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IN THE

SUPREME COURT OF VIRGINIA

Record No. 161777

NATHAN OSBURN,

Appellant,

v.

VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION AND ISSUES PRESENTED

This appeal arises from an employee grievance filed by Nathan Osburn following his termination as a Special Agent by the Virginia Department of Alcoholic Beverage Control (the "Agency" or ABC") for violating the Fourth Amendment rights of an applicant for an ABC retail license. Osburn had conducted a search of the applicant's private office, without a warrant or the applicant's consent or knowledge, during a site visit to the applicant's premises. ABC determined that Osburn's search was not permitted under the inspection authority granted to ABC by statute and regulation—because the search was of an applicant rather than a licensee—and therefore it fell outside the scope of the highly-regulated-industry exception to the warrant requirement.

ABC's termination of Osburn has been upheld at every step of the grievance and appeal process, including before the Court of Appeals. But ABC joined Osburn in asking the Court to grant this appeal, so that the Court could set aside the mistaken interpretation of Virginia Code § 4.1-204(F) adopted by the Court of Appeals. Specifically, the Court of Appeals misinterpreted Code § 4.1-204(F) as requiring case-by-case consent by *both* applicants *and* licensees before ABC agents may conduct any administrative search of their premises and records. While the Court of Appeals was correct that the statute does not authorize a warrantless search without consent of the premises of *applicants*, it was wrong

about *licensees*. And its opinion was unnecessary in any event, because this case indisputably concerned only an applicant.

The heavily-regulated-industry exception is critical to the Agency, which oversees the manufacture, sale, and transportation of alcohol in the Commonwealth. The Court of Appeals' gratuitous ruling threatens to render useless the statutory and regulatory scheme that Virginia has put in place to effectuate the exception. Unless this Court corrects the Court of Appeals' incorrect reasoning, the Agency's operations will be significantly hampered. For those reasons and those that follow, the Agency respectfully requests that this Court vacate the Court of Appeals' decision and affirm on the different grounds discussed below.

ASSIGNMENT OF ERROR

I. The Court of Appeals erred by affirming the trial court's ruling upholding Nathan Osburn's termination from employment with Defendant Virginia Department of Alcoholic Beverage Control ("ABC") on the ground that Osburn's conduct as an ABC special agent violated the Fourth Amendment.

a. The Court of Appeals misinterpreted the controlling statute, Virginia Code § 4.1-204(F).

b. Under the Court of Appeals' interpretation of Virginia Code § 4.1-204(F), ABC applicants and licensees would have the same status. ABC conceded to the hearing officer and in the trial court that if licensees and applicants had the same status under the statute, then Osburn's conduct did not violate the Fourth Amendment."

c. The Court of Appeals erroneously held that Osburn's conduct did not fall within the "highly regulated industry" exception to the Fourth Amendment's warrant requirement.[1]

STATEMENT OF THE CASE AND FACTS

A. During a site visit at the restaurant of an ABC license applicant, Osburn conducts a warrantless search of an applicant's business office.

The facts of this case are largely undisputed. On April 15, 2013, Linda Swim filed an application with ABC for a retail liquor license for Bent Mountain Agricultural Corporation t/a Bent Mountain Bistro ("Bistro").[2] ABC Special Agent David Scott was assigned to investigate the applicant's qualifications for a

[1] Opening Br. at 2-3. *See also* Order (Nov. 2, 2017) (granting consent motion for leave to amend the granted assignment of error by replacing the references to non-existent Code § 4.01-204(F) with references to Code § 4.1-204(F)).

