NO. 10-4009

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SAMUEL JOSEPH WURZELBACHER,

Plaintiff-Appellant,

v.

HELEN JONES-KELLEY, *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF APPELLANT

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Appellant makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation?

   NO

2. Is there a publicly-owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

November 10, 2010

/s/ James F. Peterson
Signature of Counsel

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT IN SUPPORT OF ORAL ARGUMENT 1

STATEMENT OF JURISDICTION 1

STATEMENT OF ISSUES PRESENTED 1

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 3

A. Defendants' Investigation of Mr. Wurzelbacher 5

B. Investigation by the Office of the Inspector General 8

SUMMARY OF ARGUMENT 10

STANDARD OF REVIEW 10

ARGUMENT 11

I. The District Court Erred As Mr. Wurzelbacher More Than Adequately Stated a Claim for Retaliation under the First Amendment 11

A. Mr. Wurzelbacher Sufficiently Alleged That His Exercise of His First Amendment Right Motivated Defendants' Adverse Action 13

TABLE OF CONTENTS (cont.)

B. Mr. Wurzelbacher Sufficiently Alleged an Adverse Action That Injured Him In a Way Likely To Chill a Person of Ordinary Firmness From Participation in that Activity 14

II. Mr. Wurzelbacher Adequately Alleged a Violation of His Right to Privacy Under the Fourteenth Amendment 21

CONCLUSION 24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

Cases

ACLU of Miss. v. State of Miss.,
911 F.2d 1066 (5th Cir. 1990) 22, 23

Angola v. Civiletti,
666 F.2d 1 (2d Cir. 1981) 22

Ashcroft v. Iqbal,
129 S. Ct. 1937 (2009) 10, 11

Barrett v. Harrington,
130 F.3d 246 (6th Cir. 1997) 16, 17

Bell v. Johnson,
308 F.3d 594 (6th Cir. 2002) 15,

Bell Atlantic Corp. v. Twombly,
550 U.S. 544, 127 S. Ct. 1955 (2007) 11, 20

Bloch v. Ribar,
156 F.3d 673 (6th Cir. 1998) 12–15, 17

Carbone v. Horner,
682 F. Supp. 824 (W.D. Pa. 1988) 22

Chatman v. Slagle,
107 F.3d 380 (6th Cir. 1997) 16

Fritz v. Charter Tp. of Comstock,
592 F.3d 718(6th Cir. 2010) 20

Genusa v. City of Peoria,
619 F.2d 1203 (7th Cir. 1980) 22

TABLE OF AUTHORITIES (cont.)

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) 15

Glasson v. City of Louisville,
518 F.2d 899 (6th Cir. 1975) 13

Griswold v. Connecticut,
381 U.S. 479 (1965) 21

Holmes v. Donovan,
984 F.2d 732, 739 (6th Cir. 1993)) 16

Holzemer v. City of Memphis,
2010 U.S. App. LEXIS 19226 (6th Cir. Sept. 15, 2010) 12

J.P. v. DeSanti,
653 F.2d 1080 (6th Cir. 1981) 22

Jenkins v. Rock Hill Sch. Dist.,
513 F.3d 580 (6th Cir. 2008) 13

Mattox v. City of Forest Park,
183 F.3d 515 (6th Cir. 1999) 18, 19, 20

Matzker v. Herr,
748 F.2d 1142 (7th Cir. 1984) 14

Memphis Community School Dist. v. Stachura,
477 U.S. 299 (1986) 15

Mezibov v. Allen,
411 F.3d 712 (6th Cir. 2005) 20

Mixon v. Ohio,
193 F.3d 389 (6th Cir. 1999) 10

TABLE OF AUTHORITIES (cont.)

Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 12

Saucier v. Katz,
533 U.S. 194 (2001) 11

Sterling v. Borough of Minersville,
232 F.3d 190 (3d Cir. 2000) 21

Olmstead v. United States,
277 U.S. 438 (1928) 22

Ramie v. City of Hedwig Village, Texas,
765 F.2d 490 (5th Cir. 1985) 22, 23

Thaddeus-X v. Blatter,
175 F.3d 378 (6th Cir. 1999) 12, 15

United States v. Clark,
531 F.2d 928 (8th Cir. 1976) 22

Whalen v. Roe,
429 U.S. 589 (1977) 21, 22

Statutes, Rules, and Other Authorities

28 U.S.C. § 1331 1

28 U.S.C. § 1291 1

42 U.S.C. § 1983 . . . . . 1, 2, 10

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Counsel respectfully submits that oral argument is likely to assist the Court in deciding this appeal. This case is important because it involves a unique set of facts under which government officials targeted a private citizen for investigation simply for asking a question of a prominent politician.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1291. The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The district court entered its final judgment on August 4, 2010 (R. 32, Opinion and Order), and a timely notice of appeal was filed on August 12, 2010. (R. 36, Notice of Appeal.)

STATEMENT OF ISSUES PRESENTED

Whether the District Court erred when it dismissed a complaint brought under 42 U.S.C. § 1983 asserting claims under the First and Fourteenth Amendments despite detailed factual allegations that the plaintiff was targeted for investigation by government officials for simply asking a question of a political candidate.

STATEMENT OF THE CASE

During the last 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 these investigations 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. (R. 1, Compl.) Defendants' actions violated 42 U.S.C. § 1983 as they retaliated against Mr. Wurzelbacher for exercising his First Amendment rights and invaded his privacy contrary to the Fourteenth Amendment of the U.S. Constitution.

Despite more than sufficient facts alleged in the complaint to maintain these constitutional claims against defendants, the district court dismissed both claims. (R. 32, Opinion and Order; *Wurzelbacher v. Jones-Kelley*, No. 2:09-cv-162, 2010 U.S. Dist. LEXIS 78613 (S.D. Ohio Aug. 4, 2010)). Ultimately, review of the issues in this case is important, not just to hold these state officials accountable for this abuse of their power and the harm inflicted on Mr. Wurzelbacher, but because it goes to the heart of free expression and political participation in this nation.

Private citizens should not have to worry whether their letter, phone call, or simple question to a political candidate will cause them to be targeted for investigation. Mr. Wurzelbacher and all Americans should have the freedom to openly participate in their government without fearing reprisal from partisan government officials. Accordingly, for the reasons set forth herein, Mr. Wurzelbacher respectfully requests that this Court reverse the district court's order granting defendants' motion for judgment on the pleadings.

STATEMENT OF FACTS

Mr. Wurzelbacher, a resident of the State of Ohio, served in and was trained by the U.S. Air Force as a plumber. (R. 1, 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 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. (R. 1, 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. (R. 1, 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.

Id. at ¶ 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. (R. 1, 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." (R.1, 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"). (R. 1, 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. (R. 1, 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. (R. 1, 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." (R. 1, 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. (R. 1, 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. (R. 1, 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." (R. 1, 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. (R. 1, 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. (R. 1, 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. (R. 1, 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. (R. 1, 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.*

On March 5, 2009, Mr. Wurzelbacher initiated this lawsuit, bringing claims under 42 U.S.C. § 1983 for violations of the First and Fourteenth Amendments to

the U.S. Constitution. (R. 1, Compl.) Following defendants' motion for judgment on the pleadings under Fed. R. Civ. P. 12(c), the district court dismissed both claims. (R. 32, Opinion and Order.) Mr. Wurzelbacher subsequently filed this timely appeal. (R. 36, Notice of Appeal.)

SUMMARY OF ARGUMENT

Mr. Wurzelbacher more than sufficiently alleged claims under 42 U.S.C. § 1983 for violations of his rights under the First and Fourteenth Amendments to the U.S. Constitution. The numerous detailed and specific factual allegations in the complaint clearly set forth that Mr. Wurzelbacher was targeted for an improper investigation by government officials because he asked a question of a political candidate.

