

IN THE
THIRD CIRCUIT COURT OF APPEAL
STATE OF LOUISIANA
DOCKET NO. 20 00610-CW

LAFAYETTE CITY – PARISH CONSOLIDATED GOVERNMENT

PLAINTIFF-RESPONDENT

VERSUS

JOHN MERRIFIELD

DEFENDANT-APPLICANT

.....
AMICUS BRIEF OF ELECTRONIC FRONTIER FOUNDATION
IN SUPPORT OF DEFENDANT-APPLICANT JOHN MERRIFIELD'S
APPLICATION FOR SUPERVISORY WRIT

From a Decision of the Honorable Judge Edward Broussard
Fifteenth Judicial District Court, Parish of Lafayette

Lafayette City-Parish Consolidated Government v. John Merrifield
Docket No. C-20204217
.....

David Greene
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Fax: (415) 436-9993
Email: davidg@eff.org
pro hac vice admission pending

Lester J. Gauthier, Jr.
LA. Bar Roll No. 05982
Law Offices of Lester J. Gauthier
P. O. Box 3371
Lafayette, LA 70502
Phone: 337-264-1783
Fax: 337-264-1869
Email: legauth@bellsouth.net

*Attorneys for Amicus Curiae
Electronic Frontier Foundation*

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INTRODUCTION AND STATEMENT OF INTEREST

Facetious speech may be frivolously funny, sharply political, and everything in between, and it is all fully protected by the First Amendment, even when not everybody finds it humorous. It is of course not that parodic, satirical, joking, and other non-serious speech can never be regulated – no protected speech is granted impenetrable immunity by the First Amendment. But the First Amendment and its protections must certainly be fully and sufficiently applied before such speech can be punished.

Like every other medium of expression throughout history before it, the Internet, and the most widely adopted social media sites in particular, is the home of pranks and other non-serious speech. In all places where people gather to communicate, that communication will inevitably include humor.

And it is unsurprising that a website like Facebook that gets used widely to organize and publicize real events will be used, also widely, as a place to publish facetious events. Indeed, phony Facebook events comprise a well-established genre of Internet humor, complete with its own conventions that usually require the events to be absurd—such as a famous musician playing at local chain restaurant—or rely on mixing current events with ludicrous ideas—such as calling on saxophonists to blow away an oncoming hurricane. These parodic events serve the same multivaried purposes as other forms of humor – to make readers laugh, to criticize the powerful, and to emphasize the abundant absurdity of the real world around us.

Amicus curiae Electronic Frontier Foundation (EFF) is a nonprofit organization dedicated to defending civil liberties and ensuring that rights and freedoms are enhanced as our use of technology grows. As such, EFF has a strong interest in protecting the rights of Internet users to communicate with each other online, and to be afforded full First Amendment protection when they do. This includes the right to speak satirically and parodically online, and to use social media

and other forms of digital communication to comment on current events and criticize public actors. EFF frequently files amicus briefs in courts across the country to assist courts in navigating the intersection of legal and technological issues. For example, EFF filed an amicus brief with the United States Supreme Court in *Elonis v. United States*, 575 U.S. 723 (2015), a case dealing with Facebook speech not intended to be taken literally. And its amicus brief in *Packingham v. North Carolina*, a First Amendment challenge to a law barring convicted sex offenders from accessing social media sites, was cited favorably by the Court for its background information about Americans' widespread use of social media. 137 S. Ct. 1730, 1735 (2019).

This brief expands upon the First Amendment arguments raised by Merrifield at pages 25-27 of Original Application for Supervisory Writ and pages 7-8 of his Reply Brief. Amicus curiae herein urges the Court to acknowledge that Mr. Merrifield's clearly facetious Facebook post is entitled to full First Amendment protection and cannot as a matter of law be the basis for the penalty levied against him, and therefore to grant the supervisory writ. If the First Amendment protections are not afforded here, governments will be able to use the pretense of believing a clearly facetious event in order to penalize political commentary they dislike.

