No. 07-1037

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID M. RUTTENBERG, et al.,

Plaintiffs-Appellants,

v.

FRANK JONES, et al.,

Defendants-Appellees,

On Appeal from the United States District Court
for the Eastern District of Virginia

Brief of *Amicus Curiae* American Civil Liberties Union of Virginia, Inc., in Support of the Appellants

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Virginia ("ACLU of Virginia"), is the Virginia affiliate of the American Civil Liberties Union, and has approximately 10,000 members in the Commonwealth of Virginia. Its mission is to protect the individual rights of Virginians under the federal and state constitutions and civil rights statutes. Since its founding, the ACLU of Virginia has been a forceful opponent of unreasonable government searches and seizures, and an equally forceful advocate of the freedom of speech.

QUESTIONS PRESENTED

Amicus addresses the following two issues:

1. Whether the plaintiffs stated a claim of unreasonable search and seizure under the Fourth Amendment?

2. Whether the plaintiffs stated a claim of retaliation for constitutionally protected speech under the First Amendment?

STATEMENT OF THE CASE

Amicus relies on the Statement of the Case set forth in the brief of Appellants.

STATEMENT OF FACTS

Amicus relies on the statement of facts set forth in the brief of Appellants, but highlights the following facts[1] relevant to this Brief.

Plaintiff David Ruttenberg is the general manager of the Rack 'N' Roll Billiard Club ("RNR") in Manassas Park, Virginia. In the fall of 2001, Ruttenberg heard from an RNR waitress that defendant L, a detective in the Manassas Park Police Department, had said that Ruttenberg was under investigation for cocaine use and distribution. When Ruttenberg called Lugo to the club to confront him with this information, Lugo took the waitress outside, reduced her to tears with threats, and demanded that she retract her statement to Ruttenberg.

Ruttenberg called Lugo's superior officer to complain about Lugo's threats and intimidation. In retaliation for Ruttenberg's complaint, Lugo engaged in a course of conduct spanning several years that was designed to drive RNR out of business, and ultimately led to the loss of RNR's ABC license and conditional use permit. This course of conduct included spreading false information about RNR, fabricating evidence, and engineering drug transactions at the club.

[1] Because this is an appeal from a dismissal under Fed. R. Civ. P. 12(b)(6), the Court must accept as true all allegations in the complaint. *See, e.g., Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1062 (4th Cir. 1984). Accordingly, the facts set forth herein are drawn from the complaint.

These activities culminated in a raid on RNR in June 2004. Lugo, along with other members of the Narcotics Task Force of Manassas Park, attempted to obtain a warrant to search RNR, but failed to establish probable cause. Instead, the defendants recruited agents of the Department of Alcoholic Beverage Control (ABC) to participate in the search, in order to disguise their search for law enforcement purposes as an administrative inspection. On June 2, 2004, the Narcotics Task Force, led by Lugo, raided RNR with more than 50 police and law enforcement personnel, including heavily armed SWAT team members. Only six or seven of these officers were ABC agents. When Ruttenberg demanded a search warrant, he was told that a warrant was not required because it was an ABC inspection.

During the raid, officers searched David Ruttenberg's private office, even though it was not covered by RNR's ABC license and therefore not subject to administrative search. Two bottles of vodka were seized from the office, although they did not constitute an ABC violation.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' FOURTH AMENDMENT CLAIM

The district court dismissed the plaintiffs' Fourth Amendment claim on qualified immunity grounds. In examining defendants' claim of qualified immunity, the Court must determine whether "the facts alleged show the

officer's conduct violated a constitutional right," and if so, "whether the right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Here, the complaint alleges that the defendants conducted a warrantless law enforcement search under the guise of an administrative ABC inspection. Moreover, the scope of the search was well beyond what is permissible for an administrative inspection. These allegations constitute a violation of the plaintiffs' clearly established Fourth Amendment rights.

A. The Defendants' Use of an Administrative Search as a Pretext for a Warrantless Law Enforcement Search Violated the Fourth Amendment.

"The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of th[e Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 528 (1967). The most fundamental Fourth Amendment protection is the requirement that, subject to narrowly defined exceptions, the government may not search private property without a warrant. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001); *Michigan v. Clifford*, 464 U.S. 287, 291-292 (1984); *Johnson v. United States*, 333 U.S. 10 (1948).