[2] JA 388.

liquor license. In reviewing Swim's application, Scott developed concerns that additional documents were needed to complete the application and that the application failed to disclose all owners as required by ABC policy.[3] Among other things, Scott spoke with the landlord of the building housing the Bistro, and he identified the owner of the Bistro as a Ben Ward, not Swim.[4] The landlord called back twenty minutes later purportedly to correct himself, saying now that Ward was merely a cook, not an owner.[5]

Scott arranged a meeting with Swim for August 9, 2013 "to conduct a site visit, follow up on the application, as well as pursue the investigation pertaining to ownership of the establishment."[6] Special Agent Nathan Osburn accompanied him on the site visit. When the agents arrived, they entered the Bistro through the front door.[7] While Scott walked to the back of the dining area to meet with Swim, Osburn proceeded directly to the kitchen "to inspect the premise to ensure it was a

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[3] JA 425-36, 605.

[4] JA 606.

[5] *Id*.

[6] JA 607, 583.

[7] JA 583.

functional and fully stocked restaurant sufficient to meet the required regulations for an ABC license."[8]

Osburn first inspected the Bistro kitchen. He conducted a "three minute[]" inspection of the kitchen—looking at the food, equipment, preparation area, storage, walk-in cooler, and pizza oven[9]—to determine whether the Bistro had sufficient restaurant capabilities to qualify it for a retail liquor license.[10] After examining the kitchen, Osburn spoke for a "brief" time with Dwayne Powell, who was standing outside behind the building, and exchanged "small talk."[11] Powell departed to run "errands."[12]

Osburn then left the kitchen and entered the Bistro's business office, which was not locked.[13] Before entering the office, Osburn "didn't see anybody, didn't talk to anybody. Didn't ask permission."[14] Osburn immediately noticed a computer, video system, and multiple cameras in the office,[15] as well as a variety

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[8] JA 583.

[9] JA 657-58.

[10] JA 583.

[11] *See* JA 651-55.

[12] JA 608.

[13] JA 658.

[14] JA 668.

[15] JA 659.

of documents.[16] He proceeded to "pick[]up numerous pieces of paper that were laying around" and "[t]ook photographs of quite a few things."[17] Osburn opened drawers and looked through cabinets, although he later could not recall specifically which drawers or cabinets he opened.[18] Osburn stated that he "made a thorough examination of everything in that office[;]" he "went through pretty much everything."[19] In fact, Osburn spent about forty-three (43) minutes searching the office.[20] Some of the documents he found confirmed his suspicion that Swim had failed to disclose Ward as an owner of the Bistro.[21]

After exhausting his search of the back office, Osburn rejoined Scott, and they continued to interview Swim in the front dining room.[22] Osburn recorded the rest of the Bistro site visit, which lasted another hour.[23]

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[16] JA 658-59.

[17] JA 659, 460-94.

[18] JA 659-60.

[19] JA 662.

[20] JA 453.

[21] JA 662-64.

[22] JA 453-54.

[23] JA 453.

B. Osburn's conduct is challenged and investigated, and he is terminated.

On October 3, 2013, Swim filed a written complaint regarding the agents' August 9, 2013 site visit, alleging, among other things, that Scott and Osburn had "rummag[ed] through her business records" and "seiz[ed] evidence in violation of [her] fourth, fifth, and fourteenth amendment rights."[24] The Agency's Office of Professional Standards received the complaint, and on October 21, 2013, forwarded it to Special Agent in Charge Tiffany Johnson as a "Preliminary Report – Citizen Complaint."[25] Johnson began an internal audit investigation into Swim's complaint, distilling it into nine (9) allegations[26] and submitting a detailed investigation report to Director Shawn Walker and Deputy Director Chris Goodman.[27]

After reviewing the investigation report, point-of-view recordings from the agent, and written statements from the agents, Goodman concluded that two of the allegations against Osburn were substantiated: 1) Osburn had "seized evidence in violation of Swim's constitutional rights"; and 2) Osburn had "rummaged through

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[24] JA 458.

[25] JA 578.

[26] JA 559.

[27] JA 446-57.

Swim's business records with deliberate indifference to her rights."[28] Walker endorsed Goodman's recommendation and determined that Osburn's warrantless search of the Bistro office and his seizure of photographic evidence violated several ABC policies.[29] ABC provided Osburn with a Memorandum of Pending Disciplinary Action that detailed the Agency's findings of misconduct.[30] Through counsel, Osburn challenged the Memorandum and argued, in part, that his conduct was permitted by the Retail Inspections Operations Manual ("OM-03").

