IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

SAMUEL JOSEPH WURZELBACHER,	)	
	)	
Plaintiff,	)	Civil Action No.: 2:09-CV-162
	)	Judge Marbley
v.	)	Magistrate Judge King
	)	
HELEN JONES-KELLEY, et al.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Samuel Joseph Wurzelbacher, by counsel, respectfully submits this opposition to Defendants' Motion for Judgment on the Pleadings ("Defs.' Mot.").

I. INTRODUCTION

During last year's presidential campaign, Joe Wurzelbacher, a plumber living near Toledo, asked a question of a prominent politician. Shortly thereafter, high-ranking officials of the State of Ohio began rummaging through confidential state databases looking for sensitive information on this private citizen, who became known as "Joe the Plumber." A subsequent report by the Ohio Office of Inspector General confirmed that this investigation by Defendants had "no legitimate agency function or purpose" and constituted a "wrongful act."

As clearly set forth in the Complaint, these state officials – and active supporters of then-presidential candidate Barack Obama – targeted Mr. Wurzelbacher for investigation merely because of his exercise of a fundamental right – asking a question of a political candidate.

Defendants' actions violated 42 U.S.C. § 1983 as they are contrary to Mr. Wurzelbacher's rights under both the First and Fourteenth Amendments to the U.S. Constitution.

This action seeks to hold these state officials accountable for this abuse of their power, not just because of the significant harm inflicted on Mr. Wurzelbacher, but because it is important that private citizens do not have to worry whether their letter, phone call, or simple question to a political candidate will cause them to be targeted for investigation by their government. Mr. Wurzelbacher and all Ohioans should have the freedom to openly participate in their government without fearing reprisal from partisan government officials.

The facts alleged in the Complaint are more than sufficient to maintain these constitutional claims against Defendants. Accordingly, for the reasons set forth herein, Mr. Wurzelbacher respectfully requests that this Court deny Defendants' motion for judgment on the pleadings.

II. BACKGROUND

Mr. Wurzelbacher, a resident of the State of Ohio, served in and was trained by the U.S. Air Force as a plumber. (Compl. ¶ 3.) At the time of the events leading to this lawsuit, Mr. Wurzelbacher was employed by a small plumbing business near his home in the Toledo area. *Id.* As a result of the media attention Mr. Wurzelbacher subsequently has received, he has come to be widely known as "Joe the Plumber." *Id.*

On October 12, 2008, Mr. Wurzelbacher was in the front yard of his home throwing a football with his son, when then-presidential candidate Senator Barack Obama and his campaign entourage appeared on his street. (Compl. ¶ 7.) Mr. Wurzelbacher eventually joined the crowd and asked several questions of Senator Obama. *Id.*

Mr. Wurzelbacher's questions to Senator Obama involved the impact his tax plan would have on Mr. Wurzelbacher's desire to purchase his employer's plumbing business and whether Mr. Wurzelbacher would have to pay higher taxes. (Compl. ¶ 8.) Senator Obama's responses to Mr. Wurzelbacher's inquiries proved to be highly controversial, especially the following statement by Senator Obama:

> It's not that I want to punish your success; I just want to make sure that everybody who is behind you, that they've got a chance at success, too . . . . I think when you spread the wealth around, it's good for everybody.

(Compl. ¶ 9.) Mr. Wurzelbacher's questions to Senator Obama were recorded by the news media and the video was replayed afterward across the nation. *Id.* at 10.

Mr. Wurzelbacher then began receiving numerous requests from the media to speak about his views regarding Senator Obama. (Compl. ¶ 11.) For example, on October 14, 2008, Mr. Wurzelbacher expressed his views regarding Senator Obama during an interview on the Fox News program "Your World With Neil Cavuto." *Id.* In his media appearances, Mr. Wurzelbacher criticized Senator Obama's tax proposals for being intended to redistribute wealth and being tantamount to socialism. *Id.* at 12.