ARGUMENT

I. FACETIOUS FACEBOOK EVENTS ARE A COMMON FORM OF SATIRICAL SOCIAL COMMENTARY AND HUMOR ON SOCIAL MEDIA SITES

Once Facebook became a popular forum for organizing and publicizing events, it was inevitable that it would soon be used for satirical events -- just as the broad adoption of social media profiles by public officials and agencies quickly led to satirical social media profiles of public officials and agencies.¹

¹ <https://www.nytimes.com/2015/09/05/us/peoria-settles-suit-over-parody-twitter-account-that-mocked-mayor.html> (noting satirical Twitter accounts for the mayors of New York, Toronto and Peoria, Illinois). *See also* <https://twitter.com/MayorOfLAPD> (parody account for Los Angeles Mayor Eric



Facebook Events was first launched in 2005 as “My Parties,” but became a more widespread phenomenon when the feature was updated in 2015 to allow hosts to invite guests who are not their Facebook friends, to promote the event both on and off Facebook, and to allow users to search events by areas of interest.²

Facetious events, including those supposedly taking place in actual locations, became so commonplace and popular that by December 2015, one journalist had decided that “Fake Facebook Events Are The Best Thing On The Internet Right Now.”³ By 2016, they were widespread in Facebook users’ news feeds.⁴ And over

Garcetti). As part of settling the lawsuit based on the fake Peoria Mayor twitter account, the city issued a directive “confirming its recognition that the state’s false personation of a public official statute does not apply to online parodies or satires of public officials, which cannot, by themselves be the basis of a criminal investigation, arrest, or prosecution.”

http://www.peoriagov.org/content/uploads/2015/09/Daniel-Settlement_1441226671_add.pdf

² <https://www.wired.com/2015/11/inside-facebook-events-updates/>

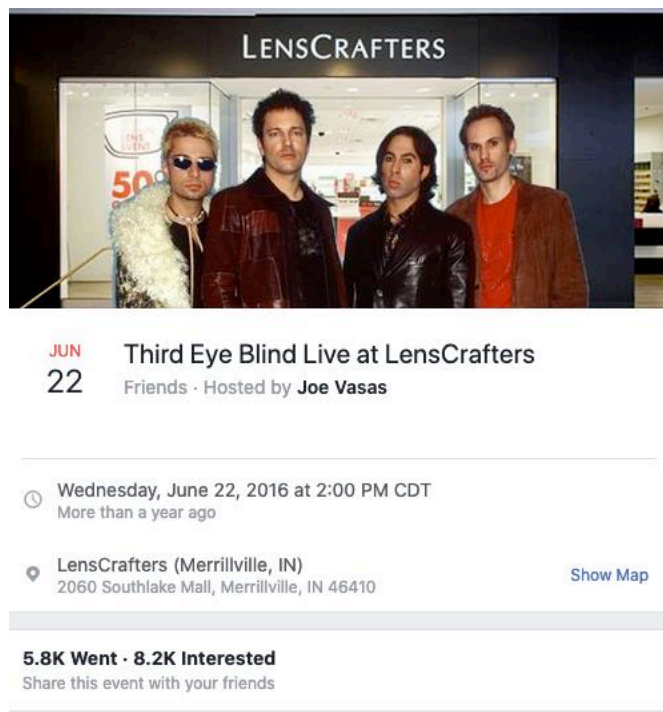
³ Krithika Varagur, *Fake Facebook Events Are The Best Thing On The Internet Right Now*, Huffington Post (Dec. 2, 2015), https://www.huffpost.com/entry/fake-facebook-events_n_565f0d77e4b079b2818cae4d

⁴ Tom Hawking, “What’s With All Those Fake Facebook Events in Your Feed of Late?”, Flavorwire (May 16, 2016) <https://www.flavorwire.com/576462/whats-with-all-those-fake-facebook-events-in-your-feed-of-late>; “Fake Facebook Events Are Trending and Are Absolutely Hilarious” <https://www.magneticmag.com/2016/05/fake-facebook-events-are-trending-and-are-absolutely-hilarious/>

time, these fake events developed their own particular brand of humor. For example, users created, a “phenom”⁵ of satirical events focused on events claiming that famous musical acts would be performing at mundane local venues: Drake performing at a Hooters,⁶ Home Depot, and Cheesecake Factory,⁷