One of these narrow exceptions is that closely regulated industries may be subject to reasonable administrative searches for the purpose of

enforcement of public regulatory interests. *See New York v. Burger*, 482 U.S. 691, 716 (1987). Statutes allowing warrantless administrative searches must be both "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes," and "carefully limited in time, place, and scope," to focus the discretion of inspectors. *Id*. at 703 (quoting, respectively, *Donovan v. Dewey,* 452 U.S. 594, 600 (1981), *United States v. Biswell,* 406 U.S. 311, 315 (1972)). Whether the objective of the search is to enforce an accepted regulatory scheme or to gather evidence of criminal activity is one of the factors in determining if a nonconsensual, warrantless entry was constitutional. *See Clifford*, 464 U.S. at 292.

Although an administrative search is not invalid merely because it may uncover evidence of criminal wrongdoing, the Fourth Amendment prohibits police from utilizing an administrative action only as a pretext for an investigative search for criminal evidence. *See Burger,* 482 U.S. at 716 (upholding administrative search where there was "no reason to believe that the instant inspection was actually a 'pretext' for obtaining evidence of respondent's violation of the penal laws"); *Clifford*, 464 U.S. at 293 (administrative warrant may not be used for purposes of criminal evidence

gathering); *Abel v. United States*, 362 U.S. 217, 226 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance by the courts"). *See also Swint v. City of Wadley, Ala*., 51 F.3d 988, 998 (11th Cir. 1995) ("While legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment, pretextual administrative searches do"); *United States. v. Johnson*, 994 F.2d 740, 742 (10th Cir. 1993) ("an administrative inspection may not be used as a pretext solely to gather evidence of criminal activity") (internal quotation marks and citation omitted).

Moreover, as this Court has explained, the administrative search process may not be used to unjustifiably target individuals or business toward which the police have personal animus.

> It is part of the settled law of administrative searches that they may "not be directed at particular individuals." If it were otherwise, no enterprise would enjoy constitutional recourse from the constable's whim. The Supreme Court has emphasized that administrative search programs must be carried out in accordance with "specific neutral criteria."

Turner v. Dammon, 848 F.2d 440, 446 (4th Cir. 1988) (internal citations omitted) (abrogated on other grounds by *Johnson v. Jones*, 515 U.S. 304 (1995)).

Here, the June 2, 2004 raid of RNR was an unconstitutional pretextual search: an investigative search under the guise of an administrative one. The police had tried and failed to obtain a search warrant for the premises, and so sought to search RNR under cover of an ABC regulatory action. By conducting what was actually a law enforcement search without a warrant, the police violated the Fourth Amendment.

The allegations in the complaint amply support plaintiffs' contention that the "administrative" search was in fact a warrantless law enforcement search. The lead detective had a personal vendetta against David Ruttenberg; the police used an unnecessary and overwhelming show of force in executing the raid; and RNR had never before been subject to sanction. Furthermore, the scope of the search exceeded accepted administrative procedures in extending beyond the licensed premises to a seizure of RNR patrons and search David Ruttenberg's office. Taken together with the fact that the police had been unable to establish probable cause for a warrant, these allegations demonstrate the pretextual nature of the administrative search. Not only was the supposed administrative search a pretext for an investigative search, it was a pretext for harassment and intimidation aimed at harming plaintiffs and their business.

Faced with similar facts, the Eleventh Circuit found that an administrative search had been unreasonably used as pretext for criminal investigation. *Swint v. City of Wadley*, 51 F.3d 988 (11th Cir. 1995). There, as here, the show of force was significantly greater than any previous regulatory action at that location, and patrons who had not subjected themselves to a regulatory scheme were also detained. *Swint*, 51 F.3d 988 at 998-999; *see also Crosby v. Paulk*, 187 F.3d 1339, 1349, n.14 (11th Cir. 1999) (distinguishing *Swint*). Moreover, as in the present case, the impetus for police intervention was claims of narcotics related activity, without any evidence of a violation of a regulatory scheme for alcohol. *Swint*, 51 F.3d 988 at 998-999.

