are going, "What the f—, they're kicking our ass still, and they're building this other stuff outside our business." That's threatening, and it scares people. All I would look at is the clients. If they were unhappy, they would fire us, right? Everybody gets fired from time to time, but in general, if you look at the totality of our business and our own personal businesses, they have grown. So, that's the answer.

EMANUEL My response is just I'm pissed off at hearing it. It's such a joke.

Patrick, how long do you think Ben will want to play Batman?

WHITESELL Well, he's contracted to do at least Justice League One and Two, so at least three times wearing the cape. And there's a script that he's written that is a really cool [Batman] idea, so that's out there as an option.

READ MORE
WME Launching Venture Capital Fund (Exclusive)

Would you ever suggest Matt do a Batman movie with him?

WHITESELL (Laughs.) No. I don't think there's room for both.

David Geffen, your friend, has said this company will go public. Do you agree?

WHITESELL No mandate. But here's the thing. Everybody talks about a public company like that would be a bad thing.
It may be a great thing. Who knows? We will not be forced to go public. This is, again, people in Hollywood who don't understand — they're not sophisticated about it.

Ari, are you willing to subject yourself to the scrutiny of running a public company?

**EMANUEL** That's why I've got a great partner. *(Laughs.)*

You might not be able to tell people to f— off as much as you do.

**EMANUEL** I don't know, we'll see.
Featured News

DC vs. Marvel: Why the Rivalry Is Bigger than 'Justice League'

Top Talent Agency Face Possible Legal Exposure for Enal Harassment

"One of the smartest things Ari and Patrick did was to incentivize collaboration," notes Mark Shapiro, the former ESPN and Dick Clark Productions executive who was brought in last year as IMG's chief content officer.

You've trimmed costs at WME and IMG. Were agents asked to forgo a part of their bonuses last year in exchange for a piece if the company goes public?

WHITESELL No. What we've done is we've created, for top execs — some 400 or 500 people at our company —

EMANUEL If they want —

WHITESELL We created an opportunity for equity in the company, which we want to be a great thing, and to spread it
around, unlike other people in our business who haven’t
done the same thing —

EMANUEL — who have taken everything off the table for
themselves.

WHITESELL So do we have a number of people who have
equity in the company? Yes. Do we think we’re going to create
long-term wealth for them that will be outside what they
could do without it? Yes. But was it thrust upon anybody? No.

EMANUEL Unlike other people who own different companies
who took the vast majority of the money and put it in their
pockets — actually, to the detriment of our own financial
upside, Patrick and I didn’t think that was appropriate.

Obviously you’re talking about CAA. What is the strategy
for those guys?

EMANUEL We have no clue, nor do we think about it. [In
October 2014, TPG Capital raised its stake in CAA to 52 percent.
While CAA has used the money to make more than 10 strategic
investments to grow and diversify, it has not been as active as
WME since the IMG deal.]

Do you worry CAA or TPG may try to go public first and
their success or failure would impact your effort?

EMANUEL No.

How comfortable do you feel at a bull-riding event or
front row at Fashion Week?

WHITESELL Can I say just one thing? There’s an inference
that we’re traveling all over the world all of a sudden. We’ve
been traveling in this job since we started, that’s what you do.
You travel. So are we traveling more? No. Bull riding is like a
client. It's a unique sport. They have a certain connection with their fans, they have a certain area where they want to grow, they have a way in which they want to be portrayed in the world, to make money, but they also have a certain integrity to it and they want fresh ideas. It's no different than working with a director.

What's a growth area of the business that people aren't paying enough attention to?

**EMANUEL** China's a pretty big puzzle to solve.

You've met several times with Alibaba's Jack Ma. What do you talk about?

**EMANUEL** Well, you'll see very soon our strategy in China.

Tell me what your strategy is.

**EMANUEL** I can't do that right now. But China is a very important puzzle to solve, and if we solve that, then we've solved a pretty big puzzle for where the movie business for our clients is going and the television business is going. And sports.

_Emanuel (left) and Whitesell (second from right) entertained Alibaba's Ma (second from left) in WME's seats at a 2014 Lakers_
game. Emanuel has visited Ma in China but is not formally advising him.

READ MORE
Sean Whitesell, Producer and Brother of WME Co-CEO
Patrick Whitesell, Dies at 52

What are Jack Ma's goals in entertainment?

EMANUEL I don't know because we're not formally or informally advising him.

But you chat with him.

EMANUEL Going to the original [Endeavor] premise in '95, content is king. We have movies and television, and we have sports. So we have a solve for a bunch of those [Chinese] companies that is unique. You'll see our foray into China that solves a bunch of their issues. They've made huge investments in distribution, and they're going to need stuff to fill the pipes.

Netflix has become a major buyer for you. How long can this streaming television boom last and what do you think is the long-term strategy at Netflix?

WHITESELL It's a land grab, right? [Netflix] is trying to get to a point where they feel like a monopoly. I don't think they've used that word, but to have a "dominant position." It's all about original content for them right now. They licensed all these libraries to get a foothold, and they've done very well with it.

EMANUEL And they really haven't paid proper pricing for that library, right? They've gotten away with that.

WHITESELL Now Amazon is going to go out and release movies theatrically. We're going to see how they do. We just
came off this Sundance festival where we had two record-selling movies by a lot. [**WME's indie film division sold Nate Parker's 'The Birth of a Nation' for $17.5 million to Fox Searchlight and Kenneth Lonergan's 'Manchester by the Sea' to Amazon for $10 million.**] But OK, what happens now? How do they handle them theatrically? If they're Oscar-worthy, how's that campaign? If they do that, great, then they're going to have success. If they don't, [the market will] come back. It was crazy when HBO started doing original content. Now you think that's the gold standard. Disruption is great because it creates more opportunities for our clients. At Netflix, you get the certainty of it getting made. The flipside is, in syndication could your backend be compromised? It could be.

**EMANUEL** Patrick and I are trying new things. Some have worked, some haven't worked. We don't like to talk about any of the ones that haven't worked. (**laughs**) But the good thing about the company and the clients is they want to try new things. [**WME also helped start merchant bank Raine, which backed Vice Media and 'South Park' creators Trey Parker and Matt Stone's Important Studios, and Media Rights Capital, which produces 'House of Cards' and the 'Ted' movies.**] People talk about [risks] because they're all f—ing scared of their own goddamn shadow.

**What's going to happen to Paramount? Is consolidation coming to the studios?**

**EMANUEL** We live in a $160 billion ecosystem. The cable bundle is about $100 billion, and then there's about a $50 billion or $60 billion advertising bundle. If the majors do not solve that issue, they will get marginalized by the Amazons, Netflixes and SVOD services. Then there will be consolidation. If the studios can figure out a solve, I think there will be less. I don't think Disney is going anywhere so quickly, I don't think Comcast [is either] because they have their own distribution.
I don't think Fox is going anywhere, I don't think Warner Bros. is going anywhere, and neither is CBS — these are still good businesses, but they have to solve for the bundle, and if they can find a solution, I don't think there's going to be as much consolidation as people think.

**The diversity issue is front and center. Do you agree agencies aren't putting enough diverse directors on shortlists for jobs?**

**EMANUEL** Hold on. The top five shows packaged by agencies all have diversity in them. Go through them!

**That's the TV business, not film.**

**WHITESELL** Well, in the film business, you go meet with the studios because, remember, they're the buyer. We're the seller. They usually say, "Here's what we're looking for, here's what we need, here is our slate." And then we react to that and bring them ideas based upon it. I'm not trying to put all the responsibility on them. It's a shared responsibility. It's not just African-Americans, it's Hispanics, it's Asians, it's everything. It's women. But the notion that the agencies are just holding back their diverse projects is crazy. It's crazy.

**Donald Trump was a WME client. You guys are both committed Democrats and have contributed to Hillary in this campaign. Given some of Trump's rhetoric, would you have him back as a client after the election if he doesn't win?**

**EMANUEL** I'm not contemplating any of that. I'm not delving into that conversation with you.

**OK. How did the deal with Trump for Miss Universe come together?**
EMANUEL There was a problem. He was running [for president]. He wanted to sell it. "Great, we want to buy it."

Emanuel was featured in THR’s Next Generation list in 1994, a year before launching Endeavor.

Did you have the Fox deal to broadcast the show in your head beforehand?

EMANUEL No. I would have rather it been back on NBC. But there was stuff going on between all of that. [Trump sued NBC after it pulled Miss Universe in response to Trump’s comments about Mexican “rapists.” Trump then bought out NBC’s 50 percent interest in the pageant company, settled the litigation and sold the whole thing to WME-IMG.]

What do you think Obama will do post-presidency, and will you help?
EMANUEL I have no idea. I'm assuming he is going to take a little break, having heard from my brother what happens with other presidents.

Would WME help if he wanted you to set up a book or a speaking tour?

EMANUEL I want to be the first one in line, but there's probably other people.

Do you think Hillary has a Hollywood enthusiasm problem?

EMANUEL Probably her best friend is Haim [Saban], so he's probably working through that, and there's some other supporters. I think it's contingent on whom she faces. So ...

If it's a Trump-Hillary battle?

EMANUEL I can give you my brother's number, he'll be happy to [talk]. I don't want him to talk about Hollywood, and I don't want to talk about political issues.

OK, done with politics. How do you identify the places to invest?

WHITESELL The general thing is if we think we can buy something that our platform or network can enhance in a different way than others. Buying something that can operate as a stand-alone [business] and doesn't have some integration or leverage or will drive more revenue and more creative ideas toward it, we won't buy. So when you buy Bull Riders, they have a huge events business. And we have a sponsorship business.

EMANUEL Licensing.
WHITESELL We represented them in their media deals before as agents, right? So a lot of the areas and where they want to go is in our core skill set. That's at the heart of our M&A strategy.

EMANUEL On e-sports, we have clients in that area. We realized it was a huge growing area — we have a pretty big research group. We look at the space and at all our businesses, and we have a whole team thinking creatively. What could we do from our media group, from our representation group? The group came together and said we should create a league. We thought through what that meant and then went and sold it and got a partner with TNT. That's the whole thesis.

Do you see any conflict in being an advocate for your clients and being a content owner and distributor now?

EMANUEL You mean in bull riding and in e-sports? No.

WHITESELL Events matter more than ever, right? So that pro bull-riding weekend or food festival or college football game — what is the content besides that core thing? It's [WME client] Brad Paisley doing free concerts on a Friday night. Sponsors love it. He loves it because he's 40-some years old, a huge country star and 18- to 22-year-old kids go and see him. That's where the cycle's power is because it's great for him and it's great for our university partners because they have this great content there. No other company in the world can do this in our space.

READ MORE
Ari Emanuel Surprises Former Assistants With Cartier Watches

Where do you see the agency business in five years?
WHITESSELL I don't know. We have created the greatest platform of resources for artists, period. Now, you may take advantage of two of the [platforms], one of them, or 15 of them. But it's going to be harder for agencies who don't have that to compete for those type of clients who have an appetite for that.

EMANUEL I don't know how many years ago, eight years ago, Richard Lovett [of CAA] made this comment that they're going to represent everybody, right? (Laughs.) Those agencies are [still] going to exist, it's great if they exist. We're just doing our thing.

WHITESSELL We respect our competitors. We battle them in the areas that we work against them.

EMANUEL Twenty percent only.

WHITESSELL And listen, what we're building, some clients will be attracted to, and those are the ones we want to represent. And the ones that aren't, it's OK.

A head of a TV network said to me, "Ari's head is getting too big. He thinks he owns the world. He's getting out of control." How do you respond to that?

EMANUEL I don't. Patrick has to put up with it.

WHITESSELL People make crazy characterizations about Ari that aren't true, right? No one works harder, no one's more loyal. No one cares more about the people he works for and with — and he's fearless. And I think that scares people sometimes. But those things are the real qualities. All the other bullshit anecdotes and the Ari Gold [from Entourage], that ain't the real guy. Someone has another agenda when they bring that up.
EMANUEL That's very sweet.

“If you're a content creator or you are a premium brand, there are more ways for you to monetize that. A part of this has been to go deeper and then go broader. And then all of it connects — even at our [Oscars] party, the world of sports, entertainment, fashion and live events all connect,” says Whitesell.

FOOTNOTES:

1. The WME side of WME-IMG reps about 5,000 clients, from actors (Christian Bale, Amy Adams) to filmmakers (Christopher Nolan, Quentin Tarantino) to reality stars (Kardashians) to TV writers (Howard Gordon, Greg Berlanti) to media players (Charlie Rose, Chris Matthews), music stars
(Adele) and even media brands like *The New York Times, Fast Company* and *THR* and sister outlet *Billboard*.

2. Of the “Power 5” conferences (SEC, ACC, Pac 12, Big 12, Big Ten), IMG College reps more than half the schools, but several, including the University of Kentucky, have either cut ties or renegotiated deals in recent years. IMG’s licensing affiliate and its brands comprise nearly 75 percent of the $4.6 billion retail market for collegiate merchandise.

Main Image: Patrick Whitesell, left, and Ari Emanuel

*Miller Mobley*
From Beyoncé to Springsteen, almost every big concert goes through Live Nation CEO Michael Rapino

"My business will do very well if we figure out how to super-serve 73 million fans."

By Eric Johnson | @HeyHeyESJ | May 26, 2016, 6:30am EDT

Live Nation / Rainer Hosch
Getting a record deal used to be the big prize in the music business. Emphasis on the "used to."

"Artists have bills just like you and me," Live Nation CEO Michael Rapino said on the latest episode of Recode Media with Peter Kafka. "They make money when they go on the road. They need to go on the road."

When they do, it is almost a given that Rapino will make money, too: Live Nation dominates the tour business and put on 25,000 shows last year. If you go to see Beyoncé, Bruce Springsteen or Luke Bryan this summer, you're going to a Live Nation show. And even if you're not going to one of those Live Nation shows, chances are very good that Rapino will make money anyway because Live Nation and its subsidiary Ticketmaster sold 530 million tickets last year.

But Rapino still has real challenges: He wants to figure out how to make more money from each show his customers go to. And he wants to make them happier — by figuring out how to solve problems like scalpers.

The first challenge is easier: Rapino said he plucked his new chief revenue officer, Tom See, out of the theme park business because Disneyland and Universal Studios know how to upsell their guests on additional purchases like food and merchandise. Live Nation wants to apply that to its 73 million annual customers.

"If I can upsell you, if I can enhance your experience — my business will do very well if we figure out how to super-serve 73 million fans," Rapino said.
Fighting the StubHubs of the world is a lot harder. Rapino talked at length about what Live Nation's subsidiary Ticketmaster is trying to do to undercut scalpers, but acknowledged that the ticket-reselling business is too big to shut down completely.

"It's an $8 billion industry," he said. "That's like cocaine money. That's going to attract a lot of good people."