On April 3, 2014, Osburn was issued a notice of termination, based on the two substantiated complaints made against him by Swim.[31] The Notice also rejected Osburn's reliance on OM-03, stating that the "investigation in question[] did not follow Bureau Policies and Procedures."[32]

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[28] JA 559.

[29] *Id.*

[30] JA 433.

[31] JA 290. The Notice advised Osburn that he was being terminated for committing a Group III Offense, consisting of a Code 13 Failure to Follow Instructions and/or Policy and a Code 99 Other – Violation of Constitutional Rights. JA 287-88.

[32] JA 291.

C. Osburn's termination is upheld by a hearing officer, the Office of Employee Dispute Resolution, and a circuit court.

Osburn challenged his termination through the State Grievance Procedure, Code § 2.2-3000 *et seq*. Following a two-day hearing in November 2014, on December 28, 2014 the hearing officer issued his decision upholding Osburn's termination.[33] In pertinent part, the hearing officer held:

> There is no statutory or regulatory provision that an applicant automatically forfeits fourth amendment rights by merely applying for a license. There is insufficient evidence to find that ABC applicants and ABC licensees and permittees are equally treated and/or equally held to the same standards regarding Fourth amendment rights and the Administrative Exception for Heavily Regulated Industries.
>
> There is insufficient evidence that individual or anyone else gave consent, expressed or implied, to Grievant's search of the office, opening of drawers and/or cabinets, and photographing of documents in that office. . . . There is insufficient evidence to find that [Swim] or anyone else impliedly consented by failing to object to Grievant's actions as there is no evidence [Swim] or any other person knew or was even aware that Grievant had entered the office and/or was searching/opening drawers and/or cabinets.[34]

Osburn appealed to the Office of Employment Dispute Resolution ("EDR"). On February 11, 2015, EDR remanded the matter back to the hearing officer with

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[33] JA 96.

[34] JA 113 (footnotes omitted).

instruction to consider mitigating evidence.[35] On March 16, 2015, the hearing officer once again upheld the termination.[36]

On May 14, 2015, EDR issued another ruling upholding Osburn's termination,[37] rejecting Osburn's claim that a newly adopted policy ("General Order 502") changed the conclusion. Neither General Order 502 nor OM-03 "specifically authorizes the actions for which [Osburn] was disciplined, such as a search of the premises involving opening a closed desk and cabinet drawers."[38] The Department of Human Resource Management ("DHRM") also declined to disturb the hearing decision.[39]

Osburn next filed an appeal in the Circuit Court for the City of Roanoke. Osburn argued that his search fell under the heavily-regulated-industry exception to the warrant requirement by virtue of Code § 4.1-204(F) and was therefore lawful. ABC countered that the statute authorizes warrantless administrative searches of licensees, but not applicants such as Swim, whose business was not yet a place where alcoholic beverages were manufactured, bottled, stored, offered for

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[35] JA 126.

[36] JA 144.

[37] JA 146.

[38] JA 147 (footnote omitted).

[39] JA 151.

sale, or sold. The circuit court concluded that, without the benefit of the heavily-regulated-industry exception, Osburn needed either a warrant or Swim's consent before conducting a full search of her business office. Having failed to obtain either, Osburn's search violated Swim's Fourth Amendment rights and, accordingly, his termination was justified. Osburn appealed to the Court of Appeals.

D. The Court of Appeals upholds Osburn's termination because his search of an applicant's premises exceeded the scope of Code § 4.1-204(F) and because he lacked consent for the search; but it further holds that case-by-case consent is required for administrative inspections of licensees' premises.

On November 15, 2016, the Court of Appeals issued a published opinion upholding Osburn's termination, agreeing with the decisions below that Osburn's search of Swim's business office violated the Fourth Amendment.[40] But in addition to analyzing whether the highly-regulated-industry exception to the Fourth Amendment applies to the search of an applicant, the Court of Appeals went further, holding that Code § 4.1-204(F) requires that consent is required before ABC agents can conduct a search of a licensee.