Third Eye Blind at a Lenscrafters,⁸



⁵ <https://www.flavorwire.com/576462/whats-with-all-those-fake-facebook-events-in-your-feed-of-late>

⁶ <https://www.flavorwire.com/576462/whats-with-all-those-fake-facebook-events-in-your-feed-of-late>

⁷ <https://www.facebook.com/events/1698541877066068/>

⁸ <https://www.facebook.com/events/233373233694754/>

and several musical artists named “Tom” (Waits, Petty, Jones and Thomas Dolby) performing at Tommy’s Burgers.⁹ The trend became so pronounced that it prompted an actual Facebook backlash event called “Rage Against the Fake Facebook Events (World Tour)¹⁰ for those who are “sick of their event page spammed up with fake events. This is our stand!”¹¹

Since that time, prank events have been used in a variety of situations, such as to lighten the stress and tension that accompanies an approaching natural disaster. Hurricane Florence in 2018, spawned several such satirical events.¹² A musical instrument store in Cary, North Carolina “hosted” a pretend “Blow Your Saxophone at Hurricane Florence” event on September 18, 2018.¹³ Another user created a “Tell Hurricane Florence to Stop” event, scheduled for the “Atlantic Ocean.”¹⁴ There were also events to “Boycott Hurricane Florence,”¹⁵ “Take Hurricane Florence and PUSH it Somewhere ELSE!,”¹⁶ “Bark at Hurricane Florence So It Will Go Away,”¹⁷ “Yell ‘Fake News’ At Hurricane Florence,”¹⁸ and, combining social media activities, “Angry Tweet at Hurricane Florence.”¹⁹

⁹ <https://www.facebook.com/events/574028952765480/>

¹⁰ <https://www.facebook.com/events/1270742512953434/>

¹¹ <https://www.flavorwire.com/576462/whats-with-all-those-fake-facebook-events-in-your-feed-of-late>

¹² <https://www.indystar.com/story/news/2018/09/13/hurricane-florence-facebook-events-joke-serious-storm/1289220002/>

¹³ <https://www.facebook.com/events/1870483396379712/>

¹⁴ <https://www.facebook.com/events/281318049135669/>

¹⁵ <https://www.facebook.com/events/2139509489637728/>

¹⁶ <https://www.facebook.com/events/275793246369728/>

¹⁷ <https://www.facebook.com/events/251919005665775/>

¹⁸ <https://www.facebook.com/events/416370705558978/>

¹⁹ <https://www.facebook.com/events/247782789235811/>



SEP 13 Blow Your Saxophone at Hurricane Florence

Public · Event · by Leachford Music

Interested

Invite

Sep 13, 2018 at 6:00 PM – Sep 15, 2018 at 11:00 PM EDT

More than a year ago

Cary, North Carolina



SEP 13 Boycott Hurricane Florence

Public · Hosted by Gabe Gravini

Thursday, September 13, 2018 at 1:00 PM EDT

More than a year ago

Prank and satirical events are commonly used as a form of protest and to begin public discussion over controversial subjects, often times using real locations. This summer, a satirical event was created to protest the cancellation of a July 4th fireworks celebration due to COVID-19.²⁰ A local Atlanta comedian commented on

²⁰ The users of a satire/parody account for the City of Sheffield Lake, Ohio, created the “Shopping Center Fireworks (CAN’T STOP US ALL!!!)” event “purely to bring attention to this issue and maybe just maybe get the firework ban lifted. All we want is to be able to celebrate this year the same way every other American does. We urgently need your help with the holiday fastly approaching so please share to spread our voice! We must be heard!” The event page also contained the disclaimer “We do not condone breaking the law. This page and its admins are not liable for the actions of its followers. We created this event purely for fun in these crazy times. If you take this event seriously and discharge illegal fireworks we will not be held responsible for your actions. Thanks and we hope everyone has a safe and enjoyable 4th of July.” It was also tagged as “Comedy.”
<https://www.facebook.com/events/2752625811532608/>

the controversy surrounding Confederate monuments by creating the “Stone Mountain Implosion” event on his parody “City of Atlanta” Facebook page – the event was scheduled for 5 minutes on August 5, 2018 – and the comments posted to the event page reflected much of the political division surrounding the issue.²¹