You can listen to Recode Media in the audio player above, or subscribe on iTunes, Google Play Music, TuneIn and Stitcher.

If you like this show, you should also sample our other podcasts:

- **Recode Decode, hosted by Kara Swisher** is a weekly show featuring in-depth interviews with the movers and shakers in tech and media every Monday. You can subscribe on iTunes, Google Play Music, TuneIn and Stitcher.

- **Too Embarrassed to Ask**, hosted by Kara Swisher and The Verge's Lauren Goode, answers all of the tech questions sent in by our readers and listeners. You can hear new episodes every Friday on iTunes, Google Play Music, TuneIn and Stitcher.

- And finally, **Recode Replay** has all the audio from our live events such as the Code conference, Recode Media and the Code Commerce Series. Subscribe today on iTunes, Google Play Music, TuneIn and Stitcher.

If you like what we're doing, please write a review on iTunes — and if you don't, just tweet-strafe Peter. Tune in next Thursday for another episode of Recode Media!
Music Business Reading, Viewing and Listening Selections
With Emphasis on the Concert Industry

NEWSLETTERS:

Billboard Billboard Subscription
AMPLIFY Amplify magazine
Music Business Worldwide Link
The Lefsetz Letter Link
MediaREDEF / MusicREDEF
HITS Daily Double Link

READING LIST:


Summers, Jazz. (2013) Big Life. Amazon


Atkins, Martin, et al. Tour Smart: And Break The Band

VIEWING LIST:

*Who the F**k is Arthur Fogel?* (Documentary, 2013) IMDB | Vimeo | Amazon | Hulu

*Music Moguls: Masters of Pop, Money Makers* (BBC Documentary) YouTube

*Music Shoals* (Documentary, 2013) IMDB | Amazon

*Supermensch: The Legend of Shep Gordon* (Documentary, 2013) IMDB | Netflix

*Inventing David Geffen* (PBS American Masters Documentary, November 20, 2012 ) YouTube | PBS

*20 Feet From Stardom* (Documentary, 2013) IMBD | Amazon

LISTENING LIST:
Freakonomics Radio *Why Is the Live-Event Ticket Market So Screwed Up?*

The Bob Lefsetz Podcast: [Podcast Link](#)
  Interviews with Nathan Hubbard of Ticketmaster, John Boyle of Insomniac Music festival, Andrew Oldham – former Manager of the Rolling Stones, and more.

Promoter 101 Podcast: [Promoter 101 The Podcast](#)
  Paradigm's Joe Atamian and Live Nation's Sean Striegel
  Paradigm's Lee Anderson, AEG (UK) Toby Leighton-pope, RCA's Nick Light
  Paradigm’s Todd Walker, the Bowery Presents’ Josh Bhatti and Mark Kates

ARTICLES:

“From Beyoncé to Springsteen, almost every big concert goes through Live Nation CEO Michael Rapino” | [Recode](#), May 26, 2016 [Audio Link](#)


MUSIC BLOGS & MEDIA

*Follow some or all of these blogs and media outlets via social media or an RSS feed tool such as Feedly*

<table>
<thead>
<tr>
<th>3hive</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agent vs. Promoter</td>
</tr>
<tr>
<td>All Things Go</td>
</tr>
<tr>
<td>All Music</td>
</tr>
<tr>
<td>Alphabet Bands</td>
</tr>
<tr>
<td>Antiquiet</td>
</tr>
<tr>
<td>Aquarium Drunkard</td>
</tr>
<tr>
<td>-----------------------------------</td>
</tr>
<tr>
<td>Billboard</td>
</tr>
<tr>
<td>Blabbermouth</td>
</tr>
<tr>
<td>Breaking More Waves</td>
</tr>
<tr>
<td>Brooklyn Vegan</td>
</tr>
<tr>
<td>Buddyhead</td>
</tr>
<tr>
<td>Buzzbands.la</td>
</tr>
<tr>
<td>Clash Magazine</td>
</tr>
<tr>
<td>CMJ</td>
</tr>
<tr>
<td>Consequence of Sound</td>
</tr>
<tr>
<td>Disco Naivete</td>
</tr>
<tr>
<td>DIY Music Biz</td>
</tr>
<tr>
<td>Drowned In Sound</td>
</tr>
<tr>
<td>Ear Buddy</td>
</tr>
<tr>
<td>FACT Magazine</td>
</tr>
<tr>
<td>Gapers Block</td>
</tr>
<tr>
<td>Gorilla Vs. Bear</td>
</tr>
<tr>
<td>Guardian Music</td>
</tr>
<tr>
<td>hypebot</td>
</tr>
<tr>
<td>Hype Machine</td>
</tr>
<tr>
<td>Indie Shuffle</td>
</tr>
<tr>
<td>IQ Magazine</td>
</tr>
<tr>
<td>JamBase</td>
</tr>
<tr>
<td>Kings of A&amp;R</td>
</tr>
<tr>
<td>Mediabase – requires (free) sign up. Great resource for radio market information.</td>
</tr>
<tr>
<td>Music Feeds</td>
</tr>
<tr>
<td>My Old Kentucky Blog</td>
</tr>
<tr>
<td>NPR Music</td>
</tr>
<tr>
<td>NME</td>
</tr>
<tr>
<td>NYT Music</td>
</tr>
<tr>
<td>Paste Magazine</td>
</tr>
<tr>
<td>Pigeons &amp; Planes</td>
</tr>
<tr>
<td>Pitchfork</td>
</tr>
<tr>
<td>Pollstar ConcertWire</td>
</tr>
<tr>
<td>Pretty Much Amazing</td>
</tr>
<tr>
<td>Rawkblog</td>
</tr>
<tr>
<td>Rollo &amp; Grady</td>
</tr>
<tr>
<td>Spin</td>
</tr>
<tr>
<td>Stereogum</td>
</tr>
<tr>
<td>The A.V. Club</td>
</tr>
<tr>
<td>The Daily Swarm</td>
</tr>
<tr>
<td>The FADER</td>
</tr>
<tr>
<td>The Line of Best Fit</td>
</tr>
</tbody>
</table>
| The Math Rock Blog
| The Needle Drop
| The Quietus
| The Wild Honey Pie
| The PRP
| Triple J Music News
| Song Exploder
| Hollywood Reporter |
ENGAGEMENT AGREEMENT


It is mutually agreed between the parties as follows:

Purchaser hereby engages the Producer to furnish the Artist to perform the engagement (hereinafter referred to as ‘the engagement’) subject to all of the Terms and Conditions herein set forth, including those on the face of this Agreement and those entitled 'Riders' and 'Terms and Conditions'.

Date of Engagement: [DATE OF ENGAGEMENT]
Hours of Performance / Set Length: [TIME SLOT]

Venue Name: [VENUE NAME]
Venue Location: [VENUE ADDRESS]
Venue Information: [CAPACITY / AGE RESTRICTION / TICKET PRICING]

Artist Guarantee: ________ U.S. Dollars (US$ ######)

Artist must be billed as: [ARTIST BILLING]
Merchandise Rate: [MERCHANDISE RATE SPLIT]

PURCHASER TO PROVIDE:
Flights: [INDICATE WHETHER COSTS ARE INCLUDED IN GUARANTEE OR IN ADDITION]
Hotels: # Room(s) (Type of Rooms)
Ground: All Local Ground By Professional Car Service.
Per Diem: $### Meal Buyout

PAYMENT SCHEDULE:
Deposit: ________ U.S. Dollars (US$ ######) due on or before [DEPOSIT DEADLINE DATE]
Balance: ________ U.S. Dollars (US$ ######) due on or before [BALANCE DEADLINE DATE]

Purchaser additionally expresses that Purchaser has read and fully agrees to the Artist Rider and Additional Terms and Conditions, which are deemed incorporated herein and made a part hereof, and the provisions of any Artist performance rider annexed hereto. Please sign and initial all pages.

Purchaser: [PURCHASER COMPANY]
By: ____________________________
Title: ___________________________

Producer: [ARTIST COMPANY]
By: ____________________________
Title: ___________________________
1. BILLING / ADVERTISING / PROMOTION / ON SALE:
   (a) Unless otherwise indicated in the contract, ARTIST is to receive 100% sole exclusive headline billing in all forms of display, advertising and publicity, including, but not limited to, program, fliers, signs and marquees. For the avoidance of doubt, no other performer shall receive credit or billing in any advertising without the prior written consent of PRODUCER.
   (b) No other performer shall receive billing equal to or greater than ARTIST and PRODUCER reserves the right of prior written approval over the type and quantity of billing for all support acts or other performers in connection with the Engagement.
   (c) It shall be PURCHASER’s sole responsibility to properly promote and advertise this Engagement.
   (d) This Engagement shall not be announced or advertised in any way without PRODUCER’s prior written approval. This includes press releases, text messages, teasers, social media blasts, or any other form of public announcement.
   (e) PRODUCER and PURCHASER shall mutually designate an announcement date and the on-sale date for the Engagement.
   (f) PRODUCER shall have the right to supply or approve (in writing) all artwork, announcements, listings, advertisements and other materials in connection with the Engagement, it being understood and agreed that no such materials shall be released or distributed without such approval. Any failure to comply with the foregoing shall constitute a material breach of this Agreement. In such event, in addition to PRODUCER’s other rights and remedies (all of which are reserved), no ad fees will be charged to the PRODUCER at settlement, and a minimum penalty of $100 per occurrence will be charged to PURCHASER.
   (g) All artwork is to use official PRODUCER logo(s) and photo(s), shall include ARTIST’s websites and social media outlets, and is subject to written approval by PRODUCER before it is distributed to the public. Proofs must be sent to PRODUCER’s Agency for approval no less than 30 days prior to the Engagement, and not less than 48 hours prior to any imposed print deadlines such that there is enough time to make any necessary changes.
   (h) UNDER NO CIRCUMSTANCES may local or national corporate entities be tagged onto or included in advertisements absent PRODUCER’s express prior written consent. There can further be no sponsorships in stand-alone ads, without management prior written approval.
   (i) There shall be no radio station presents/co-promotes or radio promotional comps without prior written permission from Producer, record label or management. For the avoidance of doubt, PURCHASER shall neither represent, nor authorize or permit any other person or entity to represent, that the Engagement is being promoted, sponsored, co-promoted or co-sponsored by any product or service, or by any person or entity manufacturing, distributing, selling or otherwise dealing in or associated, directly or indirectly, with any product or service (including any newspaper, magazine, radio or television station, or any other entertainment medium).
   (j) PURCHASER shall only use print ads, radio spots and television spots which have been approved by PRODUCER in writing prior to dissemination or broadcast, as applicable. All radio and television advertising shall only use music designated or approved in writing by PRODUCER. No music recorded by any person or group other than PRODUCER shall be used in any advertising in connection with the Engagement.
   (k) All marketing plans are to be submitted and approved by PURCHASER in writing prior to on-sale.
   (l) Promotional Meet & Greet and interview requests are subject to prior written approval by PRODUCER, which PRODUCER may approve or disapprove in its sole discretion.
   (m) All advertising to be billed at net cost.

2. SHOW SCHEDULE:
   (a) Prior to executing this Agreement, PURCHASER shall inform PRODUCER in writing of any mandatory union breaks, curfews, fire regulations, minimum and maximum light level requirements, maximum sound level limits, requirements relating to the presence of uniformed police within the venue, and any other unique regulations or peculiarities. PURCHASER’s failure to do so (or any omission therefrom) shall be deemed a representation and warranty by PURCHASER that the foregoing do not exist, and PRODUCER shall not be liable for any costs, fines or other expenses incurred due to non-adherence to the foregoing. As between PRODUCER and PURCHASER, PURCHASER shall be solely responsible for any overtime charges, fines, penalties and other costs which arise from any violation of any of the foregoing.
   (b) All show times must be confirmed and are subject to PRODUCER’s prior written approval. Any changes to any show schedule times must be confirmed in writing by PRODUCER. If, through no fault of PRODUCER, PRODUCER’s set time is delayed for more than thirty (30) minutes, for any reason whatsoever, PRODUCER has the right to not perform, shall retain all monies previously paid by PURCHASER as partial compensation and PURCHASER shall remain liable for payment of the full balance of the Guarantee, with no further obligation of PRODUCER whatsoever. Further, if PRODUCER, in its sole judgment, determines that its set time may be delayed because the set time(s) of any or all of the other performers at the engagement is/are running over the allotted times, PRODUCER has the right to demand that PURCHASER shorten any other performers’ set times. If PURCHASER fails to do so, PRODUCER shall have the right to perform, shall retain all monies previously paid by PURCHASER as partial compensation and PURCHASER shall remain liable for payment of the full balance of the Guarantee, with no further obligation of PRODUCER or ARTIST whatsoever. In the event that PURCHASER shortens other performers’ set times but PRODUCER’s set time is still delayed thirty (30) minutes or more PRODUCER will have the right, in its sole discretion, to choose not to perform, shall retain all monies previously paid by PURCHASER as partial compensation and PURCHASER shall remain liable for payment of the full balance of the Guarantee, with no further obligation of PRODUCER or ARTIST whatsoever.
   (c) PRODUCER shall have the right of prior written approval and final approval over any and all supporting acts and/or other performers and their respective order of performance and performance length. No other performer’s equipment may appear on stage during PRODUCER’s sound check or performance.

ADDITIONAL TERMS AND CONDITIONS
The following additional terms and conditions are incorporated in and are made part of the contract attached hereto.
3. **SOUND CHECK REQUIREMENTS** (in addition to the production/technical requirements stipulated in the Artist Rider):
   (a) The ARTIST reserves the right to a thorough sound check prior to the doors opening to the public at the venue. The ARTIST reserves the right to 60 minutes of set up and, in addition, at least 60 minutes of exclusive time on the house sound system with the aid of the sound technician working the venue the day of the Engagement.

**NOTE: If one or more of the backline or sound check requirements are not complied with the PRODUCER reserves the right to cancel the Engagement and the PURCHASER will be liable to the PRODUCER for the full Guarantee specified for the Engagement.**

(b) The show production schedule (including without limitation, load-in, load-out, sound check and all other production call times) shall be subject to PRODUCER’s prior written approval and shall be advanced with PRODUCER or its authorized representative not later than one week prior to Engagement. PURCHASER'S failure to comply herewith shall be deemed a material breach of this Agreement and PRODUCER shall have the right to not perform the Engagement and shall be entitled to receive the full-Guarantee with no further obligation to PURCHASER.

4. **VENUE SOUND ENGINEER:** The PURCHASER shall provide ONE competent sound engineer. The PRODUCER may provide their own FOH soundperson, who shall have the ability to, at his discretion, attenuate, or remove completely any compression or limiting that may be inserted into the main FOH mix.

