Case No. 16-3650

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD CALZONE,

Plaintiff-Appellant,

v.

JOSHUA HAWLEY, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
(District Court Case 4:15-cv-869)

APPELLANT'S REPLY BRIEF

David E. Roland
FREEDOM CENTER OF MISSOURI
P.O. Box 693
Mexico, Missouri 65265
Phone: (573) 567-0307
Fax: (573) 562-6122

Attorney for Plaintiff-Appellant

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INTRODUCTION

This case involves both facial and as-applied challenges to Mo. Rev. Stat. §§ 304.230.1, 304.230.2, and 304.230.7 (collectively, "the Challenged Subsections"), which authorize certain law enforcement officers on roving patrol randomly to seize and search almost any driver and vehicle, at any time, and at any place along Missouri's highways and interstates, even if there is no articulable and reasonable suspicion that either the vehicle or driver are in violation of any law. If the Challenged Subsections merely required an officer on roving patrol to have an "articulable basis amounting to reasonable suspicion" of some violation of the law, the seizures they authorize might satisfy the requirements of the Fourth and Fourteenth Amendments.[1] But because these provisions authorize the seizure of persons and vehicles with or without probable cause to suspect of any wrongdoing at all, this Court must rule them unconstitutional, both facially and as they were applied to Appellant Ron Calzone ("Calzone") in the circumstances that gave rise to this case.

[1] The protections of the Fourth Amendment are made applicable against state governments through the Fourteenth Amendment to the U.S. Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961).

STANDARD OF REVIEW

An appellate court reviewing a grant of a motion for summary judgment is required to believe the evidence of the non-moving party and all justifiable inferences are drawn in favor of the non-moving party. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). On a Motion for Judgment on the Pleadings, the Court must accept the non-movant's factual allegations as true and construe all reasonable inferences in favor of the non-movant. *Saterdalen v. Spencer*, 725 F.3d 838 (8th Cir. 2013).

ARGUMENT

I. The Government Never Defined or Otherwise Limited Its Idea of a Distinct "Industry" Whose Regulation Might Justify the Suspicionless Seizures Authorized by the Challenged Subsections.

An "industry" can be defined as "any department or branch of art, occupation, or business conducted as a means of livelihood or for profit; especially one which employs much labor and capital and is a distinct branch of trade." *See* Black's Law Dictionary, 776 (6th Edition 1990) (definition of "industry.") Another definition is "a distinct group of productive or profit-making enterprises." *Industry*, MERRIAMWEBSTER.COM, http://www.merriam-webster.com/dictionary/industry (last visited February 23, 2017). These definitions are important because the Government in this case is asserting that it has an interest in controlling a "closely-

regulated industry," and that that alleged interest is sufficient justification for setting aside the usual protections that the Fourth Amendment would ordinarily afford the persons who have chosen to participate in that industry. As the U.S. Supreme Court has recently observed, "the clear import of our cases is that the closely-regulated industry is the exception," and the Court has cautioned against allowing that exception "to swallow the rule." *See City of Los Angeles v. Patel,* 135 S.Ct. 2443, 2454-55 (2015) (noting that the U.S. Supreme Court has only ever identified four industries as "closely-regulated"). In the Supreme Court's discussions about the idea of "closely-regulated" industries, they have emphasized that a lowered level of Fourth Amendment protection applies because "industry participants enter into that business knowing they have no expectation of privacy." *See New York v. Burger*, 482 U.S. 691, 700-02 (1987). The focus has always been on a type of ***business*** subject to regulation, and the business participants' advance knowledge that participating in that sort of ***business*** will subject one to pervasive government regulation.

It stands to reason, then, that the Government, in seeking to justify the random, roving, suspicionless seizures authorized by the Challenged Subsections, should have started by clearly establishing what businesses, precisely, are the targets of these roving, suspicionless searches, then to explain how the searches authorized by the Challenged Subsections fit within the overall regulatory scheme for those

businesses. But the Government's brief did no such thing. Indeed, it only mentioned the word "industry" five times, and never even clearly settled on what "industry" might be at issue, referring first to "commercial trucking,"[2] then switching to "the commercial vehicle industry."[3]

As Calzone noted in his principal brief, it is certainly true that several federal circuit courts (including this Court) have determined that the "commercial trucking industry" is closely-regulated. But the cases in which they have addressed suspicionless seizures and searches related to this industry have always focused on professionals in the business of transporting hazardous materials, people, or goods for hire. In this case the Government has not—and indeed ***cannot***—suggest that the searches authorized by the Challenged Subsections are limited to this relatively well-defined industry. The provisions at issue here authorize the roving, suspicionless seizure of a wide range of people and vehicles, including Calzone and his farm truck, who are not professionally engaged in the business of transporting hazardous materials, people, or goods for hire, and who are not otherwise subject to the narrowly focused, arguably pervasive regulation that governs professional commercial truckers. For this reason, even if the business of transporting hazardous

[2] Appellees' Brief 9, 10.