Although the content and purpose of fake Facebook events are diverse, the examples above contain a common thread of using absurdity, juxtaposition, or extreme hyperbole for comedic effect.

Merrifield’s events at issue in this case draw on these conventions. Specifically, the satirical events Merrifield created that have led to this lawsuit are themselves referencing and commenting upon a genre of fake events accounts, those purporting to be associated with “Antifa.”²² According to one report, many of these

²¹ <http://www.atlantaloop.com/satirical-stone-mountain-implosion-event-makes-people-angry-on-the-internet/> ; <https://www.ajc.com/news/local/facebook-group-jokes-stone-mountain-confederate-monument-will-implode/37Le8Gox5B4gWKfqdh1KIP/>

²² A running account, claiming to be last updated in September 2020, listed 421 such accounts, many of which had been suspended. <https://medium.com/americanodyssey/list-of-fake-antifa-accounts-on-social-media-trolls-1df2e7348d7c>

accounts are created “as a way to mock Antifa, and to discredit it by tweeting out hoaxes and offensive comments.”²³

By creating his own absurdly fake versions of these abundant fake Antifa events, Merrifield used satire and parody for their core purposes, “to discredit and discourage an original author.” See *Fisher v. Dees*, 794 F.2d 432, 437–38 (9th Cir. 1986), and to “provide[] assurance that public debate will not suffer for lack of ‘imaginative expression’ or the ‘rhetorical hyperbole’ which has traditionally added much to the discourse of our Nation.” *Mink v. Knox*, 613 F.3d 995, 1005 (10th Cir. 2010) (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

II. FACETIOUS SPEECH IS FULLY PROTECTED BY THE FIRST AMENDMENT

These farcical, fake, phony, mock, parodic, satirical, etc. Facebook events fit neatly within the types of facetious speech that in other media have been granted full First Amendment protection.

Facetious speech—“such as parody, fantasy, rhetorical hyperbole, and imaginative expressions, “that cannot ‘reasonably [be] interpreted as stating actual facts,”” *Mink*, 613 F.3d at 1005—is firmly entrenched in both the First Amendment and American culture, in part because such speech may be entertainment and political commentary, and often both.

This country has a “long and storied tradition of satiric comment” that has “enhanced political debate,” and allows the public to distinguish those “who take themselves seriously and those whose self-perspective is somewhat more relaxed.” *New Times, Inc. v. Isaacks*, 146 S.W.3d 144, 151 (Tex. 2004). “Satire is particularly relevant to political debate because it tears down facades, deflates stuffed shirts, and

²³ Craig Silverman “Fake Antifa Twitter Accounts Are Trolling People And Spreading Misinformation”, BuzzFeed News (May 30, 2017) <https://www.buzzfeednews.com/article/craigsilverman/fake-antifa-twitter-accounts#.lbXB4B5YO>

unmasks hypocrisy. By cutting through the constraints imposed by pomp and ceremony, it is a form of irreverence as welcome as fresh air.” *Falwell v. Flynt*, 805 F.2d 484, 487 (4th Cir.1986) (Wilkinson, J., dissenting), *rev'd sub nom. Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 99 L.Ed.2d 41 (1988). . . . Indeed, “[n]othing is more thoroughly democratic than to have the high-and-mighty lampooned and spoofed.” *Id.*

Facetious speech was well established historically as an art form when this nation was founded, and as such, has always been part of our constitutional heritage.