Although the parties had disputed whether Code § 4.1-204(F)'s grant of "free access" to ABC agents applies to applicants or licensees—Osburn argued it applies to both, ABC argued it only applies to the latter—the Court of Appeals

[40] JA 227-28.

held that "neither party has an accurate understanding of the statute":

> Contrary to the arguments of both Osburn and ABC, Code § 4.1-204(F) does not provide ABC agents with "free access" at all, but rather the statute places the burden on both licensees and applicants for a license to provide such access. The statute states that ABC "agents *shall be allowed* free access," indicating that it is the applicant or licensee who must allow the agent access, not the other way around. Therefore, in order to obtain or retain an ABC license, Code § 4.1-402(F) [sic] directs a license applicant to allow ABC agents "free access" to his or her premises, essentially requiring a case-by-case waiver of his or her Fourth Amendment rights in order to become licensed or to retain a license. The statute does not give ABC agents the right to raid with impunity the records and businesses of either applicants or licensees.[41]

The court also rejected Osburn's contention that Code § 4.1-100's definition of "place or premises" also permits ABC agents "free access" to the property of both applicants and licensees. The court rejected that contention because "we have already decided . . . that Code § 4.1-402(F) [sic] does not convey a right of 'free access' to ABC agents, but rather places the burden on ABC applicants and licensees to permit 'free access' to ABC agents when conducting site inspections upon pain of adverse consequences to their application or license."[42]

Accordingly, the Court of Appeals held that "under the statutory scheme, ABC agents must either obtain an inspection warrant or obtain the consent of an

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[41] JA 220-21.

[42] JA 225-26.

applicant or licensee to search the premises."[43] It was undisputed that no warrant was obtained here, and so the court then analyzed whether Osburn obtained consent. It rejected Osburn's arguments that he had both express and implied consent to search Swim's back room. Specifically, the court rejected Osburn's arguments that Swim, a previous applicant for a license, gave express consent for a search of her back office merely by agreeing to the site visit, and that Swim's partner Powell gave implied consent by not stopping Osburn from performing the part of the search that Powell witnessed.[44] The Court of Appeals also rejected Osburn's other arguments.[45]

Osburn filed a timely petition for appeal. ABC joined Osburn in asking that this Court review the case, and an appeal was granted.

STANDARD OF REVIEW

The review of state employee grievances is a "tripartite review procedure" under which (1) the hearing officer is the fact finder; (2) DHRM has the authority to determine compliance with personnel policy; and (3) the courts review whether

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[43] JA 222.

[44] JA 222-26.

[45] *See* JA 226-27 ("[W]e do not review Osborn's [sic] assignment of error regarding newly discovered evidence.").

the grievance determination is "contradictory to law."[46] A hearing officer's decision is "final and binding if consistent with law and policy."[47] Because a lower court may only reverse a hearing officer's decision for being "contradictory to law," a lower court's determination necessarily "'presents a pure question of law and is accordingly subject to de novo review by this Court.'"[48]

ARGUMENT

I. The Court of Appeals misinterpreted Virginia Code § 4.1-204 as requiring ABC agents to secure consent of licensees before conducting searches (Assignments of Error 1a and 1b).

This Court should set aside the Court of Appeals' determination that consent to search must be sought and granted on a case-by-case basis under § 4.1-204(F) from applicants and licensees alike. Under the doctrine of judicial restraint,[49] the

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[46] *Va. Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002); *see Va. Polytechnic Inst. & State Univ. v. Quesenberry*, 277 Va. 420, 429, 674 S.E.2d 854, 858 (2009).