STANDARD OF REVIEW

This Court reviews a district court's grant of judgment on the pleadings under Fed. R. Civ. Proc. 12(c) using the same de novo standard of review applicable to orders of dismissal 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, a 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 has

explained, 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 stated a more than plausible claim that Defendants retaliated against Mr. Wurzelbacher contrary to his rights under the First Amendment and invaded his privacy in violation of the Fourteenth Amendment.

ARGUMENT

I. The District Court Erred As Mr. Wurzelbacher More Than Adequately Stated a Claim for Retaliation under the First Amendment.

In examining a First Amendment retaliation claim, a court must determine whether, when "[t]aken in the light most favorable to the party asserting the injury, . . . the facts alleged show the [state actor's] conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Claims that state actors retaliated against a claimant in response to his exercise of free speech are 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) defendant's adverse action injured plaintiff in a way "likely [to] chill a person of ordinary firmness from" further participation in that activity; and

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

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). Importantly, this Court has emphasized that this inquiry is context-driven: "Although the elements of a First Amendment retaliation claim remain constant, the underlying concepts that they signify will vary with the setting–whether activity is 'protected' or an action is 'adverse' will depend on *context*." *Holzemer v. City of Memphis*, 2010 U.S. App. LEXIS 19226, *15-16 (6th Cir. September 15, 2010) (citing *Thaddeus-X*, 175 F.3d at 388) (emphasis added).

A. Mr. Wurzelbacher Sufficiently Alleged That His Exercise of His First Amendment Right Motivated Defendants' Adverse Action.

It is undisputed that Plaintiff satisfied the first prong of the inquiry for a First Amendment retaliation claim: Mr. Wurzelbacher plainly alleged that he was engaged in a constitutionally protected activity. (R. 32, Opinion and Order, p. 7.) 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 v. Rock Hill Sch. Dist.*, 513 F.3d 580, 587 (6th Cir. 2008) (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, satisfied the first part of the inquiry.

Mr. Wurzelbacher also adequately alleged the third element of a retaliation claim – that defendants' actions were motivated, at least in part, by his First Amendment activities. As the district court correctly held (R. 32, Opinion and Order, p 7. n. 1), the complaint more than sufficiently alleged that the improper searches of confidential databases were the response of partisan state officials to a person who came to their attention only as a result of his First Amendment

activities. *See, e.g., 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).

B. Mr. Wurzelbacher Sufficiently Alleged an Adverse Action That Injured Him In a Way Likely To Chill a Person of Ordinary Firmness From Participation in that Activity.

The key issue in dispute is in regard to the second factor – whether an "adverse action" by defendants caused Mr. Wurzelbacher to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that constitutionally protected activity. As alleged in detail in the complaint, the knowledge of Defendants' improper investigation, prompted by Mr. Wurzelbacher's First Amendment activities, caused him to suffer "emotional distress, harassment, personal humiliation, and embarrassment." (R. 1, Compl. ¶ 45.) The district court, however, erroneously concluded that these were not the type of "concrete personal injuries" sufficient to state a claim for First Amendment retaliation.

As a preliminary matter, this Court has plainly stated that whether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from

exercising his rights is a "question of fact." *Bell v. Johnson*, 308 F.3d 594, 603 (6th Cir. 2002). By dismissing this case at this early stage, the district court overlooked this Court's admonition that the "adverse action" requirement will, in most cases, not be amenable to resolution as a matter of law:

> We emphasize that while certain threats or deprivations are so de minimis that they do not rise to the level of being constitutional violations, this threshold is intended to weed out *only inconsequential actions*, and is not a means whereby solely egregious retaliatory act are allowed to proceed past summary judgment.

Id. at 603 (citing *Thaddeus-X*, 175 F.3d at 398) (emphasis in original). As demonstrated herein, the detailed allegations in this case set forth significantly more than a "de minimis harm."