Parody as an art form may be traced at least as far back as Aristophanes' play, *The Frogs*, which spoofed the earlier plays of Aeschylus and Euripides. Its essence is the *close imitation* to some original which at the same time successfully conveys a message that it is not the original. . . . The “classic role of comedy” as seen by philosophers such as Cicero was moral uplift (of all things). Its purpose was to “correct the irrational and immoral conduct of the foolish” by showing them how ridiculous were their ways. While comedy hardly needs justification in an age which accepts laughter as something good in its own right, something of this ancient wisdom animates the legal protection afforded comedy under the First Amendment.

Patrick v. Superior Court (Torres), 27 Cal. Rptr. 2d 883, 885–86 (Cal. App. 1994).

“[F]rom the early cartoon portraying George Washington as an ass down to the present day, ... satirical cartoons have played a prominent role in public and political debate.” *Hustler Magazine v. Falwell*, 485 U.S. 46, 54 (1988).

In numerous contexts, courts throughout the country have repeatedly found that various forms of facetious speech are fully protected by the First Amendment. In analyzing trademark infringement, courts have recognized that “because parody is a form of social and literary criticism, it has socially significant value as free speech under the First Amendment,” *Mattel Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 800 (9th Cir. 2003) (internal quotation marks and citation omitted), implicating the First Amendment’s “core concerns.” *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 972 (10th Cir. 1996). *The New Times*

case, cited above, was a defamation case. The Supreme Court’s famous *Hustler v. Falwell* case, also cited above, applied the same principles to intentional infliction of emotional distress. In *Matter of Callaghan*, 238 W. Va. 495, 522 (2017), the court applied the same principles in deciding whether to discipline a judge for parodic statements made in a campaign flyer.

Facetious speech remains protected, however, even if it is for “sheer entertainment—presumably neutral as to any political or even social views.” *Berger v. Battaglia*, 779 F.2d 992, 998 (4th Cir. 1985). It need not pertain to either a public figure or a matter of public concern. *Mink*, 613 F.3d at 1006; *Levinsky’s Inc., v. Walmart Stores, Inc.*, 127 F.3d 122, 126 (1st Cir. 1997) (“The First Amendment’s shielding of figurative language reflects the reality that exaggeration and non-literal commentary have become an integral part of social discourse. . . . Hyperbole is very much the coin of the modern realm.”).

Facetious speech also remains protected even if it is offensive. *See Hustler*, 485 U.S. at 54. In the copyright context, the Supreme Court has made clear that “[w]hether . . . parody is in good taste or bad does not and should not matter to fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 582 (1994). The Ninth Circuit similarly recognized that even “[d]estructive’ parodies play an important role in social and literary criticism.” *Fisher v. Dees*, 794 F.2d 432, 437–38 (9th Cir. 1986). *See also L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 27, 34 (1st Cir. 1987) (First Amendment protected a pornographic magazine’s parody of the wholesome and outdoorsy L.L. Bean catalog against infringement, dilution, and unfair competition claims).

The Sixth Circuit, in the similar context of a facetious Facebook account, recently confirmed that “parody, like all protected speech, need not be high-minded or respectful to find safe haven under the First Amendment.” *Novak v. City of Parma*, 932 F.3d 421, 428 (6th Cir. 2019). And the court confirmed that facetious speech

remains protected even if it designed to momentarily deceive the reasonable person. “Indeed, the genius of parody is that it *comes* close enough to reality to spark a moment of doubt in the reader’s mind before she realizes the joke.” *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019). A parody “need not spoil its own punchline by declaring itself a parody.” *Id.* at 428.²⁴

Novak involved a Facebook account mocking and imitating the style of the official account of the Parma (OH) Police Department. *Id.* at 424. In the twelve hours the page was up, Novak shared posts for a “Pedophile Reform Event,” at which pedophiles would receive honorary police commissions, and issued an apology from the department for “neglecting to inform the public about an armed white male who robbed a Subway sandwich shop,” while promising to bring to justice an “African American woman” who was loitering outside the Subway during the robbery. *Id.* at 424-25. The page, which had attracted about 100 followers, was perceived by some to be humorous and by others to be confusing and anger-inducing. *Id.* at 425. The actual Parma Police Department had to field twelve minutes of calls from concerned citizens. *Id.*²⁵ Ultimately, the police investigated Novak for unlawfully impairing the department’s functions and on that basis searched his home and arrested him. Novak

²⁴ As the U.S. Supreme Court noted, “Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived).” *Campbell*, 510 U.S. at 583 n.17. *See also Isaacks*, 146 S.W.3d at 157-59.