During the third presidential debate on October 15, 2008, Senator McCain criticized Senator Obama's views on wealth distribution and repeatedly referred to Mr. Wurzelbacher by the shorthand "Joe the Plumber." (Compl. ¶ 13.) Immediately following the debate, Mr. Wurzelbacher received and responded to numerous inquiries from the media. For example, Mr. Wurzelbacher expressed his opinions during an interview by Katie Couric of the "CBS Evening News" immediately after the conclusion of the debate on October 15, 2008. *Id.* at 14. Early the

next morning, Mr. Wurzelbacher also stated his views during an interview by Diane Sawyer on ABC's "Good Morning America." *Id.*

A. Defendants' Investigation of Mr. Wurzelbacher.

At all times relevant to this lawsuit, Defendants were the three highest-ranking officials in the Ohio Department of Job and Family Services ("ODJFS"). (Compl. ¶¶ 4-6.) Defendant Jones-Kelley was the Director of ODJFS and a member of the Governor's cabinet. *Id.* at 4. Defendant Fred Williams was Assistant Director of ODJFS and Defendant Doug Thompson was Deputy Director of Child Support within ODJFS. *Id.* at 5-6. The ODJFS administers a wide range of significant state programs that include child support enforcement, the Temporary Aid to Needy Families cash assistance program, and unemployment compensation. *Id.* at 16.

As a part of its administration of these programs, ODJFS maintains certain confidential databases that are unique to the agency. (Compl. ¶ 17.) These confidential databases include the Support Enforcement Tracking System ("SETS") for child support enforcement; the Client Registry Information System Enhanced ("CRIS-E"), which maintains records pertaining to the Temporary Aid to Needy Families program; and Ohio Job Insurance ("OJI"), which contains information about unemployment benefits. *Id.* at 18.

The confidentiality requirements governing SETS, CRIS-E, and OJI are primarily specified under Ohio Revised Code sections 5101.26 through 5101.30 and Ohio Administrative Code Chapter 5101, section 1-1-3. (Compl. ¶ 19.) ODJFS personnel are permitted to access these confidential databases only to the extent necessary to carry out official agency business and, prior to being permitted to access the databases, are trained in areas related to confidentiality, safeguarding guidelines, and security procedures. *Id.* at 20-21.

On October 16, 2008, four days after Mr. Wurzelbacher asked questions of Senator Obama and the day immediately following the third presidential debate, Defendants had a meeting at which they discussed "Joe the Plumber." (Compl. ¶ 22.) Following this meeting, Defendant Jones-Kelley authorized an investigation regarding Mr. Wurzelbacher on three confidential databases (SETS, CRIS-E, and OJI) for the purpose of retrieving information on Mr. Wurzelbacher. *Id.* at 23. Defendant Thompson then directed an agency employee to conduct an inquiry regarding Mr. Wurzelbacher in the confidential SETS database. *Id.* at 24. Defendant Williams subsequently directed an agency employee to investigate Mr. Wurzelbacher in the CRIS-E confidential database. *Id.* at 25. This agency employee then contacted another employee who searched the confidential OJI database. *Id.*

The investigation of Mr. Wurzelbacher in each of these confidential databases was conducted on or about October 16, 2008, four days after Mr. Wurzelbacher asked questions of Senator Obama and made various other subsequent public statements. (Compl. ¶ 26.) Moreover, Defendants' investigation was not related to any official agency business. *Id.* at 27. Instead, Defendants authorized and directed an investigation for the purpose of retrieving sensitive information on Mr. Wurzelbacher because of Mr. Wurzelbacher's questions to Senator Obama and Mr. Wurzelbacher's subsequent public statements. *Id.* at 28.

Defendants were supporters of Senator Obama's presidential campaign. (Compl. ¶ 29.) Defendant Jones-Kelley was an active supporter and fundraiser for Senator Obama's presidential campaign. *Id.* In addition to making at least a $2,500 contribution on her own behalf to Senator Obama's presidential campaign, Defendant Jones-Kelley provided names of numerous other

potential high-dollar donors to the Obama campaign and volunteered to help arrange a campaign event for Senator Obama's wife, Michelle. *Id.*

B. Investigation by the Office of the Inspector General.

A subsequent investigation into Defendants' conduct by the Office of the Ohio Inspector General ("OIG") found "no legitimate agency function or purpose for checking on [Mr. Wurzelbacher's] name through SETS, CRIS-E, and OJI or for authorizing these searches." (Compl. ¶ 30, citing Report of Investigation, File No. 2008299 (Nov. 20, 2008) at 10). The OIG concluded that Defendant "Jones-Kelley's decision to authorize searches of the ODJFS databases was not appropriate" and found "reasonable cause to conclude that Jones-Kelley committed a wrongful act by authorizing the searches on [Mr. Wurzelbacher]." *Id.* at 31-32.