5. **PRODUCTION AND PERFORMANCE CONTROL:** The PRODUCER and their personnel shall maintain 100% creative control of the production and presentation of the ARTIST’s performance, which includes, but is not limited to, the following provisions:
   (a) There are to be no stage announcements whatsoever provided that the foregoing shall not be construed to limit required announcements for emergency or security problems and/or concerns.
   (b) The volume of the Engagement, both onstage and through the house system, shall be determined exclusively by the PRODUCER (within the limits of equipment capacity). If venue has dB restrictions, such shall be made known to PRODUCER in writing at the time of signing of this Agreement. PRODUCER shall not be responsible to pay any penalty or fine in connection with DB limits.
   (c) All production kills will be made according to ARTIST’s technical rider and coordinated through the ARTIST’s Production Manager and Tour Manager. There shall be no reduction in the Guarantee due to production kills.
   (d) All music played in the venue before and after the Engagement, between acts and during all intermissions shall be subject to PRODUCER’s prior approval, or at the PRODUCER’s election, furnished by the Tour Manager.
   (e) PURCHASER shall not utilize, display or permit any third party or entity to utilize or display, before, during or after a Engagement, any film, video or other audio-visual program without prior written approval of PRODUCER.
   (f) The house lights shall not be turned up during a Engagement unless and until cued by the Tour Manager or PRODUCER’s Lighting Director.

6. **FACILITIES:**
   (a) PURCHASER agrees to furnish at its sole cost and expense in connection with the Engagement, all that is necessary for the proper and lawful presentation of the Engagement, including, without limitation, a suitable venue, well-heated, ventilated, lighted, clean and in good order, stage curtains, microphones in number and quality required by PRODUCER, dressing rooms (clean, comfortable, properly heated and air-conditioned and near the stage), all necessary electricians and stage hands, all necessary first class lighting, tickets, house programs, all licenses (including musical performing rights licenses), special police, ushers, ticket sellers, ticket takers, appropriate and sufficient advertising in all media and PURCHASER shall pay all other necessary expenses in connection therewith.
   (b) PURCHASER shall also provide at its sole cost and expense all necessary equipment for the Engagement hereunder as provided on the face of the contract, or as designated in the attached ARTIST Rider specifications.
   (c) PURCHASER will pay for all performing rights licenses and fees in connection with the Engagement including ASCAP and BMI.
   (d) PURCHASER agrees to pay all amusement taxes, if applicable.
   (e) PURCHASER shall comply with all regulations and requirements of any union(s) that may have jurisdiction over any of the said materials, facilities and personnel to be furnished by PURCHASER and PRODUCER hereunder.
   (f) If any damage or loss is caused to the ARTIST’s equipment because of unconditioned power, improper power conversion, unstable table / riser, or any other similar reason not directly caused by the PRODUCER, it is the sole responsibility of the PURCHASER to pay one hundred percent (100%) of the amount of damages incurred within five (5) business days after the submission of an invoice.

7. **SIGNS / PLACARDS/SPONSORSHIPS:**
   (a) There shall be no signs, placards, banners, logos or any other advertisement material advertising any product, service or company inside the venue or at the rear of or on or around the stage during the entire Engagement without the PRODUCER's express prior written permission. Additionally, there shall be no national, state, municipal or other flag or banner in the stage or Engagement area prior to or during a Engagement without the PRODUCER'S express prior written permission. In any venue where such permanent signage is present, the venue agrees to turn off backlit signs but will not cover or remove signage, subject to venue management approval.
   (b) The Engagement shall not be sponsored or in any manner tied to any commercial product, service, or entity without the PRODUCER's express written permission. Any and all sponsorship requests must have a written proposal sent to the PRODUCER and it must be approved in writing by PRODUCER.
   (c) PURCHASER agrees that this Agreement is NOT contingent on PURCHASER obtaining corporate or any other type of sponsorship whatsoever.
   (d) No advertising, sponsorship, or other type of commercial endorsement allowed on ticket faces or in any flyer, handbill, poster or other promotional or publicity material unless approved in writing by PRODUCER.
(a) Subject to local laws, PURCHASER agrees to make available to PRODUCER’s Agency, within five (5) business days of the completion of the Engagement, a full and detailed database of all ticket purchasers’ details (names, addresses, etc.) as secured via the ticketing process; and to ensure that the appropriate language has been placed on the actual tickets prior to on sale to ensure the information may both be forwarded to and used by the PRODUCER.

(b) PURCHASER agrees to provide PRODUCER’s Agency and any authorized PRODUCER representative final attendance and final ticket prices on the day of the show within 48 hours after the Engagement.

9. SECURITY (in addition to any additional security requirements set forth in the ARTIST Rider):

(a) The PURCHASER shall guarantee proper security at all times to ensure the safety of the ARTIST, auxiliary personnel, instruments, all equipment, costumes and personal property during and after the Engagement. Particular security must be provided in the areas of the stage, dressing rooms and all exits and entrances to the auditorium and mixing consoles. Security protection is to commence upon arrival of the ARTIST at the venues, until all equipment is repacked into transportation and ARTIST personnel have left the premises.

(b) All backstage passes, stage access passes, and guest passes shall be issued only by PRODUCER’s authorized representatives; and neither PURCHASER nor venue management shall issue any such passes. No passes originating from another artist’s show or from PURCHASER, except those issued by PRODUCER’s authorized representative, shall be valid.

10. RECORDING THE PERFORMANCE:

(a) There shall be absolutely NO audio and/or video recording, live broadcasts, webcasts, photography, and/or any other recording, broadcast and/or exploitation of ARTIST or ARTIST’s performance unless express prior written permission has been granted by PRODUCER, which permission may be withheld or granted in PRODUCER’s sole discretion. PURCHASER acknowledges and agrees that, PRODUCER and/or ARTIST shall, throughout the universe in perpetuity, be the sole and exclusive owner (as works made for hire) of, and PRODUCER and/or ARTIST hereby reserves all rights with respect to, any and all material which displays, duplicates or reproduces all or any part of the activities of ARTIST and/or other persons in connection with the performance, this Engagement, or otherwise in connection with ARTIST’s professional and personal life (including so-called “behind the scenes” and “making of” activities). All of the foregoing are herein collectively referred to as the “Reproductions”.

(b) It is hereby agreed and understood that PRODUCER may be filming and recording the performances for potential future use and exploitation; there is to be no origination fees, location fees, usage fees, royalties or other sums due PURCHASER, venue management or any third party for any such use or exploitation. PURCHASER acknowledges and agrees that PRODUCER and PRODUCER’s designees shall have the sole and exclusive right to make and authorize the making of any Reproduction, in their sole discretion, and that the Reproductions may contain scenes in which PURCHASER’s personnel appear recognizably and/or in which PURCHASER’s name, or PURCHASER’s personnel’s names, sounds, voices, photographs, likenesses, appearances, performance and/or Engagements, activities or any combination of the foregoing are used (the “Scenes”). PURCHASER, on behalf of itself and PURCHASER’s personnel, hereby grants to PRODUCER and ARTIST, throughout the universe in perpetuity, the right to distribute, advertise, promote, exploit or otherwise use the Scenes by any and all means in any and all media. PURCHASER, on behalf of itself and PURCHASER’s personnel, hereby releases PRODUCER, ARTIST and their respective affiliates from any claims and causes of action which PURCHASER and/or PURCHASER’s personnel might have arising from the manner in which PURCHASER and/or any of PURCHASER’s personnel are depicted in the Scenes.

The only professional photographers that will be allowed to shoot during PRODUCER’s Engagement or otherwise photograph PRODUCER at or around the venue will be PRODUCER’s approved professional photographers or other photographers explicitly approved by PRODUCER’s Tour Manager, Manager or Agent. PURCHASER shall use commercially reasonable efforts to prevent anyone not specifically authorized by the PRODUCER or an authorized representative to enter the venue with any audio and/or audio-visual recording device or mechanism.

11. INSURANCE:

(a) PURCHASER agrees to provide public and general liability insurance coverage, including without limitation, public and general liability automobile, liability, and comprehensive coverage, in an amount not less than $5,000,000 per occurrence to protect against any claim for personal injury or property damage otherwise brought by or on behalf of any third party, person, firm, or corporation as a result of or in connection with the Engagement(s). The policy shall name PRODUCER, ARTIST, each individual member of ARTIST and their respective employees, directors, officers, principals, representatives, and shareholders as additional insureds.

(b) In addition, PURCHASER shall maintain in effect (a) workers’ compensation insurance (or the equivalent thereof if workers’ compensation insurance is not available) covering all of its employees, subcontractors, and other personnel under the control, direction, or authority of PURCHASER, whether directly or indirectly, who are involved in the installation, operation, and/or maintenance of equipment provided by PURCHASER, and (b) hired and non-owned automobile insurance. PURCHASER shall supply PRODUCER with certificates of insurance showing coverage of the above at least ten (10) business days prior to the Engagement date; provided, however, that if PURCHASER does not provide such certificate by the foregoing date, PRODUCER may, in its sole discretion, terminate this Agreement. If PURCHASER has not provided certificates of insurance as set forth herein, PRODUCER may elect to perform the show; provided, however, that PURCHASER will be responsible nonetheless for the insurance coverage specified herein. PURCHASER’s failure to request, review or comment on any such certificates shall not affect PRODUCER’s rights or PURCHASER’s obligations hereunder.

(c) The insurance policies described herein will contain provisions requiring the insurance company to give PRODUCER at least ten (10) days prior written notice of any revision, modification, or cancellation. Any proposed change in certificates of insurance will be submitted to PRODUCER for written approval prior to any such change taking effect.

12. INDEMNIFICATION:

(a) PURCHASER shall indemnify, protect, and hold PRODUCER, ARTIST and the individual performing members of ARTIST, as well as PRODUCER’s and ARTIST’s respective agents, employees, representatives, officers, and directors, harmless,
from and against any claim, demand, action, loss, cost, damage, or expense whatsoever (including, without limitation, reasonable attorneys’ fees) arising out of or in connection with the Engagement, including, but not limited to:

1. Any claim, demand, or action made by any third party, as a direct or indirect consequence of the Engagement;
2. Any and all loss, damage, and/or destruction occurring to PRODUCER’s, ARTIST’s, and/or their respective employees’, contractors’, or agents’ instruments and equipment at the place of the Engagement, including, but not limited to, damage, loss, or destruction caused by forces beyond the parties’ control;
3. A breach or alleged breach of any warranty, representation, or agreement made by PURCHASER hereunder in connection with the Engagement, including, without limitation, any failure by PURCHASER to perform any agreement entered into between PURCHASER and any third party; and

4. Damage or injury to any patrons, or the venue, or any fixture or personal property therein, caused by fans or any others not engaged by PRODUCER’s. For the avoidance of doubt, no claim, deduction, or offset will be made by PURCHASER in respect of same, unless proof of such damage and the cause thereof is provided to PRODUCER, and PRODUCER expressly agrees to such claim, deduction, or offset in writing.

(b) If an insurable risk occurs, resort to the procedures set forth in the insurance policies required hereunder, and any resulting remedies, will be the sole remedy of PURCHASER.

13. MERCHANDISING:
(a) PRODUCER shall have the exclusive right to sell goods (including, but not limited to, compact discs, tapes, records, and items of clothing) on the premises of the place of Engagement. The house commission rate set forth on the face page of this agreement shall be the only such commission that applies. For the purposes of this agreement, said commission rate shall apply to the sale of clothing and novelty items only. The sale of recorded product of any kind shall be exempt from said commission. The agreed payment shall include all house commissions and shall be the only payment made with respect to merchandising rights during this engagement. The PURCHASER agrees that no party, including PURCHASER, will appropriate the ARTIST’s name or likeness for any merchandising use whatsoever. For engagements of 1,000 cap or larger, PURCHASER shall provide adequate security to ensure that no "bootleg" merchandise shall be sold within venue grounds. This prohibition includes any and every type of poster intended for sale at the venue or elsewhere at any time.

(b) PURCHASER agrees to provide a secure, clean, well-lit, and highly visible area suitable for merchandise sales. At PRODUCER’s request, at least one merchandising stand accessible to the general public shall be available outside the venue near the main ticket office of the venue.

14. PAYMENT/SETTLEMENT/BOX OFFICE:
(a) If a deposit is noted on the contract face page, then a deposit of stated amount shall be made by PURCHASER in the form of a money order or certified check to, and in the name of Agency pursuant to the payment terms contained in the contract. It is understood and agreed that if deposits are not received on or before the due date, PRODUCER shall have the right to cancel the Engagement and the full amount of the Guarantee shall nevertheless be due to PRODUCER. The balance due after the Engagement shall be paid by PURCHASER to PRODUCER’s representative by cash, wire transfer, money order, or certified check not later than thirty minutes after the end of PRODUCER’s Engagement.

(b) If the full price agreed upon involves a percentage after a break point, that break point represents the maximum total of all accepted expenses pertaining to this engagement increased by an agreed percent to allow for PURCHASER profit. Any compensation, travel expenses, per diems, taxes or related overhead incurred in connection with a stage manager or production manager working for or on behalf of PURCHASER shall not be included in PURCHASER’s show expenses in connection with this Engagement. All expenses related to any such person shall be borne solely by PURCHASER. All approved variable expenses will be calculated after any approved parking and/or facility fees and approved state taxes have been deducted. (Variables will be calculated on the net net). Notwithstanding the foregoing, unless PURCHASER advises Agency promptly after submission of this agreement to PURCHASER of any and all taxes which may be required to be withheld from monies earned by PRODUCER from this engagement, any such tax shall be paid by PURCHASER and the house shall not be a deductible expense in calculating the break point). No taxes of any kind shall be deductible unless such taxes are actually paid by PURCHASER and PURCHASER does not receive or is not entitled to any form of tax deduction, credit or other offset of such taxes. All expenses are high-end budgets. These expenses should only go down. If any budgeted expenses should increase, written approval from PRODUCER representation is required. All budgeted expenses will be actualized at time of settlement with original copies of invoices and be calculated as show costs. Details of all expenses must be made available along with copies of all supporting invoices and receipts to the PRODUCER’s representative. In house nut situations, there will be no "caps" or charge backs for any production elements that would penalize the PRODUCER. For any deals with "Sell Out" bonuses, "Sell Out" is defined as 95% of sellable capacity. “Sellable Capacity” is defined as legal capacity less mutually agreed comps and production kills.

(c) PURCHASER shall first apply any and all receipts derived from the entertainment presentation to the payments required hereunder. All payments shall be made in full without any deductions whatsoever.

(d) PRODUCER shall have the right to have a representative present in the box office at all times. Said representative shall have the right to enter the box-office and inspect the records of the PURCHASER and venue relating to the gross receipts of this engagement. There can be ABSOLUTELY NO PRE-PULLED TICKETS prior to on-sale date and time, with the exception of approved presale and auction sales. There may be surprise ticket audits moments before on sale to ensure no other holds or tickets have been pulled from the system prior to going on sale.