By failing to recognize that the so-called administrative search was only a pretext for a warrantless law enforcement search, the district court's analysis repeatedly misses the point. For example, the court simply ignores the allegation that the police did not instigate an "administrative search" until they failed to establish sufficient probable cause for a warrant. Next, the court observes that "there is no constitutional significance in the fact that police officers, rather than 'administrative' agents are permitted to conduct the administrative inspection" *Ruttenberg v. Jones*, 464 F. Supp. 2d 536, 549 (E.D. Va. 2006) (internal quotation marks and citations omitted),

without acknowledging the implausibility that fifty armed police officers, including SWAT team members, would be needed to carry out a mere administrative search. Similarly, the court dismissed the allegations that RNR patrons were also subject to search, on the grounds that the plaintiffs may not vicariously assert the rights of their plaintiffs. *Id.* at 449-50. But the significance patron search is that, again, it supports the claim that this was no mere administrative search.

The district court apparently found it irrelevant that the sole motive for the purported administrative search was law enforcement, but the only authority it cites for this view is an unpublished, *per curiam* opinion from the Sixth Circuit. *Ruttenberg v. Jones*, 464 F. Supp. 2d 536, 549 (D. Va. 2006) (quoting *Hamilton v. Lokuta*, No. 92-2361, 1993 U.S. App. LEXIS 29172 at *7 (6th Cir. 1993)). The court simply ignored the Supreme Court's repeated admonitions that it is unreasonable to use an administrative search as pretext for the discovery of criminal evidence is unreasonable. *See, e.g., Burger,* 482 U.S. at 716; *Clifford*, 464 U.S. at 291-292; *Michigan v. Tyler,* 436 U.S. 499, 507-509 (1978).

Moreover, the district court's repeated reliance on the unpublished decision in *Cottom v. Town of Seven Devils,* 30 Fed. Appx. 230 (4th Cir. 2002) is inapposite. *See Ruttenberg*, 464 F. Supp. 2d at 549-550, n.9.

Unlike RNR, the premises searched in *Cottom* "had been plagued by community complaints regarding the rowdy and drunken behavior of attendees. Such a history of violations and complaints is a legitimate ground for increased police attention." 30 Fed. Appx. at 237 (citing *Turner*, 848 F.2d 440 at 447). This is in sharp contrast to the situation here, where the only "history of violations" was the defendants' own manufactured drug deals.

The facts here are more akin to *Turner*, where this Court held that the police had abused administrative search procedures to target a particular bar. As in *Turner*, the searching officers in this case had no evidence of heightened criminal activity or other reason to focus specifically on the premises searched. 848 F.2d at 445. At the time of the raid, RNR had never been previously sanctioned criminally or administratively, and the drug transactions that were supposed to be the basis for the search were completely manufactured by the police. As in *Turner*:

> It is this utter absence of objective justification… that raises constitutional concerns. The two officers offer no basis from which any reviewing authority can gauge the reasonableness of their actions. That, of course, is the very definition of official lawlessness and the very behavior that the Fourth Amendment, by its express terms, forbids.

Id.

The district court distinguished *Turner* on the grounds that that case involved over one hundred administrative searches. *See Ruttenberg*, 464 F. Supp. 2d at 550, n.9. But a citizen should not be required to endure countless Fourth Amendment violations before being allowed any recourse. The significance of the sheer number of searches in *Turner* was as evidence that the administrative searches took place not as part of a neutral scheme, but in order to harass a particular business. Here, while only one search is at issue, plaintiffs allege plenty of other facts to demonstrate that the supposed administrative search was a personal attack and not neutrally applied as required by law.

Given plaintiffs' allegations of police intimidation and harassment, manufacture of drug evidence, and attempt and failure to acquire a particularized search warrant, there can be no doubt that the June 2, 2004 raid on RNR was and pretextual administrative search in violation of the Fourth Amendment. Each of plaintiffs' allegations point to an improper basis for the raid, and each alone should be enough to find a constitutional violation; taken in concert, no other conclusion can be reached.