The OIG also determined that Defendant Thompson, subsequent to the investigation he ordered of Mr. Wurzelbacher's name on the SETS confidential database, instructed an agency employee to send an e-mail to another agency official asserting that the search was for an agency purpose. (Compl. ¶ 33.) The OIG concluded that "this email orchestrated by [Defendant] Thompson was an attempt to deceive as there was no agency function or purpose for accessing [Mr. Wurzelbacher's] records." *Id.*

The OIG also determined that Defendant Jones-Kelley used state resources to engage in political activity on behalf of Senator Obama's presidential campaign, specifically the use of a state computer and e-mail account for political fundraising. (Compl. ¶ 34.) The OIG concluded that Defendant Jones-Kelley's political activities were "an inappropriate use of state resources" and constituted a "wrongful act." *Id.* at 35.

Following the issuance of the OIG report, Defendants were suspended from their positions by Ohio Governor Ted Strickland. (Compl. ¶ 36.) Defendants Jones-Kelley and Thompson reportedly were placed on unpaid suspension for their role in the investigation of Mr. Wurzelbacher. Defendant Williams also reportedly was suspended without pay for one week. *Id.*

Defendant Jones-Kelley reportedly resigned her position prior to the end of her suspension. (Compl. ¶ 37.) Defendant Williams reportedly resigned effective January 31, 2009. *Id.* Defendant Thompson reportedly was terminated from his position prior to the end of his suspension. *Id.*

III. STANDARD OF REVIEW

The standard of review applicable to a motion for judgment on the pleadings under Fed. R. Civ. Proc. 12(c) is the same as a motion to dismiss under Rule 12(b)(6). *See Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir. 1999). When ruling on a defendant's motion to dismiss, the court must accept as true all of the allegations contained in a complaint and "then determine whether they plausibly give rise to an entitlement of relief." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1940 (2009). As the Supreme Court recently held, to survive a Rule 12(b)(6) motion to dismiss, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and have "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Under *Twombly*'s construction of Rule 8 of the Federal Rules of Civil Procedure, a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

Under this standard, Mr. Wurzelbacher has pled sufficient facts from which the Court can infer that Defendants retaliated against Mr. Wurzelbacher contrary to his rights under the First Amendment and Fourteenth Amendment.

IV. ARGUMENT

A. Mr. Wurzelbacher Has Alleged Sufficient Facts to Maintain A Claim For Retaliation Under the First Amendment.

A claim for retaliation in violation of the First Amendment is reviewed under the framework generally set forth in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977). Under *Mount Healthy* and its progeny, a plaintiff must show that

(1) he was participating in a constitutionally protected activity;

(2) defendants took an adverse action that would "likely [to] chill a person of ordinary firmness from" further participation in that activity; and

(3) in part, plaintiff's constitutionally protected activity motivated defendants' adverse action.

Jenkins v. Rock Hill Local Sch. Dist., 513 F.3d 580, 585-86 (6th Cir. 2008) (citing *Bloch v. Ribar*, 156 F.3d 673, 678 (6th Cir. 1998) (internal citations omitted)); *see also Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc).

First, it cannot be disputed, and Defendants do not try to dispute, that Mr. Wurzelbacher has alleged that he was engaged in a constitutionally protected activity when he asked then-presidential candidate Barack Obama about the impact of his tax plan. Asking a question of a political candidate is the kind of quintessential political activity that receives the highest level of protection under the First Amendment. *Jenkins*, 513 F.3d at 587 (citing *Bloch*, 156 F.3d at 678 (citing *Glasson v. City of Louisville*, 518 F.2d 899, 904 (6th Cir. 1975) ("The right of an

American citizen to criticize public officials and policies and to advocate peacefully ideas for change is the central meaning of the First Amendment.")). Mr. Wurzelbacher's claim, therefore, satisfies the first part of the inquiry.