(e) In the event that the compensation payable to PRODUCER hereunder is based in whole or in part on the box office receipts, PRODUCER shall have the right to set a limit on the number of complimentary admissions to be allowed by the house. PURCHASER agrees that at no time will the house list be in excess of twenty (20) people. All ticket holds must be approved by management at least 2 days prior to on sale. PRODUCER shall have the right to set a limit to the number of free admissions authorized by PURCHASER. If PURCHASER is unable to accurately determine the number of persons admitted free, PURCHASER agrees to accept as binding a reasonable estimate made by PRODUCER’s representative.

(f) PURCHASER shall not itself, nor shall it authorize or allow others (including the venue) to sell so-called “VIP” ticket packages or any other ticket packages in connection with the engagement without PRODUCER’s prior, written consent and approval. Should PURCHASER consent and approve of any such ticket packaging in connection with the engagement, PRODUCER
shall have approval over the terms of such packaging and sales, and shall share in the revenue derived thereof, in an amount to be mutually agreed by all parties.

(g) It is understood and agreed there will be no charge-backs to PRODUCER under any circumstances.

(h) All prices for the tickets and the scaling of the venue shall be approved in writing by PRODUCER prior to the sale of any tickets. Any changes to ticket scaling, ticket prices (including type of seating/standing) are subject to written approval. In the event of any increase in capacity PRODUCER and PURCHASER are to negotiate a bonus in good faith.

(i) All invoices, bills, receipts, and other books and records of PURCHASER shall be retained by PURCHASER for a period of not less than three hundred sixty five (365) days after the date of the applicable Engagement, during which time an authorized representative of PRODUCER shall have the right to inspect all invoices, bills, receipts and other books and records of PURCHASER with respect to the Engagement.

(j) All ticket faces to list net ticket price with any additional fees listed separately.

15. ADDITIONAL WARRANTIES AND REPRESENTATIONS/ MISCELLANEOUS PROVISIONS:
(a) PURCHASER hereby warrants that he/she is of sound mind and of legal age to enter into this binding contract. The person executing this agreement on PURCHASER’s behalf warrants his/her authority to do so, and such person hereby personally assumes liability for any payments due under this agreement.
(b) A representative of PURCHASER capable of making any decisions pertaining to this engagement must be present at the place of Engagement from the time the PRODUCER and/or crew is scheduled to arrive and shall remain through the time of their load-out and all requirements of the contract and rider are fulfilled. This representative must have copies of this entire agreement together with any and all information pertaining to this engagement in his/her possession.
(c) The PURCHASER warrants that all terms outlined in this contract and rider are strictly confidential between the PURCHASER and the PRODUCER. Any disclosure by PURCHASER regarding PRODUCER’s Guarantee, additional provisions, technical requirements, or other confidential information contained herein will be considered a material breach of this Agreement.
(d) Any requirement hereunder to obtain PRODUCER’s approval shall be deemed to require the prior written approval of PRODUCER or PRODUCER’s authorized representative, it being understood and agreed that such approval may be granted in any form of writing, including, without limitation, via email.
(e) Nothing in this Agreement shall require the commission of any act contrary to applicable law or to any rules or regulations of any union, guild or similar body having jurisdiction over the services and personnel to be furnished by PRODUCER to PURCHASER hereunder. In the event of any conflict between any provision of this Agreement and any such law, rule or regulation, such law, rule or regulation shall prevail and this Agreement shall be curtailed, modified, or limited only to the extent necessary to eliminate such conflict.
(f) PURCHASER shall not have the right to assign or transfer this Agreement, or any provision thereof.
(g) The waiver of any breach of any provision of this Agreement shall not be deemed a continuing waiver, and no delay in exercise of a right shall constitute a waiver.
(h) Nothing herein contained shall ever be construed as to constitute the parties hereto as a partnership, or joint venture, nor to make PRODUCER and/or ARTIST liable in whole or in part for any obligation that may be incurred by PURCHASER, in PURCHASER's carrying out any of the provisions hereof, or otherwise. THE PERSON EXECUTING THIS AGREEMENT ON PURCHASER'S BEHALF WARRANTS HIS/HER AUTHORITY TO DO SO.
(i) This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original and all of which taken together shall constitute one (1) and the same instrument. Delivery of an executed counterpart of a signature page to this Agreement by telescopier or electronic delivery (i.e. PDF format), including electronically signed versions of the same shall be as effective as delivery of a manually executed counterpart of this Agreement and shall be sufficient to bind the parties to the terms and conditions of this Agreement.

16. DEFAULT
(a) In the event PURCHASER refuses or neglects to provide any of the items herein stated and/or fails to make any of the payments as provided herein, or otherwise commits any material breach of PURCHASER’s obligations hereunder, then without limiting PRODUCER’s other rights or remedies, PRODUCER shall have the right to refuse to render services or otherwise perform under this Agreement and shall have the right to retain any amounts theretofore paid to or on behalf of PRODUCER. Furthermore, in such Engagement PURCHASER will remain liable to PRODUCER for the full Guarantee specified for the Engagement.

(b) In addition, if on or before the date of any scheduled Engagement, PURCHASER has failed, neglected, or refused to perform any contract with any other performer for any earlier engagement, PRODUCER’s Agent shall have the right to demand immediate payment of all guaranteed compensation hereunder. If PURCHASER fails or refuses to immediately make such payment, said Agent shall have the right to cancel this engagement by notice to PURCHASER to that effect. In such an Engagement, PRODUCER shall have the right to retain any amounts theretofore paid to or on behalf of PRODUCER.

(c) Should PURCHASER cancel this engagement under any circumstance, other than an Act of God, more than 45 days before the Engagement, the PURCHASER shall immediately remit to Agency, a wire transfer, certified check or money order in the amount of fifty percent of the full Guarantee specified for the Engagement. Should PURCHASER cancel this engagement under any circumstance, other than an Act of God, 0-45 days before the Engagement, the PURCHASER shall immediately remit to Agency, a wire transfer, certified check or money order in the amount of one hundred percent of the full Guarantee specified for the Engagement. If PURCHASER cancels the engagement, PURCHASER will also incur full financial responsibility for all non-refundable flights, hotel accommodations, and vehicle rentals, related to the Engagement. PRODUCER agrees to furnish PURCHASER with receipts for travel and hotel costs.

(d) Please note that none of the requirements of the ARTIST Rider can be invalidated by the failure of PRODUCER personnel to advance the engagement with any member of PURCHASER’s production staff. Failure to provide any of the requirements of this rider may result in the cancellation of the Engagement. In case of such cancellation, PURCHASER shall remain liable to the PRODUCER for the full Guarantee specified for the Engagement.
17. **LIMITATION OF LIABILITY**

In the event of an alleged material breach of this Agreement by PRODUCER, PURCHASER agrees that the maximum damages which PURCHASER may seek to recover will be limited to necessary out-of-pocket expenses directly incurred by PURCHASER relating to the Engagement, including out-of-pocket costs, taking into account any amounts that PURCHASER recovered or could have recovered using its best efforts to mitigate its damages. Notwithstanding the foregoing, PURCHASER will not be entitled to recover any alleged lost profits or similar damages.

18. **FORCE MAJEURE**

(a) The PRODUCER’s obligations hereunder are subject to suspension or cancellation by PRODUCER in the event of ARTIST (or any key member thereof) sickness, illness, incapacity, inability to perform, accident, failure of means of transportation, Act of God, riot, strike, labor difficulty or restriction, epidemic, any act of public authority, failure of transportation, or any other cause, similar or dissimilar, beyond PRODUCER or ARTIST’s reasonable control. In such event, there shall be no claim for damages or expenses by PURCHASER and PRODUCER and ARTIST’s obligations in connection with the Engagement shall be deemed waived.

(b) If, as a result of a Force Majeure Event (as defined below), PRODUCER or ARTIST is unable to or is prevented from performing the Engagement or any portion thereof or any material obligation under the Agreement, then PRODUCER and ARTIST’s obligations hereunder will be fully excused, there shall be no claim for damages or expenses by PURCHASER. Notwithstanding the foregoing, (i) PRODUCER shall be entitled to payment for services rendered up until the time of inability to perform by reason of such Force Majeure Event; and (ii) in the event of nonperformance due to such Force Majeure Event, if ARTIST was otherwise present and ready, willing and able to perform as scheduled, then PRODUCER shall be entitled to payment of the full Guarantee hereunder.

(c) A “Force Majeure Event” is defined as one or more of the following causes which renders performance impossible, impractical, or unsafe: death, illness of, or injury to ARTIST or a member of ARTIST’s immediate family, any of ARTIST’s musicians; theft, loss, destruction, or breakdown of instruments or equipment owned or leased by ARTIST; fire; threat(s) or act(s) of terrorism; riot(s) or other form(s) of civil disorder in, around, or near the Engagement(s) venue; strike, lockout, or other forms of labor difficulties; any act, order, rule, or regulation of any court, government agency, or public authority; act of God; absence of power or other essential services; failure of technical facilities; failure or delay of transportation not within PRODUCER’s reasonable control; severe inclement weather (noting that the Engagement shall proceed regardless of incumbent weather, however if conditions become so severe as to threaten safety of either party or the audience, the Force Majeure Event class shall apply); and/or any similar or dissimilar cause beyond PRODUCER’s or PURCHASER’s reasonable control.

19. **ROLE OF AGENT.** It is expressly understood by the PURCHASER, PRODUCER and ARTIST that Agency, its employees and its managers, do not assume any liability for any action(s) taken by the PRODUCER, ARTIST, the PURCHASER or anyone connected with the venue or its operator(s). It is further understood that Agency, its employees and its managers do not assume liability for any claim of any type of damages arising out of the Engagement that is the subject of this contract.

20. **CHOICE OF LAW/FORUM.** This agreement shall be construed in accordance with the laws of the State of [ ] and shall be deemed entered into in that State. Solely the courts located in the State of Illinois shall have jurisdiction and venue with regard to any claim arising out of or in connection with this agreement.

21. **AGREEMENT PREVAILS.** In case of any conflict of terms, the terms contained within the contract and ARTIST Rider shall prevail over all others. All terms of the contract and ARTIST rider are specifically accepted by the PURCHASER unless they are waived by the PRODUCER or their representative. Such waiver shall be effective only if initialed by the PRODUCER or their representative.
Supplemental Reading

https://www.fastcompany.com/40508931/live-streamed-broadway-shows-the-tech-was-easy-but-oh-the-drama
TCA Television Corp. v. McCollum, 839 F.3d 168 (2016)

Holdings: The Court of Appeals, Reena Raggi, Circuit Judge, held that:

[1] purpose and character of use factor weighed against fair use defense;

[2] nature of copyrighted work factor weighed against fair use defense;

[3] amount and substantiality of use factor weighed against fair use defense;

[4] factor considering effect of use on potential market for copyrighted work weighed against fair use defense;

[5] heirs failed to plausibly allege a valid copyright interest in “Who's On First?” routine based on contract in which comedians agreed to license use of comedy routines to film production company for use in movies;

[6] heirs failed to plausibly allege a valid copyright interest in “Who's On First?” routine based on work-for-hire agreements; and

[7] heirs failed to plausibly allege a valid copyright interest in “Who's On First?” routine based on allegations that routine merged into film production company's movies so as to avoid the need for creators to renew the copyright.

Affirmed as modified.

Synopsis

West Headnotes (26)

Cases that cite this headnote


Nature of statutory copyright

Copyright protection is based on the economic philosophy that encouragement of individual effort by personal gain is the best way to advance public welfare.

1 Cases that cite this headnote


Nature of statutory copyright

The monopoly created by copyright rewards the individual author, but only in order to benefit the public.

2 Cases that cite this headnote


Fair use and other permitted uses in general

Some opportunity for fair use of copyrighted materials is necessary to promote progress in science and art. 17 U.S.C.A. § 107.

1 Cases that cite this headnote


Fair use and other permitted uses in general

In reviewing challenged determination of fair use, the court necessarily discusses statutory factors of fair use individually, at the same time that the court heeds the Supreme Court's instruction that the factors must be viewed collectively, with their results weighed together, in light of the purposes of copyright. 17 U.S.C.A. § 107.

2 Cases that cite this headnote


Dramatic works, pantomimes, and choreographic works

Purpose and character of use factor weighed against fair use defense to copyright infringement claim based on comedians' “Who's On First?” routine brought by comedians' heirs against producers of theatrical production; the dramatic purpose served by the routine in theatrical production appeared to be as a “McGuffin,” that is, a theatrical device that set up the plot but was of little or no significance in itself, and producers' commercial use of the routine was not transformative, rather, it duplicated to a significant degree the comedic purpose of the original work. 17 U.S.C.A. § 107.

Cases that cite this headnote

[7] Copyrights and Intellectual Property

Fair use and other permitted uses in general

Fair use inquiry properly considers whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message. 17 U.S.C.A. § 107.

1 Cases that cite this headnote

[8] Copyrights and Intellectual Property

Fair use and other permitted uses in general

Fair use is not limited to transformative works. 17 U.S.C.A. § 107.

2 Cases that cite this headnote

[9] Copyrights and Intellectual Property

Fair use and other permitted uses in general
Focus of fair use inquiry is not simply on the new work, i.e., on whether that work serves a purpose or conveys an overall expression, meaning, or message different from the copyrighted material it appropriates, rather, the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created, otherwise, any play that needed a character to sing a song, tell a joke, or recite a poem could use unaltered copyrighted material with impunity, so long as the purpose or message of the play was different from that of the appropriated material. 17 U.S.C.A. § 107.

Cases that cite this headnote

Nature of copyrighted work factor weighed against fair use defense to copyright infringement claim based on comedians' “Who's On First?” routine brought by comedians' heirs against producers of theatrical production; original comedy sketch created for public entertainment was at the heart of copyright's intended protection, and even if producers could justify their dramatic need to use a small, identifiable segment of the routine, that did not justify having their characters perform, verbatim, some dozen variations on the routine's singular joke. 17 U.S.C.A. § 107.

Cases that cite this headnote

In assessing fair use factor regarding amount and substantiality of use of copyrighted material, court considers not only the quantity of the materials used but also their quality and importance. 17 U.S.C.A. § 107.

Cases that cite this headnote

Even a substantial taking of copyrighted material can constitute fair use if justified. 17 U.S.C.A. § 107.
Cases that cite this headnote


Fair use and other permitted uses in general

Fair use factor regarding the effect of the use upon the potential market for or value of the copyrighted work focuses on whether the secondary use usurps demand for the protected work by serving as a market substitute. 17 U.S.C.A. § 107.

5 Cases that cite this headnote

[16] Copyrights and Intellectual Property

Fair use and other permitted uses in general

In weighing fair use factor regarding the effect of the use upon the potential market for or value of the copyrighted work, a court properly looks to not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original. 17 U.S.C.A. § 107.