²⁵ The page also soon “became a platform for a wide range of citizens to air their grievances about the Department.” “Once the officers got wind of Novak’s page, they “all stopped what [they] were doing to take a look at it, and a couple of [them] tried to figure out who did it.” One officer said they “just wanted it down.” They took several steps to make that happen. A Facebook battle ensued. First, the department posted a warning on its official Facebook page. The warning alerted the public to the fake page and assured them that the matter was “currently being investigated.” Then Novak reposted the exact same warning on his own page. He claims he did this to “deepen his satire.” For the same reason, Novak deleted “pedantic comments” on his page explaining that the page was fake, as these “clumsy explication[s]” only “belabored the joke.”” *Id.* at 425 (internal citations omitted).

was acquitted at trial and then sued the department and the arresting officers for violating his constitutional rights. *Id.* at 425-26.

The Sixth Circuit addressed the parodic nature of the fake Facebook account in evaluating whether the officers were entitled to qualified immunity on Novak's claim that they retaliated against his exercise of freedom of speech. After acknowledging our legal system's time-honored history of protecting facetious speech under the First Amendment, the court found that Novak had sufficiently alleged that his account was protected speech.²⁶

III. FACETIOUS SPEECH CANNOT BE THE BASIS OF INCITEMENT OR ANY LIABILITY THAT REQUIRES AN INTENT TO HARM

Although there are situations in which facetious speech may be actionable, it cannot support a legal claim that requires an affirmative intent to reach a harmful result.²⁷ Under the the First Amendment, “an actual subjective intent to produce future criminal consequences is required to transform ‘protected’ into ‘unprotected’ and legitimately proscribable speech.” *City of Baton Rouge v. Ross*, 654 So.2d 1311, 1337 (1995). As this Court has held, speech is not incitement unless it was “directed or intended toward the goal of producing imminent lawless conduct,” and does not extend to that speech which unintentionally inspires others to such imminent lawlessness. *Byers v. Edmonson*, 826 So. 2d 551, 555-56 (La. Ct. App. 2002). Like the copycat cases addressed in *Byers*, facetious speech does not support any permissible inference that the speaker intended to assist criminal conduct. *Id.* at 556.

²⁶ The Sixth Circuit thus denied the government defendants' motion to dismiss. Although the Sixth Circuit believed the ultimate question of whether Novak's parody was protected speech was a question of fact it need not resolve on a motion to dismiss, *id.* at 428, this Court has held that whether speech is protected by the First Amendment is a question of law. *Byers v Edmonson*, 826 So. 2d 551, 555 (La. Ct. App. 2002)


²⁷ This argument expands upon Merrifield's similar argument presented at pages 25-27 of his Original Application and pages 8-9 of his Reply Brief.

CONCLUSION

For the foregoing reasons, amicus respectfully request that the Court acknowledge that Mr. Merrifield's posts are entitled to full First Amendment protection and grant the supervisory writ.

Respectfully submitted,

Dated: January 8, 2021

By: 
David Greene
Electronic Frontier Foundation
815 Eddy Street
San Francisco, CA 94109
Tel.: (415) 436-9333
Fax: (415) 436-9993
Email: davidg@eff.org
pro hac vice admission pending

Lester J. Gauthier, Jr./vp
Lester J. Gauthier, Jr.
LA. Bar Roll No. 05982
Law Offices of Lester J. Gauthier
P. O. Box 3371
Lafayette, LA 70502
Phone: 337-264-1783
Fax: 337-264-1869
Email: legauth@bellsouth.net

*Counsel for Amicus Curiae
Electronic Frontier Foundation*