B. The Administrative Search was Unconstitutional in its Scope.

Even if the administrative search were not a mere pretext for a warrantless law enforcement search, it would still be unconstitutional

because of its exceedingly broad scope. "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation." *Terry v. Ohio*, 392 U.S. 1, 28-29 (1968). "[A] properly authorized official search is limited by the particular terms of its authorization." *Walter v. United States*, 447 U.S. 649, 657 (U.S. 1980). The officer conducting a search must ensure that the search is valid and appropriate in both its foundation and its scope. *See Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

The ABC regulations governing administrative inspections imposes limitations on those carrying out the inspection. ABC special agents are allowed access "for the purpose of examining and inspecting," while other law enforcement personnel are permitted only "the purpose of observation." 3 VAC § 5-50-70(B),(C). Nowhere does the regulation authorize the holding of patrons at gunpoint against their will or seizing non-contraband private property, as happened here. The overwhelming show of force applied here went well beyond what is authorized by the administrative scheme.

The search also exceeded its lawful scope by extending to David Ruttenberg's private office, which is not a place where "alcoholic beverages are… stored, offered for sale or sold." *See* 3 VAC § 5-50-70(B). Testimony by ABC Agent John Loftis, while under oath at an ABC hearing, confirms that the office was not legally searched as it was beyond the area licensed by ABC. If the office is not part of the licensed premises, it cannot be subject to an administrative search. [2]

In sum, the raid exceeded the bounds of any reasonable administrative search and thus required a valid search warrant. Absent a warrant, the search violated the Fourth Amendment.

C. The Search Violated Plaintiffs' Clearly Established Rights.

To find a right clearly established, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). However, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The Fourth Amendment's prohibition on using administrative searches as pretext for law enforcement searches is a clearly

[2] The district court apparently believed that plaintiff's private office was within the scope of a reasonable administrative search because two bottles of vodka happened to be found there. *See Ruttenberg*, 464 F. Supp. 2d at 549. This reasoning ignores the fact that the vodka in the office was not intended to be sold on the premises, as well as the ABC agent's admission that the office was not part of the licensed premises.

established standard that should be known by any objectively reasonable police officer. Decades of Supreme Court jurisprudence have confirmed beyond doubt the unconstitutional nature of defendants' actions.

No reasonable officer would believe it acceptable to organize an administrative inspection to search for criminal evidence after he had been unable to show the requisite probable cause for obtaining a particularized search warrant. *See, e.g., Burger,* 482 U.S. at 716 (1987); *Clifford*, 464 U.S. at 291-292 (1984); *Abel,* 362 U.S. at 226 (1960). Even if he believed he was properly operating to enforce regulations, a reasonable officer would know that the scope and force of such a search were limited by the administrative scheme. *See, e.g., Colonnade Catering Corp.*, 397 U.S. at 77 (1970); *Terry*, 392 U.S. at 28-29 (1968); *Camara*, 387 U.S. at 528 (1967). Nor would such an officer believe he was permitted to seize individuals or property without a warrant and outside the administrative scheme. *See, e.g., Steagald v. United States*, 451 U.S. 204 (1981); *Payton v. New York*, 445 U.S. 573 (1980); *Ybarra v. Illinois*, 444 U.S. 85 (1979); *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1977).

On similar facts, this Court has previously found officers not entitled to qualified immunity. In *Turner v. Dammon*, 848 F.2d 440, 447 (4th Cir. 1988), the Court noted that "[t]he basic standards governing administrative

searches condemn the baseless isolation of a single establishment for grossly disproportionate intrusions," and that [t]he cases upholding warrantless administrative searches clearly establish that these rules require certainty, regularity, and neutrality in the conduct of the searches." 848 F.2d at 446-47. As in *Turner*, there was so little objective basis for the officers' behavior in this case that no reasonable officer would have felt justified doing the same. *Id.* The *Swint* court similarly rejected claims of qualified immunity on facts nearly identical to those at bar – finding the prohibition against pretextual administrative searches to be clearly established over a decade ago. 51 F.3d at 1000. Here, both the inquiry and result should be the same.

The district court erroneously held that defendants' here were entitled to qualified immunity because the reasonableness standards for administrative searches represent an unsettled area of Fourth Amendment law. *Ruttenberg*, 464 F. Supp. 2d at 550. However, the pretextual raid, the overbroad search, the exceptional show of force, the warrantless seizure of RNR patrons, the warrantless seizure of private property, and the warrantless albeit temporary seizure of David Ruttenberg are all examples of objectively unreasonable actions taken by defendants in violation of clearly established law.