1 Cases that cite this headnote

[17] Copyrights and Intellectual Property

Dramatic works, pantomimes, and choreographic works

Factor considering effect of use on potential market for copyrighted work weighed against fair use defense to copyright infringement claim based on comedians’ “Who’s On First?” routine brought by comedians’ heirs against producers of theatrical production, as heirs alleged the existence of a traditional and active derivative market for licensing the routine. 17 U.S.C.A. § 107.

Cases that cite this headnote

[18] Copyrights and Intellectual Property

Fair use and other permitted uses in general

Court considering fair use properly identifies and weighs relevant harm to the derivative market for a copyrighted work, which market includes uses that creators of original works might license others to develop. 17 U.S.C.A. § 107.

1 Cases that cite this headnote

[19] Copyrights and Intellectual Property

Fair use and other permitted uses in general

In assessing harm posed to a licensing market for copyrighted work, for purposes of fair use analysis, a court’s focus is not on possible lost licensing fees from defendants’ challenged use, rather, a court properly considers the challenged use’s impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets. 17 U.S.C.A. § 107.

1 Cases that cite this headnote

[20] Copyrights and Intellectual Property

Requisites and validity

Comedians’ heirs failed to plausibly allege a valid copyright interest in “Who’s On First?” routine based on contract in which comedians agreed to license use of comedy routines to film production company for use in movies.

Cases that cite this headnote

[21] Contracts

What law governs

Where contract does not have a choice of law provision, the controlling law would be the contract’s “center of gravity,” which typically is the place of contracting or performance.
TCA Television Corp. v. McCollum, 839 F.3d 168 (2016)


2 Cases that cite this headnote

[22] Contracts
  ➔ Language of contract

Under New York and California law, the best evidence of the parties' intent is the language used in their contract.

Cases that cite this headnote

[23] Contracts
  ➔ Application to Contracts in General

Under New York and California law, where contract language is clear and unambiguous, courts will enforce an agreement according to its terms, without looking outside the four corners of the document.

Cases that cite this headnote

  ➔ Works made for hire

Comedians' heirs failed to plausibly allege a valid copyright interest in “Who's On First?” routine based on work-for-hire agreements, as the routine was first performed more than two years before comedians entered into the agreements.

1 Cases that cite this headnote

[25] Copyrights and Intellectual Property
  ➔ Joint works; contributions to collective works

Comedians' heirs failed to plausibly allege a valid copyright interest in “Who's On First?” routine based on allegations that routine merged into film production company's movies so as to avoid the need for creators to renew the copyright, as routine was created and performed by comedians well before movies were filmed and comedians continued to perform routine for years after, and comedians' license agreement with company contemplated such independent performances.

1 Cases that cite this headnote

[26] Copyrights and Intellectual Property
  ➔ Joint works; contributions to collective works

Authors of freestanding works that are incorporated into a film may copyright these separate and independent works. 17 U.S.C.A. § 101.

1 Cases that cite this headnote

*171 Appeal from the Southern District of New York

Attorneys and Law Firms

JONATHAN D. REICHMAN (Jonathan W. Thomas, on the brief), Kenyon & Kenyon LLP, New York, New York, for Plaintiffs–Appellants.


*172 Before: Jacobs, Calabresi, Raggi, Circuit Judges.

Opinion

Reena Raggi, Circuit Judge:

In this action for copyright infringement, plaintiffs, successors-in-interest to the estates of William “Bud” Abbott and Lou Costello, appeal from a judgment of dismissal entered in the United States District Court for the Southern District of New York (George B. Daniels, Jr., Judge) in favor of defendants, who include the producers of Hand to God and the play's author, Robert Askins. See TCA Television Corp. v. McCollum, 151 F.Supp.3d 419 (S.D.N.Y. 2015). Plaintiffs assert that the district court erred in concluding from the amended complaint that defendants' use of a portion of the iconic Abbott and Costello comedy routine, Who's on First?, in Act I of Hand to God was so transformative as to establish defendants' fair use defense as a matter of law. See Fed.
For the reasons explained herein, we conclude that defendants' verbatim incorporation of more than a minute of the Who's on First? routine in their commercial production was not a fair use of the material. Nevertheless, we affirm dismissal because plaintiffs fail plausibly to allege a valid copyright interest.

I. Background
The following facts derive from plaintiffs' amended complaint, incorporated exhibits, and documents susceptible to judicial notice. See Goel v. Bunge, Ltd., 820 F.3d 554, 559 (2d Cir. 2016) (acknowledging that, on motion to dismiss, courts may consider documents appended to or incorporated in complaint and matters of which judicial notice may be taken); Island Software & Comput. Serv., Inc. v. Microsoft Corp., 413 F.3d 257, 261 (2d Cir. 2005) (stating that court may take judicial notice of copyright registrations). For purposes of this appeal, we presume these facts to be true. See Anschutz Corp. v. Merrill Lynch & Co., 690 F.3d 98, 102 (2d Cir. 2012).

A. Abbott and Costello's Who's on First? Routine
Abbott and Costello were a popular mid-Twentieth Century comedy duo. One of their routines, commonly referred to as Who's on First? (also, the “Routine”), has become a treasured piece of American entertainment history. The Routine's humor derives from misunderstandings that arise when Abbott announces the roster of a baseball team filled with such oddly named players as “Who,” “What,” and “I Don't Know.” A rapid-fire exchange reveals that who's on first need not be a question. It can be a statement of fact, i.e., a player named “Who” is the first baseman. Later parts of the routine reveal, after similar comic misunderstandings, that a player *173 named “What” is the second baseman, and one named “I Don't Know” is the third baseman.

1. Abbott and Costello's Agreements with UPC

a. The July 1940 Agreement
Abbott and Costello first performed Who's on First? in the late 1930s, notably on a 1938 live radio broadcast of The Kate Smith Hour. The Routine was published for purposes of federal copyright law when Abbott and Costello performed a version of it in their first motion picture, One Night in the Tropics (“Tropics”).

The team appeared in Tropics pursuant to a July 24, 1940 contract (the “July Agreement”) with Universal Pictures Company, Inc. (“UPC”). The July Agreement guaranteed Abbott and Costello a minimum of five weeks' work at a pay rate of $3,500 per week. In turn, Abbott and Costello (the “Artists”) agreed to grant UPC (the “Producer”) certain rights and to furnish it with certain items. We reproduce the relevant text here, adding bracketed signals and highlighting to distinguish various provisions:

[1] The Artists expressly give and grant to the Producer the sole and exclusive right to photograph and/or otherwise reproduce any and all of their acts, poses, plays and appearances of any and all kinds during the term hereof, and [2] further agree [a] to furnish to the Producer, without charge to it, the material and routines heretofore used and now owned by the Artists for use by the Producer in the photoplay in which they appear hereunder and for which the Producer shall have the exclusive motion picture rights, and [b] to record their voices and all instrumental, musical and
other sound effects produced by them, and [c] to reproduce and/or transmit the same, either separately or in conjunction with such acts, poses, plays and appearances as the Producer may desire, and further [3] give and grant to the Producer solely and exclusively all rights of every kind and character whatsoever in and to the same, or any of them, perpetually, including as well the perpetual right to use the names of the Artists and pictures or other reproductions of the Artists' physical likenesses, and recordations and reproductions of the Artists' voices, in connection with the advertising and exploitation thereof.

J.A. 168–69.

b. The November 1940 Agreement

On November 6, 1940, only days before Tropics's public release, Abbott and Costello entered into a new multi-year/multi-picture agreement with UPC (the “November Agreement”). That contract terminated the July Agreement without prejudice to, among other things, UPC's “ownership ... of all rights heretofore acquired,” including those “in or to any ... material furnished or supplied by the Artists.” Id. at 162. In the November Agreement, Abbott and Costello agreed “to furnish and make available to the Producer all literary and dramatic material and routines heretofore used by the Artists either on the radio or otherwise and now owned by the Artists,” and acknowledged that “the Producer shall have the right to use said material and routines to such extent as the Producer may desire in connection with any photoplay in which the Artists render their services hereunder and in connection with the advertising and exploitation of such photoplay.” Id. at 129. Abbott and Costello agreed that they would “not use or license, authorize or permit the use of any of the material and/or routines” so referenced “in connection with motion pictures” by others than UPC for specified times. Id. Nevertheless, they reserved the right to use materials and routines created by them (without the assistance of UPC writers) “on the radio and in personal appearances.” Id. at 129–30.

2. UPC Registers a Copyright for Tropics

In November 1940, UPC registered a copyright for Tropics with the United States Copyright Office, which it renewed in December 1967. See id. at 36, 39–40.

3. UPC Uses an Expanded Version of the Routine in The Naughty Nineties and Registers a Copyright for that Movie


In June 1945, UPC registered a copyright for The Naughty Nineties with the United States Copyright Office, which it renewed in 1972. See id. at 37, 41–42; Am. Compl. ¶ 45.

4. The 1944 Copyright Registration for “Abbott and Costello Baseball Routine"

In April 1944, a work entitled “Abbott and Costello Baseball Routine” was registered with the Copyright Office “in the name of Bud Abbott and Lou Costello, c/o Writers War Board.” J.A. 114. The certificate indicates that this “Baseball Routine” was published on “March 13, 1944” in “ ‘Soldier Shows,’ No. 19.” Id. The record suggests that this registration was not renewed, prompting the Copyright Office to conclude that the work had entered the public domain in 1972, and, on that ground, to reject a 1984 application for a derivative work registration filed by the children of Abbott and Costello based on the 1944 registration.
5. The 1984 Quitclaim Agreement

Plaintiffs do not rely on the 1944 registration to support their copyright claim here. Rather, they claim to have succeeded to UPC's copyright interests in the Routine as performed in Tropics and The Naughty Nineties based on a quitclaim agreement dated March 12, 1984 (the “Quitclaim”).

In the Quitclaim, which was subsequently recorded with the Copyright Office, UPC's successor-in-interest, Universal Pictures (“Universal”), granted Abbott & Costello Enterprises (“A & C”), a partnership formed by the heirs of Abbott and Costello, “any and all” of Universal's rights, title, and interest in the Routine. Id. at 45. Universal stated that it did so relying upon A & C's representation that it was “a partnership composed of the successors in interest to the late Bud Abbott and Lou Costello” and, therefore, “the owner of copyright in and to the Routine.” Id. at 46.

A & C dissolved in 1992, with 50% of its assets transferred to TCA Television Corporation, a California entity owned by Lou Costello's heirs, and the other 50% divided evenly between Bud Abbott's heirs, Vickie Abbott Wheeler and Bud Abbott, Jr. Wheeler would later transfer her 25% interest to a California partnership, Hi Neighbor, and Abbott, Jr. would transfer his 25% interest to Diana Abbott Colton. It is by operation of the Quitclaim and the referenced dissolution and transfer agreements that plaintiffs TCA Television, Hi Neighbor, and Colton now claim a copyright interest in Who's on First?

C. Hand to God

As described in the amended complaint, Hand to God (the “Play”) is “a dark comedy about an introverted student in religious, small-town Texas who finds a creative outlet and a means of communication through a hand puppet, which turns into his evil or devilish persona.” Am. Compl. ¶ 58. After two successful off-Broadway runs, Hand to God opened to critical acclaim on Broadway in the spring of 2015. Through press coverage, plaintiffs learned that Hand to God incorporated part of the Routine in one of its “key scene[s],” without license or permission. Id. at ¶ 63. While the Play was still in previews for its Broadway opening, plaintiffs sent defendants a cease and desist letter. Defendants’ failure to comply with that request prompted this lawsuit.

1. The Relevant Scene

Plaintiffs allege that the Play infringes their copyright in the Routine by using its first part—that is, the part pertaining to first baseman “Who”—in Act I, Scene 2. In that scene, which occurs approximately 15 minutes into the Play, the lead character, “Jason,” and the girl with whom he is smitten, “Jessica,” have just emerged from the basement of their church, where they had been participating in a Christian puppet workshop. Jason tries to impress Jessica by using his sock puppet, “Tyrone,” to perform, almost verbatim, a little over a minute of Who's on First?. Jason plays the Bud Abbott role, while Tyrone assumes Lou Costello's character.

When Jason somewhat bashfully concludes the “Who” part of the Routine, Jessica compliments him by saying, “That's really good,” and asks, “Did you come up with that all by yourself?” Suppl. App'x 21. When Jason answers, “Yes,” the audience laughs at what it recognizes as a lie. Id.; see Am. Compl. ¶ 64. The answer, however, triggers a different response from the puppet, which, seemingly of its own volition, calls Jason a “Liar,” and states that the comic exchange they just performed is “a famous routine from the [F]ifties.” Suppl. App'x 21. Jason corrects Tyrone, stating that the sketch is from the “Forties.” Id. Tyrone then insults Jessica, telling her that she would know the Routine's origin if she “weren't so stupid.” Id. Jason and Jessica each order Tyrone to “shut up” to no effect. Id. at 22. Instead, as the scene continues, Tyrone vulgarly divulges Jason's physical desire for Jessica. Only after a seeming physical struggle with Tyrone is Jason able to remove the puppet from his hand and thereby end Tyrone's outburst. Jason tries to apologize to Jessica, but she quickly exits, leaving Jason—in the words of the stage direction *177* —“defeated by what he ca[ ]n't defeat.” Id. at 24.
The scene foreshadows darker and more disturbing exchanges between Jason and the puppet that will occur as the Play proceeds.

2. Promotional Materials
Plaintiffs allege that, in online promotional materials for the Play, defendants used a “video clip” of Jason and his puppet performing Who's on First? to “stoke interest” in and sell tickets for the Play. Am. Compl. ¶¶ 69, 89. These promotional materials are not part of the court record.

D. District Court Proceedings
On June 4, 2015, plaintiffs filed this action in the Southern District of New York, claiming both federal and common law copyright infringement. Defendants promptly moved to dismiss, arguing, inter alia, that (1) plaintiffs did not hold a valid copyright; (2) the Routine was in the public domain; and (3) Hand to God's incorporation of the Routine was sufficiently transformative to qualify as a permissible fair use, not prohibited infringement.

On December 17, 2015, the district court granted defendants' motion to dismiss. It declined to do so on either of the first two grounds argued by defendants, concluding that, at the 12(b)(6) stage, plaintiffs had “sufficiently alleged a continuous chain of title” to the Routine to survive dismissal. TCA Television Corp. v. McCollum, 151 F.Supp.3d at 431. Instead, the court concluded that dismissal was warranted because defendants' use of Who's on First? in Hand to God was “highly transformative” and a non-infringing fair use. Id. at 434, 437.

This appeal followed.

II. Discussion

A. Dismissal Was Not Properly Based on Fair Use

1. Standard of Review

We review de novo a judgment of dismissal under Fed. R. Civ. P. 12(b)(6), accepting all factual allegations in the amended complaint and its incorporated exhibits as true and drawing all reasonable inferences in plaintiffs' favor. See Concord Assocs., L.P. v. Entm't Props. Tr., 817 F.3d 46, 52 (2d Cir. 2016). The challenged dismissal here is based on the district court's determination that plaintiffs could not succeed on their copyright infringement claim because the Rule 12(b)(6) record established defendants' fair use defense as a matter of law.