The U.S. Supreme Court has specifically recognized 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)). This Court also has recognized that these types of injuries are sufficient to maintain a retaliation claim. *See Bloch*, 156 F.3d at 679 (holding that "allegation of injury based on embarrassment, humiliation, and emotional distress" is 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)).

In the context of the facts of this case, Mr. Wurzelbacher plainly stated a claim for First Amendment retaliation and properly alleged injuries that are compensable under the law. (R. 1, Compl. ¶ 45.) The complaint alleged in detail 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 for the purpose of obtaining sensitive information on Mr. Wurzelbacher. *Id.* at ¶ 28, 31, 32. These included an investigation for information on Mr. Wurzelbacher relating to child support payments, the Temporary Aid to Need Families program, and unemployment benefits. *Id.* at ¶¶ 24, 25. As further alleged in the Complaint, Defendants were supporters of then-Senator Obama's presidential campaign. *Id.* at ¶ 29. Mr.

Wurzelbacher, a private citizen, simply asked what turned out to be a controversial question of Senator Obama and then became the target of Defendants' investigation. The knowledge that he became the target of an improper investigation by high-ranking partisan state officials merely because he asked a question of a political candidate caused these specific injuries.

Despite this clear precedent and Mr. Wurzelbacher's detailed allegations, the district court concluded that Mr. Wurzelbacher's injuries – "emotional distress, harassment, personal humiliation, and embarrassment" – were not sufficiently "concrete" to state a First Amendment retaliation claim. (R. 32, Opinion and Order, p. 12.) This conclusion runs directly contrary to this Court's instruction in *Bell* that the adverse action requirement is intended to "weed out" only the most "inconsequential actions" with only "de minimis harm." 308 F.3d at 603. Moreover, to the extent that any question exists as to the nature of harms suffered by Mr. Wurzelbacher, that is question of fact not to be resolved at this stage. *Id.*

The case law relied on by the district court further demonstrates that Mr. Wurzelbacher's allegations of harm are sufficient. Plausible claims of harm resulting in emotional distress were recognized in *Bloch* and *Barrett*. *See Bloch*, 156 F.3d at 679 (holding that a rape victim could maintain retaliation claim against a police officer that released details of the victim's rape following criticism

of the police officer) (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 falsely accusing a lawyer of stalking her). While these cases arose in different contexts, and also involved egregious conduct, they leave no doubt that allegations such as emotional distress are sufficient to support allegations of an adverse action.

Notably, the case most heavily relied on by the district court, *Mattox v. City of Forest Park*, 183 F.3d 515, 521-23 (6th Cir. 1999), demonstrates that Mr. Wurzelbacher's allegations of harm are more than sufficient. In *Mattox*, this Court, reversing a denial of summary judgment, concluded that the plaintiff had not demonstrated sufficient harm to maintain a First Amendment retaliation claim. (R. 32, Opinion and Order, pp. 8-9.) The case involved a volunteer firefighter, Dona Holly, who raised concerns about the city's fire department that resulted in an investigation and report. 183 F.3d at 522-23.[1] When the investigative report was made public by the city, the plaintiff alleged that release of the report, which included statements of the plaintiff regarding a traumatic childhood incident, constituted First Amendment retaliation. This Court concluded that the harm

[1] A second plaintiff in *Mattox*, a city council member, also brought a retaliation claim, but the Court reasoned that a different, higher standard should apply to such a claim by a public official. 183 F.3d at 522.

alleged by the plaintiff was not sufficient to maintain a claim, as the details of the childhood incident were not the focus of the investigation or even of the questions asked in the interview. *Id.* In fact, the plaintiff "volunteered" the information on the childhood incident "by way of analogy," as an aside during a legitimate line of questioning. Furthermore, the information was not referenced in the introduction or overview of the 690-page report. *Id.* It was within this context that this Court in *Mattox* found that the plaintiff's alleged harms were insufficient to maintain a claim.