II. THE PLAINTIFFS STATED A FIRST AMENDMENT RETALIATION CLAIM.

The First Amendment guarantees of freedom of speech and to petition the government are two of the most basic rights constitutionally promised to all citizens of our republic. As part and parcel of the First Amendment, the government may not unduly influence citizens to hold back exercise of those rights through intimidation or harassment, nor may the government seek to punish individuals solely for the lawful exercise of their constitutional rights. "Retaliation, though it is not expressly referred to in the Constitution, is nonetheless actionable because retaliatory actions may tend to chill individuals' exercise of constitutional rights." *American Civil Liberties Union, Inc. v. Wicomico County*, 999 F.2d 780, 785 (4th Cir. 1993) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

Plaintiffs in this case properly alleged that they the victims of government retaliation for constitutionally protected speech. Plaintiff David Ruttenberg made complaints about a Manassas Park detective to his superiors. His complaints went unaddressed and resulted not only in express threats made against him and his business but also a years-long course of retaliation by defendants. This illegal retaliation included, the fabrication of criminal evidence and the unlawful June 2, 2004 raid of RNR.

This Court has established the proper test to be applied in this context:

"First, the plaintiff must demonstrate that his or her speech was protected. Second, the plaintiff must demonstrate that the defendant's alleged retaliatory action adversely affected the plaintiff's constitutionally protected speech. Third, the plaintiff must demonstrate that a causal relationship exists between its speech and the defendant's retaliatory action." *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685-686 (4th Cir. 2000) (internal citations omitted).

As to the first prong of this analysis, the district court correctly acknowledged that David Ruttenberg engaged in constitutionally protected speech when he spoke out to police supervisors about the inappropriate behavior of their subordinates. *Ruttenberg*, 464 F. Supp. 2d at 547 (citing *City of Houston v. Hill*, 482, U.S. 451, 461 (1987)). As to the second prong, it is unquestionable that the prolonged campaign of harassment and intimidation by defendants adversely affected plaintiffs' ability to exercise their First Amendment rights. While "not every reaction made in response to an individual's exercise of his First Amendment right to free speech is actionable retaliation," the proper inquiry is "whether a similarly situated person of 'ordinary firmness' reasonably would be chilled by the government conduct in light of the circumstances presented in the particular case." *Suarez*, 202 F.3d at 685; *Baltimore Sun Co. v*, *Ehrlich*, 437 F.3d 410,

416 (4th Cir. 2006) (citing *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 499 (4th Cir.2005); *Wicomico County*, at 785). Here, plaintiffs did not suffer "no more than a *de minimis* inconvenience," but rather experienced harassment and cognizable constitutional violations in retaliation for the exercise of their First Amendment rights. *See id*. It defies logic to conclude that direct threats against person and property followed up by aggressive and illegal police action designed to drive the victim out of business would not have a chilling effect on the speech of a person of ordinary firmness.

It was on this second prong that district court rejected the plaintiffs' First Amendment claim. *Ruttenberg*, 464 F. Supp. 2d at 547. However, the court failed to ask whether a reasonable person would be *chilled* by the defendants' retaliatory course of conduct. Instead, the district court apparently demanded that the retaliatory action directly inhibited plaintiffs' First Amendment rights. *Id*. This simply is not the correct standard. As this Court has explained, "a plaintiff alleging retaliation [need not] show that the action taken in response to her exercise of constitutional rights independently deprives her of a constitutional right." *Wicomico County*, 999 F.2d 780 at 786, n.6. To mandate such a showing "would make a cause of

action for retaliation wholly redundant of the protections provided by the Constitution itself." *Id.*

While not addressed by the district court, the third prong of the retaliation analysis is easily satisfied as well. plaintiffs assert that their complaints to the police caused retaliatory action. Defendants had a vendetta against plaintiffs that was caused by plaintiffs' exercise of their right to free speech; defendant Lugo admitted as much in his express statements to and about David Ruttenberg. Immediately subsequent to plaintiff's exercise of First Amendment rights, what previously could have defendant Lugo and his cohorts engaged in a thorough retaliatory campaign.

After exercising their constitutional rights by complaining about unfair police treatment, plaintiffs experienced systematic retaliation by defendants that resulted in numerous harms, including a very real chilling effect upon their freedom of speech. Dismissal of plaintiffs' First Amendment claim was erroneous.

CONCLUSION

For the foregoing reasons, *amicus* respectfully requests the Court to reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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