Our review of that decision is necessarily informed by certain basic copyright principles. First, the law affords copyright protection to promote not simply individual interests, but—in the words of the Constitution—“the progress of science and useful arts” for the benefit of society as a whole. U.S. Const. art I, § 8, cl. 8. As the Supreme Court has explained, copyright protection is based on the “economic philosophy ... that encouragement of individual effort by personal gain is the best way to advance public welfare.” Mazer v. Stein, 347 U.S. 201, 219, 74 S.Ct. 460, 98 L.Ed. 630 (1954).

In short, the “monopoly created by copyright ... rewards the individual author,” but only “in order to benefit the public.” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985) (internal quotation marks omitted); see Fox Film Corp. v. Doyal, 286 U.S. 123, 127, 52 S.Ct. 546, 76 L.Ed. 1010 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.”).

Second, and consistent with this public purpose, the law has long recognized that “some opportunity for fair use of copyrighted materials” is necessary to promote progress in science and art. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994); Iowa State Univ. Research Found., Inc. v. Am. Broad. Cos., 621 F.2d 57, 60 (2d Cir. 1980) (stating that fair use doctrine “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster”). The doctrine of fair use, derived from common law, is now codified in the Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541. See 17 U.S.C. § 107. That codification does not so much define “fair use” as provide a non-exhaustive list of factors to guide courts' fair use determinations.
2. The Statutory Framework for Analyzing Fair Use

In the preamble to 17 U.S.C. § 107, Congress states that “the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research is not an infringement of copyright.” As the words “such as” indicate, the listing is “illustrative and not limitative.” 17 U.S.C. § 101; see Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. at 561, 105 S.Ct. 2218. Four nonexclusive factors—incorporating common law traditions—are properly considered in “determining whether the use made of a work in any particular case is a fair use.” 17 U.S.C. § 107. These statutory factors are as follows:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

In reviewing the challenged determination of fair use in this case, we necessarily discuss these factors individually, at the same time that we heed the Supreme Court's instruction that the factors must be viewed collectively, with their results “weighed together, in light of the purposes of copyright.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 578, 114 S.Ct. 1164.

a. Purpose and Character of the Use

(1) Transformative Use

[6] The first statutory fair use factor considers the purpose and character of the secondary use. In this regard, the uses identified by Congress in the preamble to § 107—criticism, comment, news reporting, teaching, scholarship, and research—might be deemed “most appropriate” for a purpose or character finding indicative of fair use. Nimmer § 13.05[A][1][a], at 13–162; see Authors Guild v. Google, Inc., 804 F.3d 202, 215 (2d Cir. 2015) (noting that providing commentary or criticism on another's work is “[a]mong the best recognized justifications for copying”).

The challenged use here does not appear to fit within any of these statutory categories. Nevertheless,
TCA Television Corp. v. McCollum, 839 F.3d 168 (2016)


the district court concluded that defendants' use was “transformative,” indeed, so “highly transformative” as to be “determinative” of fair use. TCA Television Corp. v. McCollum, 151 F.Supp.3d at 434–35. The district court explained that by having a single character perform the Routine, the Play's authors were able to contrast “Jason's seemingly soft-spoken personality and the actual outrageousness of his inner nature, which he expresses through the sock puppet.” Id. at 436. This contrast was “a darkly comedic critique of the social norms governing a small town in the Bible Belt.” Id. This reasoning is flawed in that what it identifies are the general artistic and critical purpose and character of the Play. The district court did not explain how defendants' extensive copying of a famous comedy routine was necessary to this purpose, much less how the character of the Routine was transformed by defendants' use.

[7] [8] The Supreme Court has stated that “the goal of copyright ... is generally furthered by the creation of transformative works.” Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579, 114 S.Ct. 1164. But *180 how does a court decide “whether and to what extent the new work is ‘transformative’”? Id. Campbell instructs that a court properly considers “whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.” Id. (emphasis added) (alterations, citations, and internal quotation marks omitted).

[9] As the highlighted language indicates, the focus of inquiry is not simply on the new work, i.e., on whether that work serves a purpose or conveys an overall expression, meaning, or message different from the copyrighted material it appropriates. Rather, the critical inquiry is whether the new work uses the copyrighted material itself for a purpose, or imbues it with a character, different from that for which it was created. See id. Otherwise, any play that needed a character to sing a song, tell a joke, or recite a poem could use unaltered copyrighted material with impunity, so long as the purpose or message of the play was different from that of the appropriated material.

In sum, even if, as the district court concluded, Hand to God is a “darkly comedic critique of the social norms governing a small town in the Bible Belt,” TCA Television Corp. v. McCollum, 151 F.Supp.3d at 436, and even if the Play's purpose and character are completely different from the vaudevillian humor originally animating Who's on First?, that, by itself, does not demonstrate that defendants' use of the Routine in the Play was transformative of the original work.

We made this point in Cariou v. Prince, 714 F.3d 694. There, the defendant, a self-styled “appropriation artist,” id. at 699, had taken plaintiff's copyrighted photographs —“serene and deliberately composed” portraits of Rastafarian men—and altered them to create “crude and jarring” collages, id. at 706. Defendant acknowledged that he had not used the photographs to “comment on” the original works. Id. at 707. Instead, both works had an underlying artistic purpose, but defendant stated that he had sought to change the original material “into something that's completely different.” Id. (internal quotation marks omitted). Reversing a district court award of summary judgment in favor of plaintiff, this court ruled that, although commentary frequently constitutes fair use, it is not essential that a new creative work comment on an incorporated copyrighted work to be transformative. See id. at 706. Rather, “to qualify as a fair use” in the absence of such a different purpose, the new work “generally must alter the original with 'new expression, meaning, or message.'” Id. (quoting Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579, 114 S.Ct. 1164).

*181 Cariou concluded that the challenged artworks there satisfied this standard because they not only strove for “new aesthetics with creative and communicative results distinct from” that of the copyrighted material, but also gave the incorporated photographs “new expression,” thereby admitting a transformative purpose. Id. at 708. Indeed, where the defendant's use so “heavily obscured and altered” the original photographs as to make them “barely recognizable” within the new work, the court ruled that transformative purpose (and ultimately fair use) was established as a matter of law. Id. at 710. But where lesser changes retained certain of the original work's aesthetics, the court could not say “for sure” that their incorporation into the defendant's works had “transformed [the original] work enough to render
it transformative.” Id. at 711. As to those works, Cariou remanded for further proceedings. Id.

Insofar as Cariou might be thought to represent the high-water mark of our court's recognition of transformative works, it has drawn some criticism. See Kienitz v. Sconnie Nation LLC, 766 F.3d 756, 758 (7th Cir. 2014) (expressing skepticism as to Cariou's approach and criticizing reliance on transformativeness as substitute for the statutory factors, which threatens to override the copyright owner's exclusive right to prepare derivative works); see also Nimmer § 13.05[B][6], at 13.224.20 (stating with respect to Cariou: “It would seem that the pendulum has swung too far in the direction of recognizing any alteration as transformative, such that this doctrine now threatens to swallow fair use. It is respectfully submitted that a correction is needed in the law.”). We need not defend Cariou here, however, because our point is that even scrupulous adherence to that decision does not permit defendants' use of Who's on First? in Hand to God to be held transformative.

Far from altering Who's on First? to the point where it is “barely recognizable” within the Play, Cariou v. Prince, 714 F.3d at 710, defendants' use appears not to have altered the Routine at all. The Play may convey a dark critique of society, but it does not transform Abbott and Costello's Routine so that it appropriates the Routine's humor not incidentally, but transforming the Routine's aesthetic. Moreover, the Play appropriates the Routine's humor not incidentally, but extensively by having the characters perform some dozen settings).

The fact that, even as a McGuffin, the Routine is quite funny, also cannot justify its use in the Play. That humor is an achievement of the Routine's creators, not of the playwright who takes advantage of it without transforming the Routine's aesthetic. Moreover, the Play appropriates the Routine's humor not incidentally, but extensively by having the characters perform some dozen of the original exchanges on the comic ambiguity of the words “who's on first.” No new dramatic purpose was served by so much copying. Cf. Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 589, 114 S.Ct. 1164 (Kennedy, J., concurring) (observing that courts should not afford fair use protection to persons who merely place characters from familiar copyrighted works into novel or eccentric settings).

More than the Routine's ability to capture audience attention is necessary to provide such justification. As the Supreme Court has cautioned, where a secondary use “has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention ..., the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish).” Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 580, 114 S.Ct. 1164. Nor is a different conclusion warranted because defendants here place the unaltered Routine in a sharply different context from its original authors. See id. at 598, 114 S.Ct. 1164 (Kennedy, J., concurring) (observing that courts should not afford fair use protection to persons who merely place characters from familiar copyrighted works into novel or eccentric settings).

The argument will not bear close scrutiny. The "dramatic" purpose served by the Routine in the Play appears to be as a “McGuffin,” that is, as a theatrical device that sets up the plot, but is of little or no significance in itself. To advance the plot of the Play, specifically, to have the puppet Tyrone take on a persona distinct from that of Jason, defendants needed Jason to lie about something and for Tyrone to call him on it. But the particular subject of the lie—the Routine—appears irrelevant to that purpose. Such unaltered use of an allegedly copyrighted work, having no bearing on the original work, requires justification to qualify for a fair use defense. See Authors Guild v. Google, Inc., 804 F.3d at 215 (stating that “taking from another author's work for the purpose of making points that have no bearing on the original may well be fair use, but the taker would need to show a justification”).

Defendants nevertheless maintain that using the Routine for such a “dramatic,” rather than comedic, purpose was transformative. Appellees' Br. 18 (stating that Play's use of Routine was "far cry" from original “comedy schleick”). The argument will not bear close scrutiny. The “dramatic” purpose served by the Routine in the Play appears to be as a “McGuffin,” that is, as a theatrical device that sets

In sum, nothing in the 12(b)(6) record shows that the Play imbued the Routine with any new expression, meaning, or message. Nor does any new dramatic purpose justify defendants' extensive copying of the Routine. Accordingly, the district court erred both in finding defendants' use of the Routine transformative and in concluding, on that basis, that a fair use defense was established as a matter of law.

(2) Commercial Purpose

The first statutory factor specifically instructs courts to consider whether copyrighted materials are used for a commercial purpose or for a nonprofit educational purpose, the former tending “to weigh against a finding of fair use.” Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 585, 114 S.Ct. 1164 (internal quotation marks omitted). There is no question here that defendants' use of Who's on First? in Hand to God was for a commercial purpose. Nevertheless, the district court discounted that fact upon finding the use “highly transformative.” TCA Television Corp. v. McCollum, 151 F.Supp.3d at 434–35; see Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579, 114 S.Ct. 1164 (recognizing that “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”). Because we here conclude that defendants' use was not transformative, let alone “highly transformative,” we conclude that the district court erred in discounting Hand to God's commercial character. See Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579–81, 114 S.Ct. 1164.14

This conclusion applies with particular force here where plaintiffs allege that defendants not only used an unaltered and appreciable excerpt of the Routine in a commercial play but also featured the Routine in the Play's advertising, conduct which reasonably qualifies as commercial exploitation weighing strongly against fair use. See id. at 585, 114 S.Ct. 1164 (observing that use of copyrighted work “to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enqiry than the sale of a parody for its own sake”); American Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d Cir. 1994) (stating that fair use claim will not be sustained when secondary use can fairly be *184 characterized as “commercial exploitation” (internal quotation marks omitted)); Consumers Union of U.S., Inc. v. Gen. Signal Corp., 724 F.2d 1044, 1049 (2d Cir. 1983) (observing that some infringement actions involve copying of creative expression for “purpose of having that precise form of expression advance someone else's commercial interests—for example, using well-known copyrighted lines to attract attention to an advertisement”). Indeed, to the extent defendants excessively copied from the Routine even within the Play, their advertising focus on the Routine's comic exchanges raises particular commercial exploitation concerns.

Thus, defendants' commercial use of the Routine was not transformative. Rather, it duplicated to a significant degree the comedic purpose of the original work. As such, the first statutory factor, far from weighing in defendants' favor, weighs in favor of plaintiffs.

b. Nature of Copyrighted Work

[10] [11] The second statutory factor, “the nature of the copyrighted work,” also weighs in plaintiffs' favor. As the Supreme Court has observed, certain “works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied.” Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 586, 114 S.Ct.
Like the district court, we conclude that Who's on First?, an original comedy sketch created for public entertainment, lies at the heart of copyright's intended protection. See id. (recognizing that creative expression created for public dissemination is at core of “copyright's protective purposes”); On Davis v. Gap, Inc., 246 F.3d at 175 (concluding that second factor favored plaintiff because copyrighted work was “in the nature of an artistic creation”). Thus, while the secondary user of noncreative information can more readily claim fair use based on the law's recognition of “a greater need to disseminate factual works than works of fiction or fantasy,” Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. at 563, 105 S.Ct. 2218; see Authors Guild v. Google, Inc., 804 F.3d at 220 & n.21 (explaining that factual works “often present well justified fair uses” because “there is often occasion to test the accuracy of, to rely on, or to repeat their factual propositions,” which “may reasonably require quotation”), the secondary user of a creative work must justify his use, usually by explaining the functional or creative rationale behind its quotation, see Pierre N. Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1113 (1990) (explaining that, in considering whether quotation is fair, courts must consider utility of each challenged passage).

Defendants argue that their use was justified by the dramatic need to use an instantly recognizable “cultural” touchstone in the relevant scene. Appellees' Br. 15. Defendants do not explain, however, why Jason's lie had to pertain to a cultural touchstone, as opposed to any obvious tall tale—e.g., inventing the Internet, traveling to Mars, out-swimming Michael Phelps. See generally Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. at 1111 (observing that court considering fair use must determine not only if justification for copying exists, but also “how powerful, or persuasive, is the justification”). But even assuming defendants' professed dramatic need, they do not explain why the cultural touchstone had to be the Routine—or even a comedy sketch—as opposed to some other readily recognizable exchange, including those already in the public domain. Most troubling, even if defendants could justify their dramatic need to use a small, identifiable segment of the Routine, that does not justify having their characters perform, *185 verbatim, some dozen variations on the Routine's singular joke. As already noted, the purpose of such extensive use was to provoke audience laughter in exactly the same way as the Routine's creators had done.

In sum, because defendants' use of the Routine cannot be deemed transformative, and because the record is devoid of any persuasive justification for the extent of defendants' use, the creative nature of the Routine weighs strongly against a fair use defense.

c. Amount and Substantiality of Use

[12] [13] The third statutory factor asks whether “the amount and substantiality of the portion used in relation to the copyrighted work as a whole ... are reasonable in relation to the purpose of the copying.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 586, 114 S.Ct. 1164 (quoting 17 U.S.C. § 107(3)). In assessing this factor, we consider not only “the quantity of the materials used” but also “their quality and importance.” Id. at 587, 114 S.Ct. 1164; see Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. at 565, 105 S.Ct. 2218 (stating that “fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression”).