Given the factual context in *Mattox*, this Court's conclusion that no "adverse action" was alleged is unsurprising. *Mattox* involved no suggestion of an intent to "punish" the plaintiff. The sensitive information contained in the investigative report was, in fact, voluntarily disclosed by the plaintiff. And the plaintiff claimed no specific injury to herself, other than an "effect on her character and reputation."

In sharp contrast, the harms alleged by Mr. Wurzelbacher far exceed those in *Mattox*. Mr. Wurzelbacher alleged that he was targeted for investigation by partisan government officials in retaliation for exercising his First Amendment rights. This knowledge, that he was being specifically targeted for investigation by government officials, plausibly caused the harms, such as emotional distress

and harassment, alleged in the complaint. Such injuries are well above the "de minimis" threshold (*Bell*, 308 F.3d at 603) necessary to maintain a First Amendment retaliation claim and are far more significant than the voluntarily disclosed information in *Mattox*. *Cf. Mezibov v. Allen*, 411 F.3d 712 (6th Cir. 2005)(alleged defamatory comments by prosecutor were insufficient basis for retaliation claim by attorney that took on high-profile case); *Fritz v. Charter Tp. of Comstock*, 592 F.3d 718, 723, 725-26 (6th Cir. 2010) (phone conversations between a public official and a plaintiff's employer were sufficient to maintain a plausible claim of an adverse action).

Moreover, there is nothing "generalized" about the harm being the specific target of a government investigation. It is an intimidating, if not frightening, prospect for a person to learn that he or she has become the target of government officials, especially if all that person has done is ask a question of a prominent politician. Mr. Wurzelbacher's allegations are more than 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" – in fact, intimidated – if they know that, simply by exercising their First Amendment rights, they will become the target of improper investigations by government officials. The fact that a person becomes

the target of an investigation, even if no embarrassing information is located or ultimately disclosed, by itself constitutes an "adverse action."

Mr. Wurzelbacher more than adequately alleged that Defendants' adverse actions caused him harm sufficient to chill a person of ordinary firmness from continuing to exercise his or her First Amendment right. Consequently, Mr. Wurzelbacher alleged a viable claim of retaliation in violation of his First Amendment rights.

II. Mr. Wurzelbacher Adequately Alleged a Violation of His Right to Privacy 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.")). This Court 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, the district court dismissed Mr. Wurzelbacher's claim, noting a lack of cases in this circuit that have considered the "right to be let alone." (R. 32, Opinion and Order, p. 15.) The district court also did not address whether it is "implicit in the concept of ordered liberty" that a private citizen may not be targeted for investigation without any "legitimate and proper concern." *Id*.; *Ramie*, 765 F.2d at 492.

As clearly alleged in the complaint, defendants conducted a politically motivated investigation of Mr. Wurzelbacher for the purpose of retrieving sensitive, possibly embarrassing, information regarding Mr. Wurzelbacher. These databases accessed by defendants were alleged to contain highly sensitive information, which is why the information in them is safeguarded by numerous provisions of law. (R. 1, 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 investigations 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."

Accordingly, construed in their most favorable light, Mr. Wurzelbacher's allegations set forth a violation of his right to privacy under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court reverse the district court's decision below and remand for further proceedings.

Respectfully submitted,

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November 10, 2010

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.App.P. 32(a)(7)(c) and 6th Cir. R. 32(a), the undersigned hereby certifies that this brief is proportionally spaced, has a typeface of 14 point and contains 5,820 words, as counted by the word-processing system used to prepare the brief.

November 10, 2010 /s/ James F. Peterson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served on November 10, 2010, via the Court's Electronic Case Filing system, on the following:

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ADDENDUM

PLAINTIFF-APPELLANT'S DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry No.	Description
1	Complaint
24	Joint Motion for Judgment on the Pleadings by Defendants
32	Opinion and Order
36	Notice of Appeal