The next question is whether Defendants' "adverse action" would likely "chill" a person of ordinary firmness from continuing to engage in constitutionally protected activity. In regard to the first part of this question – the existence of an adverse action – the Complaint alleges that, as a direct result of Mr. Wurzelbacher's First Amendment activities, Defendants targeted him for investigation by authorizing and directing improper searches of confidential state databases seeking sensitive information on Mr. Wurzelbacher. (Compl. ¶¶ 28, 31, 32.) These included an investigation for information on Mr. Wurzelbacher relating to child support payments, the Temporary Aid to Needy Families program, and unemployment benefits. (Compl. ¶¶ 24, 25.) Importantly, as further alleged in the Complaint, Defendants were supporters of Senator Obama's presidential campaign. (Compl. ¶ 29.) Mr. Wurzelbacher asked a controversial question of Senator Obama and then became the target of Defendants' investigation.

Taken together, these allegations are more than sufficient to demonstrate an "adverse" action. Contrary to Defendants' dismissive characterization as a "mere internal agency search" (Defs.' Opp. at 4), these allegations show that Mr. Wurzelbacher became the target of an investigation by high-ranking partisan state officials merely because he asked a question of a political candidate. Defendants authorized and directed an investigation seeking highly sensitive and confidential information on Mr. Wurzelbacher. The highly improper nature of this investigation is further supported by the allegations that the Ohio Office of Inspector General subsequently determined Defendants' actions to be, among other things, "wrongful" and

"inappropriate." (Compl. ¶¶ 30-36.) To become the target of such an investigation simply for asking a question plainly constitutes an "adverse" action.

The next part of the inquiry is whether the adverse action alleged is likely to "chill a person of ordinary firmness" from further participation in a protected activity. Here, the Complaint plainly alleges actions that are more sufficient, on their face, to "chill a person of ordinary firmness" from continuing to engage in a protected activity. It is more than "plausible" (*Twombly*, 550 U.S. at 545-47) that a person of ordinary firmness will be "chilled" – even intimidated – if they know that, simply by exercising their First Amendment rights, they will become the target of improper investigations by state officials. The fact that a person becomes the target of an investigation, regardless of the outcome of the investigation, is more than sufficient to "chill" an ordinary person's participation in the protected activity. Hence, having alleged an "adverse action" and a sufficient "chill," Mr. Wurzelbacher has satisfied the second part of the three-step inquiry.

In regard to the third and final element necessary to maintain a First Amendment retaliation claim, Mr. Wurzelbacher plainly has alleged that Defendants' actions were motivated, at least in part, by his First Amendment activities. Defendants do not even attempt to argue that their targeting of Mr. Wurzelbacher would have occurred absent Mr. Wurzelbacher's participation in First Amendment activities. Instead, Defendants try to dismiss their investigation as mere "internal searches" (Defs.' Mot. at 5) – implying that the investigation was a routine function of the agency – and that, in any event, none of the Defendants were responsible for publicizing the investigation or informing Mr. Wurzelbacher that the investigation took place. *Id.* In fact, the Complaint more than sufficiently alleges that the improper investigation of Mr.

Wurzelbacher was the response of partisan state officials to a person who came to their attention only as a result of his First Amendment activities. *Bloch*, 156 F.3d at 681-82 (stating that "an act taken in retaliation for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for a different reason, would have been proper.") (citing *Matzker v. Herr*, 748 F.2d 1142, 1150 (7th Cir. 1984) (other citations omitted)). Moreover, Mr. Wurzelbacher plainly alleges that the reason he was targeted, certainly at least in part, was because he asked a controversial question of Senator Obama and that Defendants were supporters of Senator Obama. (Compl. ¶ 29.)

Defendants' argument that they are not alleged to have directly publicized or disclosed the fact of their investigation is entirely irrelevant to whether Mr. Wurzelbacher has sufficiently alleged Defendants' intent to retaliate against him. The harm of targeting a private citizen for an improper investigation is not in publicizing the fact of the investigation, but targeting the citizen in the first place. Defendants' protestations aside, the Complaint more than adequately alleges that Defendants' adverse actions were motivated by Mr. Wurzelbacher's First Amendment activities.