While acknowledging that the portion of the Routine used by defendants was “instantly recognizable” and “more than merely the ‘introductory premise,’ ” the district court decided—without explanation—that this factor tipped only “slightly” in plaintiffs' favor in light of defendants' transformative use. TCA Television Corp. v. McCollum, 151 F.Supp.3d at 434. We reject the district court's transformative use determination for reasons already explained. On de novo review, we further conclude that the third statutory factor weighs strongly in favor of plaintiffs.

While the portion of the Routine copied by defendants takes less than two minutes to perform, it plainly reveals the singular joke underlying the entire Routine: that words understood by one person as a question can be understood by another as an answer. Moreover, defendants repeatedly exploit that joke through a dozen
The defendant would result in a substantially adverse impact and widespread conduct of the sort engaged in by the alleged infringer, but also whether unrestricted extent of market harm caused by the particular actions of the alleged infringer. A court properly looks to “not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant would result in a substantially adverse impact on the potential market for the original.”

The district court weighed this factor in defendants' favor, concluding that the Play's use of the Routine could not reasonably be expected to usurp the market for Abbott and Costello's original performance. See TCA Television Corp. v. McCollum, 151 F.Supp.3d at 434–35. In so doing, however, the district court disregarded the possibility of defendants' use adversely affecting the licensing market for the Routine. See id. at 434 (citing Cariou v. Prince, 714 F.3d at 708 (stating that fourth factor “does not focus principally on the question of damage to [a] derivative market”).

While derivative markets are not the principal focus of the fourth inquiry, that does not mean that they are irrelevant. See Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 593, 114 S.Ct. 1164 (recognizing that evidence of substantial harm to derivative market would weigh against fair use). A court considering fair use properly identifies and weighs relevant harm to the derivative market for a copyrighted work, which market includes uses that creators of original works might “license others to develop.” Id. at 592, 114 S.Ct. 1164; see American Geophysical Union v. Texaco Inc., 60 F.3d at 929 (“[T]he impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.”).

To be clear, in assessing harm posed to a licensing market, a court's focus is not on possible lost licensing fees from defendants' challenged use. See American Geophysical Union v. Texaco Inc., 60 F.3d at 929 n.17 (explaining that fourth factor would always favor copyright owner if courts focused on loss of potential licensing fees from alleged infringer); see also Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. at 1124 (“By definition every fair use involves some loss of royalty revenue because the secondary user has not paid royalties.”). Rather, a court properly considers the challenged use's “impact on potential licensing revenues for traditional, reasonable, or likely to be developed markets.” American Geophysical Union v. Texaco Inc., 60 F.3d at 930; accord Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 91 (2d Cir. 2014).
Plaintiffs here alleged the existence of a traditional—and active—derivative market for licensing the Routine. See Am. Compl. ¶¶ 40, 81–83 (alleging that plaintiffs receive “regular” requests to license Who's on First?, which they frequently grant). Further, they alleged market harm. See id., at ¶ 83 (alleging that defendants' unlicensed use of Who's on First? negatively affected commercial market for future licensing). Accepting these allegations as true at this *187 stage of the litigation, we conclude that this factor weighs in favor of plaintiffs. See On Davis v. Gap, Inc., 246 F.3d at 175–76 (concluding that fourth factor favored copyright owner where defendants' taking caused both loss of royalty revenue and “diminution of [owner's] opportunity to license to others who might regard [owner's] design as preempted by [defendant's] ad”).

In sum, on the 12(b)(6) record, all four statutory factors weigh in favor of plaintiffs and against a defense of fair use. Because, at this stage of the proceeding, defendants have identify no other equitable factors as here relevant to the fair use analysis, we conclude that the dismissal of plaintiffs' amended complaint on the ground of fair use was error. Nevertheless, for reasons explained in the next section of the opinion, we conclude that dismissal was warranted because plaintiffs did not plausibly allege a valid copyright interest in the Routine.

**B. Dismissal for Failure To Plead a Valid Copyright**

Defendants argue that, even if we reject dismissal on the basis of a fair use defense, we should affirm because plaintiffs fail plausibly to plead ownership of a valid copyright in the Routine. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361, 111 S.Ct. 1282, 133 L.Ed.2d 358 (1991) (identifying two elements of infringement: (1) ownership of valid copyright and (2) copying original elements of work). Defendants assert that Abbott and Costello's Who's on First? Routine fell into the public domain in 1968, when the initial copyright term for Tropics expired. Defendants concede that UPC's registration for that movie protected the Routine—first published therein—from entering the public domain through the term of that copyright, see Shoptalk, Ltd. v. Concorde–New Horizons Corp., 168 F.3d 586, 592 (2d Cir. 1999), but they assert that only Abbott and Costello, as the Routine's authors, could renew the copyright in that work—as distinct from Tropics—which the team failed to do. 15

In disputing this challenge, plaintiffs argue that UPC had the right to renew the copyright in the Routine because (1) Abbott and Costello assigned ownership of their common law copyright in the Routine to UPC in either the July or November Agreement, (2) the Routine as published in Tropics was a “work for hire” owned by UPC, and (3) the Routine merged into Tropics so as to support a single copyright. Plaintiffs maintain that, under any of these theories, UPC's renewal of the Tropics copyright also maintained copyright protection for the Routine, so that they now hold a valid copyright in that work by virtue of UPC's transfer of its rights in the Routine in the Quitclaim.

We identify no merit in any of the theories relied on by plaintiffs to support their copyright claim and, accordingly, we affirm dismissal of the amended complaint for failure to plead a valid copyright.

1. Copyright Assignment

In rejecting defendants' copyright invalidity challenge, the district court thought that “[t]he contract language, together with UPC's subsequent registration *188 of the copyrights” for Tropics and The Naughty Nineties, might admit a finding of “implied assignment of the initial copyright from Abbott and Costello.” TCA Television Corp. v. McCollum, 151 F.Supp.3d at 429; see Nimmer § 10.03[B][2], at 10–56.2(6) (explaining that pre-1978 assignment of common law copyright could be effectuated orally or implied from conduct). The conclusion is flawed in two respects. First, as detailed in this section, the July and November Agreements clearly express the parties' intent for Abbott and Costello to license the use of, not to assign copyrights in, their existing comedy routines for use in UPC movies in which the team appeared. Second, and requiring no further discussion in the face of clear contract language, UPC's registration (and renewal) of copyrights in its movies says nothing about what Abbott and Costello intended to convey in the two agreements because UPC would have taken such action to protect its independent movie rights in any event.
Artists either on the radio or otherwise and now owned furnish UPC with all “routines heretofore used by the November Agreement similarly states that the team would have the right to use said material and routines to such extent as the Producer may desire in connection with any photoplay in which the Artists render their services hereunder.” Id. at 129 (emphasizes added). As the highlighted language in each agreement makes plain, Abbott and Costello furnished UPC with their routines for a limited purpose: use in any movies in which the team appeared under the respective agreements.16 This is unmistakably the language of an exclusive, limited-use license, not the assignment of copyright. See Compendium of Copyright Office Practices § 12.2.1 (1973) (stating that license is “exclusive or non-exclusive grant of permission to use a copyrighted work for certain purposes”).

Turning then to the agreements, we note at the outset that neither contract has a choice of law provision. Thus, the controlling law would be the contract’s “center of gravity,” which typically is the place of contracting or performance. Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1539 (2d Cir. 1997) (internal quotation marks omitted). The July Agreement was executed in New York with expected performance in California. The November Agreement was also to be performed in California and may have been executed there, where UPC was located and Abbott and Costello were then completing Tropics. Any uncertainty on the latter point is irrelevant, however, because New York and California law both instruct that contracts must be interpreted according to the mutual intent of the parties at the time the contract was formed. See Welsbach Elec. Corp v. MasTec N. Am., Inc., 7 N.Y.3d 624, 629, 825 N.Y.S.2d 692, 695, 859 N.E.2d 498 (2006); AIU Ins. Co. v. Superior Court, 51 Cal.3d 807, 821, 274 Cal.Rptr. 820, 799 P.2d 1253, 1264 (1990). Both states recognize that the best evidence of the parties' intent is the language used in their contract. See Brad H. v. City of New York, 17 N.Y.3d 180, 185, 928 N.Y.S.2d 221, 224, 951 N.E.2d 743 (2011); AIU Ins. Co. v. Superior Court, 51 Cal.3d at 822, 274 Cal.Rptr. 820, 799 P.2d at 1264. Thus, where contract language is clear and unambiguous, courts will enforce an agreement according to its terms, without looking outside the four corners of the document. See Brad H. v. City of New York, 17 N.Y.3d at 185, 928 N.Y.S.2d at 224, 951 N.E.2d 743; AIU Ins. Co. v. Superior Court, 51 Cal.3d at 822, 274 Cal.Rptr. 820, 799 P.2d at 1264.

The July Agreement employing Abbott and Costello for “one feature photoplay,” J.A. 165, states that the team would furnish UPC with “routines heretofore used and now owned by Artists for use by the Producer in the photoplay in which they appear hereunder and for which the Producer shall have the exclusive motion picture rights.” Id. at 169 (emphases added). The longer-term November Agreement similarly states that the team would furnish UPC with all “routines heretofore used by the Artists either on the radio or otherwise and now owned by the Artists,” and that UPC would “have the right to use said material and routines to such extent as the Producer may desire in connection with any photoplay in which the Artists render their services hereunder.” Id. at 129 (emphasizes added). As the highlighted language in each agreement makes plain, Abbott and Costello furnished UPC with their routines for a limited purpose: use in any movies in which the team appeared under the respective agreements.16 This is unmistakably the language of an exclusive, limited-use license, not the assignment of copyright. See Compendium of Copyright Office Practices § 12.2.1 (1973) (stating that license is “exclusive or non-exclusive grant of permission to use a copyrighted work for certain purposes”).

A clause in the July Agreement granting UPC “all rights of every kind and character whatsoever in and to the same ... perpetually” warrants no different conclusion. J.A. 169. This language appears in the same sentence as that quoted in the preceding paragraph and, thus, “all rights ... in and to the same” can only be understood to reference UPC’s motion picture rights, not the team’s common law copyright in its routines.17 Indeed, in the November Agreement, wherein the team grants UPC the right to photograph and reproduce their “acts,” the “perpetual” right “to use the same” is expressly granted “only in connection with the photoplays in which the Artists appear hereunder and in connection with the advertising and exploitation thereof.” Id. at 127. The November Agreement states that “the Producer shall not have the right to use the Artists’ names or likenesses or reproductions of their voices in radio broadcasts (except as hereinafter expressly permitted) independent of ... motion picture productions or in commercial tie-ups.” Id. at 128.

Other language in the November Agreement further confirms that Abbott and Costello granted UPC only a license to use their routines. The team therein agreed “that they [would] not use or license, authorize or permit the use of any of the material and/or routines” furnished to UPC under the agreement “in connection with motion pictures for any person, firm or corporation other than the Producer, at any time prior to the termination of the employment of the Artists under this agreement or one year after the general release of the photoplay in which
used, whichever is later.” Id. at 129. The fact that the Agreement limits Abbott and Costello’s ability to use or license specified material (i.e., material created before the agreements) only “in connection with motion pictures,” and only for a limited time, plainly indicates the parties’ understanding that the team retained ownership of the copyright in their pre-agreement material and granted UPC only a license. See P.C. Films Corp. v. MGM/UA Home Video Inc., 138 F.3d 453, 456 (2d Cir. 1998) (explaining that under 1909 Copyright Act, “transfer of anything less than the totality of rights commanded by copyright was automatically a license rather than an assignment [of] the copyright”).

Thus, the language of the July and November Agreements, by itself, clearly belies plaintiffs’ claim that Abbott and Costello therein conveyed their common law copyright in the Routine to UPC. That conclusion is reinforced by the very Quitclaim on which plaintiffs’ claimed ownership of the Who’s on First? copyright depends. To secure the Quitclaim of UPC’s *190 interests in the Routine (then held by its successor, Universal), plaintiffs’ predecessors-in-interest therein represented that they owned the copyright in the Routine. In short, the parties to the Quitclaim understood Abbott and Costello not to have transferred, but to have retained, ownership of the Routine’s copyright.

Accordingly, plaintiffs cannot state a plausible infringement claim based on a 1940 transfer of copyright ownership from Abbott and Costello to UPC in either the July or November Agreement. The record does not support such assignment. 18

2. Work Made for Hire

[24] Plaintiffs maintain that, even if the July and November Agreements cannot be construed to have assigned copyrights, they are work-for-hire agreements. They argue that UPC, “[a]s the author under a work-for-hire agreement of the films ..., properly registered its copyright in these two films with the Copyright Office, and thereafter timely renewed their copyright registrations.” Appellants’ Br. 9; see Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc., 342 F.3d 149, 156–57 (2d Cir. 2003) (explaining that, under 1909 Copyright Act, employer was legal author and, therefore, had renewal rights).

The argument is defeated by plaintiffs’ own allegation—which we must accept as true—that the Routine was first performed in March 1938, more than two years before Abbott and Costello entered into the July and November Agreements with UPC. See Am. Compl. ¶ 32. Insofar as Abbott and Costello had already performed Who’s on First? in 1938, they plainly did not create the Routine at UPC’s “instance and expense” in 1940, as would be required for it to be a work-for-hire. Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 554 (2d Cir. 1995) (stating that work is considered “for hire” when made at hiring party's instance and expense, i.e., “when the motivating factor in producing the work was the employer who induced the creation” (internal quotation marks omitted)); see also Urantia Found. v. Maaherra, 114 F.3d 955, 961 (9th Cir. 1997) (“An employment (or commissioning) relationship at the time the work is created is a condition for claiming renewal as the proprietor of a work made for hire.” (internal quotation marks omitted)).

Plaintiffs seek to avoid this conclusion by noting defendants’ (1) concession—at least for purposes of their motion to dismiss—that new material was added to the Routine for Tropics, see TCA Television Corp. v. McCollum, 151 F.Supp.3d at 431; and (2) failure to establish “the contents, language or scope of protectable expression of the 1938 radio broadcast,” Appellants’ Reply Br. 22. We are not persuaded.