[3] Appellees' Brief 11.

materials, people, or goods for hire might qualify as a "closely-regulated" industry, the Challenged Subsections reach well beyond that industry and, thus, do not comply with the U.S. Supreme Court's analytical framework in this line of cases.

The Government tried to suggest in its brief that Calzone should be considered a professional trucker by asserting that he holds a "commercial vehicle trucking license." Appellee's Brief 1. Of course, there is no such thing. It is true, however, that Calzone holds a commercial driver's license ("CDL")—but that is also irrelevant. Holding a CDL in no way means that one makes a living or otherwise acts as a professional truck driver.[4] The record in this case establishes that Calzone occasionally uses his truck in support of his cattle and horse ranch; he does not act as a common carrier and he is not involved in any pervasively- or closely-regulated

[4] It is worth noting that a law enforcement officer on roving patrol could not possibly know prior to initiating a suspicionless stop whether any given person driving one of the wide range of vehicles that state law defines as a "commercial motor vehicle" might be the holder of a CDL. Even if merely possessing a CDL made one part of a closely-regulated industry, random, roving, suspicionless stops of vehicles when the law enforcement officer has no way of knowing whether the driver holds a CDL would be useless in terms of advancing any regulatory interest. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

businesses. App. 9, 74. Furthermore, Calzone's truck is classified as a "farm vehicle" under both state and federal law, which means he does not even need a CDL to lawfully operate it. For the purposes of federal motor carrier safety regulations, 49 C.F.R. § 390.5 defines "covered farm vehicle" as "a commercial motor vehicle controlled and operated by a farmer and used exclusively for the transportation of agricultural products, farm machinery, farm supplies, or a combination of these, within one hundred fifty miles of the farm."[5] The Missouri Uniform Commercial Driver's License Act uses almost exactly the same definition. *See* Mo. Rev. Stat. § 302.700(23). Under federal law, an operator of a farm vehicle is not required to possess a CDL in order to operate the truck. 49 C.F.R. § 390.39 (exempting "covered farm vehicles" and individuals operating those vehicles from various federal regulations, including "any requirement relating to commercial driver's licenses"). Missouri law also exempts "any person driving a farm vehicle" from the requirements of the Uniform Commercial Driver's License Act. Mo. Rev. Stat. § 302.775. Consequently, the Government has failed to establish that Calzone has made a voluntary decision to enter a business that would diminish his expectation of

[5] The local license plates on Calzone's farm truck mean it may only be used within 50 miles of his ranch. App. 8-9, 74, 159-60.

privacy under the Fourth Amendment, and even if the Challenged Subsections are not facially unconstitutional, they are unconstitutional as applied to Calzone.

II. Calzone Has Standing Because He is Directly Impacted by Each of the Challenged Subsections.

The Government asserted in its brief that Calzone lacks standing to challenge Mo. Rev. Stat. § 304.230.1 and 304.230.2 because those subsections do not "relate directly to him." Appellees' Brief 8. To the contrary, the record includes the Government's own unambiguous statement that "Corporal Keathley stopped Mr. Calzone under the authority of 304.230, ***paragraph 1, 2 and paragraph 7***." App. 91. (emphasis added) This statement that the Government relied upon each of the Challenged Subsections for the authority to subject Calzone to a roving, suspicionless seizure demonstrates that he suffered a real, immediate, and direct injury as a result of each of those subsections. The fact that Calzone happened to be behind the wheel of his farm truck on June 3, 2013, rather than a half-ton pickup or an economy-class car, makes absolutely no legal difference considering the vast scope of each of the Challenged Subsections—the Challenged Subsections give designated law enforcement officials the statutory authority to subject him (or any other Missourian) to a suspicionless seizure regardless of which of these vehicles he might be driving. Thus, in addition to the reasons stated in Section IV of his

principal brief, Calzone's standing to question the validity of each of the Challenged Subsections, both facially and as-applied, cannot legitimately be questioned.