Finally, Mr. Wurzelbacher clearly has alleged that Defendants' improper investigation, prompted by his First Amendment activities, caused him to suffer "emotional distress, harassment, personal humiliation, and embarrassment." (Compl. ¶¶ 45, 52.) While Defendants attempt to denigrate the significance of these injuries (Defs.' Mot. at 5-6), the U.S. Supreme Court specifically has held that, in the context of a § 1983 action, "compensatory damages may include . . . such injuries as 'impairment of reputation . . ., personal humiliation, and mental anguish and suffering.'" *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307

(1986) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974)). The Sixth Circuit also has recognized that these types of injuries are sufficient to maintain a claim. *See Bloch*, 156 F.3d at 679 (holding that "allegation of injury based on embarrassment, humiliation, and emotional distress" are sufficient to maintain retaliation claim) (citing *Barrett v. Harrington*, 130 F.3d 246 (6th Cir. 1997) (affirming a denial of summary judgment on qualified immunity grounds when a judge retaliated against a litigant by attempting to embarrass him)); *Chatman v. Slagle*, 107 F.3d 380, 384-85 (6th Cir. 1997) (listing numerous cases that have found emotional distress to be a compensable injury under § 1983, including damages for "intimidation, marital problems, weight loss, loss of sleep, shock, or humiliation." (quoting *Holmes v. Donovan*, 984 F.2d 732, 739 (6th Cir. 1993)). As alleged in the Complaint, the knowledge that he was the target of an improper investigation by high-ranking state officials caused Mr. Wurzelbacher to suffer these injuries.

Consequently, Mr. Wurzelbacher has satisfied each of the three elements necessary to maintain a viable claim of retaliation in violation of his First Amendment rights.

B. Mr. Wurzelbacher Has Adequately Alleged a Violation of His Rights Under the Fourteenth Amendment.

The right to privacy is "the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion of the government upon the privacy of an individual . . . must be deemed a [constitutional violation]." *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

Relevant to this case is the right under the Fourteenth Amendment that protects "the right of the individual to be free in his private affairs from government surveillance and intrusion."

Whalen v. Roe, 429 U.S. 589, 600 n.24 (1977); *Id.* at n.25 (citing *Griswold v. Connecticut*, 381 U.S. 479, 483 ("[T]he First Amendment has a penumbra where privacy is protected from government intrusion.")). The Sixth Circuit has recognized that the right to privacy applies when the interest at stake relates to "those personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.* (citing *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981).

Courts have recognized that the "right to be let alone" includes "the right to be free from . . . the government inquiring into matters in which it does not have a legitimate and proper concern." *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985). *See also Whalen*, 429 U.S. 589, 600 n.23; *Angola v. Civiletti*, 666 F.2d 1 (2d Cir. 1981) (compelling one to cooperate with law enforcement authorities violates one's privacy rights); *United States v. Clark*, 531 F.2d 928 (8th Cir. 1976) (the recording and tracing of a gun's serial number is too intrusive without a reasonable suspicion of criminal activity). As explained by one court, the "Constitution protects us from extensive and intrusive governmental scrutiny not in furtherance of bona fide state goals." *Carbone v. Horner*, 682 F. Supp. 824, 826 (W.D. Pa. 1988) (denying motion to dismiss action challenging background investigation by police without legitimate purpose). *See also Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (background investigation without legitimate purpose constituted invasion of privacy); *ACLU of Miss. v. State of Miss.*, 911 F.2d 1066, 1070 (5th Cir. 1990) (compilation of personal information on civil rights activists for the purpose of suppressing speech violated First and Fourteenth Amendments).

In this case, Mr. Wurzelbacher plainly has alleged that Defendants investigated him without any "legitimate and proper concern." *Ramie*, 765 F.2d at 492. Defendants conducted a politically motivated investigation of Mr. Wurzelbacher, specifically authorizing improper searches of confidential government databases for the purpose of retrieving sensitive, possibly embarrassing, information regarding Mr. Wurzelbacher. These databases accessed by Defendants are alleged to contain highly sensitive information, which is why the information in them is safeguarded by numerous provisions of law. (Compl. ¶ 19.) It is certainly "implicit in the concept of ordered liberty" that government officials cannot set out to violate the law and a person's privacy by conducting improper searches of such databases for improper reasons. Again, Defendants investigated Mr. Wurzelbacher without any legitimate or proper purpose. By doing so, they violated Mr. Wurzelbacher's most basic right "to be let alone."