On review of a motion to dismiss, courts must draw all reasonable inferences in plaintiffs’ favor. Even applying that principle here, it is not plausible to infer that the Routine, as performed in 1938, did not already contain the initial series of exchanges about a person named “Who” playing first base for the simple reason that there is no Routine without at least that part. Further, because that is the part of the Routine appropriated in Hand to God, plaintiffs must plausibly allege a valid copyright in that material, regardless of later additions. Thus, to the extent plaintiffs’ copyright claim rests on a theory of work-for-hire, it was their burden to plead facts showing that the appropriated parts *191 of the Routine had not existed in the 1938 iteration of Who’s on First?, but were first created for Tropics so as to be covered by the copyright and copyright renewal of that movie. See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. at 361, 111 S.Ct.
3. Merger of Routine in Motion Pictures

[25] Finally, plaintiffs argue that even if their copyright ownership claim cannot rest on either an assignment or work-for-hire theory, it is plausible because “so much of the Routine as was used in the Movies ‘merged’ with the Movies to become a ‘unitary whole.’” See Appellants’ Reply Br. 28. Thus, the Routine was not separately registerable; rather it was protected by UPC's statutory registration and its renewal of the copyrights for movies using the Routine.

[26] This argument also fails because, as this court recently observed, “authors of freestanding works that are incorporated into a film ... may copyright these ‘separate and independent works.’” 16 Casa Duse, LLC v. Merkin, 791 F.3d 247, 259 (2d Cir. 2015) (emphasis added) (quoting 17 U.S.C. § 101); see id. at 257 (noting that separate copyrights may be necessary where motion picture incorporates “separate, freestanding pieces that independently constitute ‘works of authorship’”). Who's on First? was such a freestanding work within Tropics. As already noted, plaintiffs acknowledged in the amended complaint that the Routine (1) was prepared and existed on its own for some years before it was performed in Tropics, see Am. Compl. ¶ 32; and (2) was performed independently from the films “thousands of times” on the radio and elsewhere, see id. at ¶¶ 34–35; see also J.A. 129 (stating in November Agreement that “Artists reserve the right to use on the radio and in personal appearances” all preexisting routines). The Quitclaim representation that plaintiffs' predecessors-in-interest still owned the Routine's copyright in 1984 is also at odds with the argument that the Routine had so merged with Tropics as to admit a single copyright owned by UPC.

Neither Garcia v. Google, Inc., 786 F.3d 733 (9th Cir. 2015) (en banc), nor Richlin v. Metro–Goldwyn–Mayer Pictures, Inc., 531 F.3d 962 (9th Cir. 2008), relied on by plaintiffs, is to the contrary. In Garcia, the Ninth Circuit reversed a panel decision holding that an actor's five-second contribution to a movie was sufficiently creative to entitle her to register a copyright in her performance. The en banc court explained that “[t]reating every acting performance as an independent work” would be a “logistical and financial nightmare.” Garcia v. Google, Inc., 786 F.3d at 743. This case is not analogous. While the screen actor's performance there was so “integrated into” the filmed work as to be “inseparable from” it, see 16 Casa Duse, LLC v. Merkin, 791 F.3d at 254, Who's on First? is a freestanding comedy routine performed by Abbott and Costello not only years before the first frame of Tropics was ever filmed but also for many years thereafter. Thus, the concerns at issue in Garcia are not present here.

As for Richlin, the Ninth Circuit did not there hold, as plaintiffs contend, that an author is “not entitled to an independent copyright by reason of inclusion of his [story] treatment's material in [a] motion picture.” Appellants' Reply Br. 27–28 (emphasis in original). Rather, the court there assumed that plaintiffs' story treatment was independently copyrightable when it held that plaintiffs had “failed to secure a federal copyright for it.” *192 Richlin v. Metro–Goldwyn–Mayer Pictures, Inc., 531 F.3d at 976. Thus, the court acknowledged that “publication of a motion picture with notice secures federal statutory copyright protection for all of its component parts,” but observed “that does not mean that the component parts necessarily each secure an independent federal statutory copyright.” Id. at 975–76. The movie's publication protected so much of the treatment as was disclosed therein, but it “did not constitute publication of the Treatment ‘as such’—i.e., as a work standing alone.” Id. at 973.

This reasoning undermines rather than supports plaintiffs' merger theory. The plaintiffs in Richlin “clearly intended” that the treatment “be merged into inseparable or interdependent parts of a unitary whole.” Id. at 967. That is not this case. As already explained, the Routine was created and performed by Abbott and Costello well before Tropics was filmed, and the team continued to perform it for years after. Indeed, the Agreements' licensing of the Routine's performance in Tropics and The Naughty Nineties contemplated such independent performances. In these circumstances, we conclude that the Routine did not merge into UPC's films so as to avoid the need for its creators to renew the copyright. See 16 Casa Duse, LLC v. Merkin, 791 F.3d at 259.
In sum, because plaintiffs fail plausibly to allege that (1) Abbott and Costello assigned their common law copyright in *Who's on First?* to UPC; (2) the Routine, as appropriated by defendants in *Hand to God*, was first created for UPC as a work-for-hire; or (3) the Routine so merged with the UPC movies in which it was performed as to become a unitary whole, we conclude that plaintiffs did not plead their possession of a valid copyright in the Routine, as required to pursue their infringement claim.

Accordingly, even though the district court erred in dismissing plaintiffs' amended complaint based on defendants' fair use of the appropriated material, we affirm dismissal based on plaintiffs' failure plausibly to allege a valid copyright.

III. Conclusion
To summarize, we conclude as follows:

1. Dismissal was not supported by fair use because all four relevant factors weigh in plaintiffs' favor:

   a. Defendants' verbatim use of over a minute of *Who's on First?* in their commercial production, *Hand to God*, was not transformative because defendants neither used so much of the Routine for a different purpose nor imbued the original with a different message, meaning, or expression;

   b. Defendants failed persuasively to justify their use of the Routine, as a secondary user who appropriates a creative work without alteration must do;

   c. Defendants' use of some dozen of the Routine's variations of “who's on first” was excessive in relation to any dramatic purpose; and

   d. Plaintiffs allege an active secondary market for the work, which was not considered by the district court.

2. Dismissal is warranted by plaintiffs' failure plausibly to plead ownership of a valid copyright. Their efforts to do so on theories of assignment, work-for-hire, and merger all fail as a matter of law.

Accordingly, the judgment of dismissal is AFFIRMED.

All Citations

Footnotes
1. Defendants do not cross-appeal the district court's denial of dismissal on the ground of copyright invalidity; rather, they argue it as an alternative ground for affirmance, even if plaintiffs' fair use challenge prevails. In this opinion, we first address plaintiffs' challenge to the fair use determination supporting dismissal because if we were to identify no error in that ruling there would be no need to consider defendants' proposed alternative ground for affirmance.


3. Viewing the facts in the light most favorable to plaintiffs, the district court discussed in some detail why (1) before *Tropics*'s release, the Routine was protected by common law copyright; and (2) the movie's release could constitute “publication” of the Routine, extinguishing any common law right and requiring registration and deposit with the federal Copyright Office to claim any statutory copyright protection. See *TCA Television Corp. v. McCollum*, 151 F.Supp.3d at 427–30.

4. Plaintiffs' amended complaint cites only the November Agreement with UPC as the relevant contract. See Am. Compl. ¶ 43. By the time that agreement was signed, however, Abbott and Costello presumably had already finished their work on *Tropics*—including any additions to the Routine reflected in that movie. Thus, it would appear that the team's work on *Tropics* was pursuant to the July Agreement, discussed *supra* at I.B.1.a. The discrepancy does not affect our analysis here because, in the district court, defendants conceded that, at least for purposes of their motion to dismiss, the July Agreement had “in effect, been pleaded” by plaintiffs in support of their claim. Sept. 9, 2015 Hr'g Tr. 2–3.

The George Mason University Libraries, in their “Guide to the John C. Becher Soldier Show Collection, 1940–1953,” indicates that “Soldier Shows” refers to entertainments “made by soldiers for soldiers,” with the object of “mass participation” to raise morale. J.A. 208–09. Because the record here is devoid of any information about either Soldier Shows generally or Soldier Shows, No. 19 in particular, we make no assumptions about the content of the material that is the subject of the 1944 copyright registration.


The Routine is used in the Play as follows:

JASON .... You wanna see something[?]
JESSICA Ummm.
JASON You'll like it.
JESSICA Yeah?
JASON I think you'll like it.
JESSICA Okay.
JASON Okay.

Jason slicks back his hair. Takes a deep breath and then says ...

JASON Well Costello, I'm goin' to New York with you. You know Buck Harris the Yankee[s'] manager gave me a job as coach as long as you're on the team.
TYRONE Look Abbott, if you're the coach, you must know all the players.
JASON I certainly do.
TYRONE Well I've never met the guys. So you'll have to tell me their names and then I'll know who's playing on the team.
JASON Oh I'll tell you their names, but you know it seems to me they give these ball players now-a-days very particular names.

As he starts he's a little aspergersy. As he goes on he gets more and more comfortable.

TYRONE You mean funny names?
JASON Well let's see we have on the bags, Who's on first, What's on second, I don't know is on third ...
TYRONE That's what I want to find out.
JASON I say Who's on first, What's on second, I don't know's on third.
TYRONE Are you the manager?
JASON Yes.
TYRONE You gonna be the coach too?
JASON Yes.
TYRONE And you don't know the fellows' names.
JASON Well I should.
TYRONE Then who's on first?
JASON Yes?
TYRONE I mean the fellow's name.
JASON Who.
TYRONE The guy on first.
JASON Who.
TYRONE The first baseman.
JASON Who.
TYRONE The guy playing ...

Jason is really into it. Jessica is giggling a bit. But you can imagine him going into it all alone on a Saturday night.

JASON Who is on first.
TYRONE I'm askin['] you who's on first.
JASON That's the man's name.
TYRONE That's whose name.
JASON Yes.
TYRONE Well go ahead and tell me.
JASON That's it.
TYRONE That's who?
JASON Yes.

Jason reaches a pause in the routine and looks out at her. He becomes aware of what he's doing.

JESSICA What are you doing[?] Don't stop.
JASON I ...

He gets red.
JESSICA What?
JASON I can't remember anymore.

Suppl. App'x 17–21 (emphases added).

9 The idea that “transformative” purpose could support fair use was put forth by our colleague, Judge Leval, in a seminal article, “Toward a Fair Use Standard.” See 103 Harv. L. Rev. 1105, 1111 (1990) (“[T]he question of justification turns primarily on whether, and to what extent, the challenged use is transformative. The use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original. A quotation of copyrighted material that merely repackage[s] or republishes the original is unlikely to pass the test.... If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.”).

Fair use is not limited to transformative works. See Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579, 114 S.Ct. 1164. But because the only purpose found by the district court and relied on by defendants is the creation of a transformative work, in analyzing this factor, we necessarily focus on whether a finding of transformative purpose could be made as a matter of law on a Rule 12(b)(6) motion.

10 Even if such commentary is not essential to fair use, it remains the case, even after Cariou, that commentary or criticism on another's work is “[a]mong the best recognized justifications for copying” because such commentary or criticism is in the public interest and frequently requires quoting the copyrighted work to be effective. Authors Guild v. Google, Inc., 804 F.3d at 215; see Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 580–81, 114 S.Ct. 1164 (explaining that if new work “has no critical bearing on the substance or style of the original composition ... the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger”). Hand to God may be a “critique of the social norms governing a small town in the Bible Belt,” TCA Television Corp. v. McCollum, 151 F.Supp.3d at 436, but defendants have not argued that it is a commentary or criticism of Who's on First? Thus, such transformative purposes do not justify defendants' challenged use here.

11 In Swatch Group Management Services Ltd. v. Bloomberg L.P., 756 F.3d 73 (2d Cir. 2014), we stated in dictum that “a secondary work can be transformative in function or purpose without altering or actually adding to the original work.” Id. at 84 (internal quotation marks omitted). But that statement must be read in context. We were there discussing the fair use of data, not the creation of new artistic work as in Cariou. In the former context, we recognized that “the need to convey information to the public accurately may in some instances make it desirable and consonant with copyright law for a defendant to faithfully reproduce an original work without alteration.” Id. That is not this case. Defendants used a verbatim portion of Who's on First? in Hand to God. The unaltered use of such creative material within another creative work has a weaker claim to fair use protection. See Campbell v. Acuff–Rose Music, Inc., 510 U.S. at 579, 114 S.Ct. 1164; Cariou v. Prince, 714 F.3d at 706; see also Nimmer § 13.05[A][2][a], at 13–187 (recognizing that “scope of fair use is greater when informational type works, as opposed to more creative products[,] are involved” because there is “greater license to use portions” of “work more of diligence than of originality or inventiveness” (internal quotation marks omitted)). For such an appropriation to be deemed “fair use,” the new creative work must either use the copyrighted work for a different purpose or imbue it with a different character, so as to alter the expression, meaning, or message of the original.

12 See 3 Oxford English Dictionary Additions Series 285 (1997) (defining “McGuffin” as “particular event, object, factor, etc., which ... acts as the impetus for the sequence of events depicted, although often proving tangential to the plot it develops”); see also Merriam–Webster's Collegiate Dictionary 744 (11th ed. 2003) (defining “MacGuffin” as “object, event, or character in film or story that serves to set and keep the plot in motion despite usu[ally] lacking intrinsic importance”).
We note that even a correct finding of transformative use is not necessarily determinative of the first statutory factor, much less of fair use. See Authors Guild v. Google Inc., 804 F.3d at 218; Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. at 1111 (recognizing that “existence of ... transformative objective does not ... guarantee success in claiming fair use” because “transformative justification must overcome factors favoring the copyright owner”).

This court has sometimes assigned little weight to the commercial nature of a secondary use even absent a transformative purpose. See, e.g., Castle Rock Entm't, Inc. v. Carol Pub'l'g Grp., Inc., 150 F.3d 132, 142 (2d Cir. 1998). But where, as here, defendants justify their use solely by reference to a transformative purpose, commercialism cannot automatically be discounted absent a finding of such purpose. See Blanch v. Koons, 467 F.3d at 254 (discounting commercial nature of secondary use only because new work was substantially transformative).

Because both parties seemingly concede that the Routine was protected from entering the public domain through at least Tropics's initial copyright term, we need not determine whether Tropics's publication automatically divested Abbott and Costello of their common law copyright and injected it into the public domain. See Roy Export Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc., 672 F.2d 1095, 1101–02 (2d Cir. 1982).

Plaintiffs acknowledged as much in the district court when they argued that the agreements' language “represented a clear grant of rights to UPC in all previous acts and routines created by Abbott and Costello ... if used in any motion pictures produced by UPC in which Abbott & Costello provided their services.” Pls.' Mem. Opp. Mot. Dismiss at 7, TCA Television Corp. v. McCollum, No. 15–cv–4325 (GBD), ECF No. 61 (emphasis added).

Because the agreements cannot be construed to effect an assignment of the Routine's copyright to UPC, we need not decide whether they further conveyed the Routine's renewal rights. See Corcovado Music Corp. v. Hollis Music, Inc., 981 F.2d 679, 684 (2d Cir. 1993) (recognizing strong presumption against conveyance of renewal rights).