III. Section 1983 Allows Litigants to Sue Government Officials in Their Official Capacities.

Although it did not raise this issue in the trial court, the Government's brief asserted as an afterthought that Calzone failed to state a claim against the Defendants because "Section 1983… only allows actions against persons in their individual capacities." Appellees' Brief 14. This argument is both untimely and incorrect.

The defense of "failure to state a claim upon which relief can be granted" may be raised (1) in any pleading allowed or ordered under Fed. R. Civ. P. 7(a); (2) by motion under Fed. R. Civ. P. 12(c); or (3) at trial. Fed. R. Civ. P. 12(h)(2). Such a defense may not be raised on appeal. *See, e.g., Kontrick v. Ryan*, 540 U.S. 443, 445-46 (2004).

Furthermore, the very case the Government cited, *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1988), described the distinction between (1) a §1983 lawsuit in which the plaintiff sues a government actor in their official capacity seeking money damages for some injury inflicted upon the plaintiff and (2) a § 1983 lawsuit in which the plaintiff sues a government actor in their official capacity seeking only prospective injunctive relief from future constitutional violations. Although in the former circumstance courts will not treat officials acting in their official capacities

as "persons" within the meaning of § 1983, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71, n. 10 (quoting *Kentucky v. Graham*, 473 U.S. 159, 167, n. 14 (1985)).

In this case Calzone is seeking only prospective relief in the forms of declaratory judgment and injunctive relief that would prevent the Defendants and their officers, employees, and agents from relying on the Challenged Subsections to conduct future suspicionless roving seizures and searches. App. 17. Consequently, this Court must treat the Defendants, sued in their official capacities, as "persons" within the meaning of 42 U.S.C. § 1983.

IV. The Attorney General, Governor, and Superintendent of the Missouri State Highway Patrol are the Proper Parties to be Enjoined From Future As-Applied Violations of the Challenged Subsections.

The Government's brief raised the question of whether the Attorney General, Governor, and Superintendent of the Missouri State Highway Patrol are proper Defendants in regard to the relief Calzone requested in Count II of his Complaint. Both the Government's Motion for Judgment on the Pleadings regarding Count II of Calzone's Complaint and the trial court's discussion regarding that motion, evidence a fundamental misunderstanding of the relief Calzone requested in that Count. This

Court should reverse the trial court's error.

Count II of Calzone's Complaint aimed at ensuring that even if the Court found the Challenged Subsections to be facially constitutional, they could still be found to violate the Fourth Amendment as they were applied to Calzone on May 3, 2013. Contrary to the trial court's conclusion, Calzone's target was the scope of authority authorized by the Challenged Subsections. Calzone did not ask for judgment or damages against Keathley, either as an individual or in an official capacity. Rather, he asked first for "declaratory judgment, pursuant to 42 U.S.C. § 1983, that § 304.230 may not constitutionally be applied in a way that allows roving government officials to subject Missouri citizens to suspicionless searches and seizures that are not brief, standardized, discretionless, and/or targeted at an important state interest distinguishable from the general interest in crime control," and second for the Court to "enjoin[] the Defendants and their officers, employees, or agents from relying on § 304.230 [to] conduct suspicionless roving searches and seizures." App. 17.

The regular references Calzone made to Keathley in Count II are purely attributable to the fact that Keathley happened to be the subordinate of the Defendants whose actions pursuant to Mo. Rev. Stat. § 304.230 brought about the violation of Calzone's Fourth Amendment rights that precipitated the lawsuit. Calzone's complaint made clear that the named Defendants, who are those

ultimately responsible for the enforcement and defense of the statute, are also those who need to be enjoined from future unconstitutional applications of the Challenged Subsections. As such, they—not Keathley—are the proper parties to be named as Defendants and bound by the declaratory judgment and injunction Calzone requested in Count II.

V. The Government's Brief Simply Ignored the Precedents and Arguments It Found Inconvenient.

The caverns of silence in the Government's brief speak volumes.

Calzone's principal brief explored more than four decades' worth of cases from the U.S. Supreme Court and this Court that stand for the idea that the Fourth Amendment prohibits law enforcement officers on roving patrol from seizing drivers in the absence of at least a reasonable suspicion of wrongdoing. The Government's brief made no effort at all to address this issue. To the contrary, it pretended that those precedents and the longstanding constitutional rule they represent do not exist.