C. Defendants Are Not Entitled to Qualified Immunity.

Defendants argue that even if Mr. Wurzelbacher's constitutional rights were violated, they are entitled to qualified immunity, allegedly because there was no clearly-established law that "internally reviewing agency databases" would violate those rights. Defs.' Mot. at 11. Defendants' arguments are misplaced as the law governing violations of the constitutional rights alleged by Mr. Wurzelbacher is clearly established.

In general, government officials are immune from civil liability unless, in the course of performing their discretionary functions, they violate the plaintiff's clearly established constitutional rights. *Hills v. Kentucky*, 457 F.3d 583, 587 (6th Cir. 2006) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Significantly, the "clearly established" element does not require previous adjudication of the very question at hand, as "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). Instead, "in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. In determining whether a right is "clearly established," the Sixth Circuit has stated that courts should "look first to decisions of the Supreme Court, then to decisions of [the Sixth Circuit] and other courts within our circuit, and finally to decisions of other circuits." *McBride*, 100 F.3d 457, 460 (6th Cir. 1996) (citing *Daughtery v. Campbell*, 935 F.2d 780, 784 (6th Cir. 1991). In this case, Mr. Wurzelbacher has more than adequately alleged a violation of both his rights under the First and Fourteenth Amendments and, as these rights are both clearly established, Defendants' claim of qualified immunity should be rejected.

First, in regard to a First Amendment retaliation claim, both the U.S. Supreme Court and the Sixth Circuit have consistently recognized that "retaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment." *McBride v. Village of Michiana*, 100 F.3d at 460-61. This is why the defense of qualified immunity "has generally been rejected by the courts in conjunction with retaliation claims." *Rodriguez v. City of Cleveland*, No. 08-1892, 2009 U.S. Dist. LEXIS 47847 (N.D. Ohio June 1, 2009). According to the Sixth Circuit, "courts that have considered qualified immunity in the context of a retaliation claim have focused on the retaliatory intent of the defendant," and have held that "[t]he unlawful intent inherent in such a retaliatory action places it beyond the scope of an [official]'s qualified immunity if the right retaliated against was clearly established." *Bloch*, 156 F.3d at 682 (citations omitted); *see also Bennett v. Hendriz*, 423 F.3d 1247, 1254 (11th Cir. 2005) ("It is well established that public officials cannot retaliate against someone for exercising their constitutional rights . . . even if the effect on free speech 'may be small'").

In this case, as discussed above, Mr. Wurzelbacher has more than sufficiently alleged that Defendants targeted him for investigation as a result of his exercise of his First Amendment rights. Mr. Wurzelbacher also has plainly alleged that the highly improper searches authorized and directed by Defendants were "not related to any official agency business," but were, in fact, intended to retrieve sensitive, possibly embarrassing, information regarding him. In such a situation, a reasonable government official should have known that retaliation against Mr. Wurzelbacher, by conducting such an improper investigation, violated Mr. Wurzelbacher's rights. *See Bloch*, 156 F.3d at 682 (rejecting qualified immunity as "the right to criticize public officials is clearly established"). As such, Defendants are not entitled to qualified immunity regarding the First Amendment retaliation claim.

The right "to be let alone" also is clearly established under the law. *See supra, discussing Whalen v. Roe*, 429 U.S. 589 (1977); *Ramie v. City of Hedwig Village, Texas*, 765 F.2d 490, 492 (5th Cir. 1985) (right to privacy includes being free "from the government inquiring into matters in which it does not have a legitimate and proper concern"). Qualified immunity in regard to Mr. Wurzelbacher's Fourteenth Amendment claim is particularly inappropriate as it is plainly alleged – and not disputed – that the databases searched by Defendants were strictly confidential pursuant to law, and that Defendants were fully aware of this. Accordingly, a reasonable government official should have been fully aware that conducting searches of these databases without a lawful or proper purpose was contrary to "clearly established" law.

V. CONCLUSION

For the reasons stated above, Defendants' Motion for Judgment on the Pleadings must be denied.

December 14, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Plaintiff's Memorandum in Opposition to Defendants' Motion for Judgment on the Pleadings was served on December 14, 2009 via the ECF system (or electronic mail) to the following:

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