In his principal brief Calzone explained the astonishing scope of the power that the Challenged Subsections give certain law enforcement officers over citizens who are not suspected of any wrongdoing. Specifically in regard to Mo. Rev. Stat. §§ 304.230.1 and 304.230.2, Calzone pointed out that these subsections authorize "random roadside examinations or inspections" of almost any vehicle—commercial

or non-commercial[6]—"with or without probable cause to believe" that the driver or vehicle are in violation of any law. Appellant's Brief 15-18. Addressing Mo. Rev. Stat. §§ 304.230.7 and its application to "commercial motor vehicles," Calzone cited both statutory definitions and caselaw to demonstrate the long-established fact that any half-ton pickup truck is a "commercial motor vehicle" under Missouri law, as is any vehicle "regularly used for carrying… merchandise."[7]

Although the Government did attempt to obscure and downplay the impact of the Challenged Subsections by suggesting that Missouri law enforcement officials might choose not to employ the power granted to its fullest extent, it ***did not*** disagree with or otherwise attempt to refute Calzone's explanation as to the scope of the power conferred. Nor did the Government's brief suggest that under these

[6] The only types of vehicles exempt from these random, roving seizures and searches are certain agriculture-related vehicles, Mo. Rev. Stat. § 304.170.12, vehicles "designed for use and used by a fire department," Mo. Rev. Stat. § 304.172, and "any wrecker or tow truck performing a wrecker or towing service," Mo. Rev. Stat. § 304.174.

[7] "Merchandise is a broad and comprehensive term, embracing all tangible articles of commerce—whatever is usually bought or sold in trade." *State v. Lasswell*, 311 S.W.2d 356, 358-59 (Mo. App. 1958).

subsections Calzone himself could ***only*** be subject to a random, suspicionless seizure and search if he was driving what the statutes define as a "commercial vehicle." Instead, the Government argued (incorrectly, as was shown in Section II above) that because Calzone has not yet been subjected to a random suspicionless stop while driving a "small passenger vehicle," he lacks standing to contest the validity of those subsections. Appellees' Brief at 7. The fact of the matter is that however the Government might describe its current approach to applying the Challenged Subsections, those provisions do grant authority to seize drivers and vehicles even in the absence of any articulable, reasonable suspicion that the driver or vehicle is in violation of any law. On June 3, 2013, the Government used that authority against Calzone, and unless this Court rules in his favor and enjoins future enforcement of the Challenged Subsections the Government could use that same authority against him again in the future.

Calzone's principal brief anticipated each of the federal appellate cases the Government would rely upon regarding whether "commercial trucking" is a closely-regulated industry such that participants in that industry accept a lower standard of Fourth Amendment protection, pointing out that ***all*** of those cases focused on persons and vehicles ***engaged in the business of professional commercial trucking***, and most of those cases also involved stops at permanent weigh stations and/or stops

supported by probable cause. Calzone also discussed two Tenth Circuit cases[8] in which, similar to this case, state statutes authorized the suspicionless seizure of drivers who ***were not*** engaged in the business of professional commercial trucking;[9] in each the Tenth Circuit followed U.S. Supreme Court precedent to hold that it violates the Fourth Amendment to initiate roving traffic stops without any reasonable suspicion of wrongdoing and without any meaningful standards or guidelines to determine which vehicles to stop. The Government made no effort at all to respond to Calzone's arguments; to the contrary, it turned a blind eye to the differing factual context of its favored cases and pretended that the more analogous Tenth Circuit cases do not exist.

[8] *U.S. v. Seslar*, 996 F.2d 1058 (10th Cir. 1993), and *U.S. v. Herrera*, 444. F.3d 1238 (10th Cir. 2006).

[9] Both the Ryder rental truck that was pulled over in *Seslar* and the Ford F-350 that was pulled over in *Herrera* would have been "commercial vehicles" within the meaning of Mo. Rev. Stat. § 304.230.7.

CONCLUSION

For the reasons stated herein and in Calzone's principal brief, this Court should reverse the district court's grant of summary judgment for the Government and should enter judgment in favor of Calzone.

Respectfully submitted this 23rd day of February, 2017.

David E. Roland Mo. Bar #60548
FREEDOM CENTER OF MISSOURI
P.O. Box 693
Mexico, MO 65265
Phone: (573) 567-0307
Fax: (573) 562-6122
Email: dave@mofreedom.org

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