[47] Va. Code Ann. § 2.2-3005.1(C) (2017). *See also Commonwealth, Dep't of Envtl. Quality v. Wright*, 256 Va. 236, 241, 504 S.E.2d 862, 864 (1998) (reviewing court "lacks authority to consider the grievance *de novo,* to modify the hearing officer's decision, [or] to substitute the court's view of the facts for those of the hearing officer) (decided under former Title 2.1).

[48] *Warrington v. Commonwealth*, 280 Va. 365, 370, 699 S.E.2d 233, 235 (2010) (quoting *Jones v. Commonwealth*, 276 Va. 121, 124, 661 S.E.2d 412, 414 (2008)).

[49] *See Commonwealth v. Swann*, 290 Va. 194, 196, 776 S.E.2d 265, 267 (2015) (As this Court has often said, "[t]he doctrine of judicial restraint dictates that we decide cases on the best and narrowest grounds available.") (punctuation and citations omitted).

Court of Appeals should have avoided deciding the question as to licensees, given that answering the question was unnecessary to resolve a case involving only an applicant.[50]

But, departing from its own practice,[51] the Court of Appeals proceeded to answer that question, and answered it incorrectly. It failed to recognize that, given Virginia's highly regulated alcohol industry, the regulatory inspection scheme does not require consent from licensees to be valid under the Fourth Amendment. By holding that affirmative consent is required before a regulatory inspection may be conducted even of licensees who participate in the industry, the Court of Appeals imposed an unnecessary obstacle to enforcing the regulatory scheme.

A. The Fourth Amendment is not violated by warrantless inspections in highly regulated industries, such as Virginia's alcohol industry, that are governed by an adequately protective regulatory scheme.

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

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[50] *See* JA 220 (recognizing that "Swim was not yet licensed to sell alcohol, but was only in the application process" yet concluding that "the issue is whether the statute, and thus the highly regulated industry exception to the warrant requirement, applies to ABC licensees only, or to both licensees and applicants for a license").

[51] *See Canales v. Torres Orellana*, 67 Va. App. 759, 784 n.21, 800 S.E.2d 208, 221 n.21 (2017) ("Virginia courts strive to decide cases on the best and narrowest grounds available, leaving unanswered questions that the litigants have raised that are unnecessary to resolve the matter before the court.") (punctuation and citations omitted).

seizures."[52] Warrantless searches are generally unreasonable, whether of commercial premises or private residences.[53] But the Supreme Court has recognized an exception to the general rule: no warrant is required in cases involving "closely regulated" industries, where the commercial operator's privacy interest is adequately protected by a detailed regulatory scheme authorizing warrantless inspections.[54] As the Supreme Court explained,

> Because the owner or operator of commercial premises in a "closely regulated" industry has a reduced expectation of privacy, the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search . . . have lessened application in this context.[55]

Indeed, "it is well-settled that such regulatory inspections do not need to be accompanied by probable cause or a search warrant . . . . This is because licensees [ ] enjoy a 'particularly attenuated' expectation of privacy."[56]

In order for the "highly-regulated-industry" exception to apply, (1) there must be a substantial government interest that informs the regulatory scheme under

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[52] U.S. Const. amend. IV.

[53] *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978) (quoting *Camera v. Municipal Court*, 387 U.S. 523, 528-29 (1967)).

[54] *Donovan v. Dewey*, 452 U.S. 594, 599 (1980).

[55] *New York v. Burger*, 482 U.S. 691, 702 (1987) (internal citations omitted).

[56] *Ruttenberg v. Jones*, 283 F. App'x 121, 133 (4th Cir. 2008) (quoting *Burger*, 482 U.S. at 700) (internal citations omitted).

which the inspection is made; (2) the warrantless inspection must be necessary to further the regulatory scheme; and (3) the statutory scheme must provide a constitutionally adequate substitute for a warrant by advising the owner that the search is being made pursuant to the law and has a properly-defined scope, and it must limit the discretion of the inspecting officers.[57]

The Court of Appeals correctly found that Virginia's "liquor industry falls within the highly regulated industry exception to the warrant requirement."[58] Indeed, regulation of the liquor industry pre-dates passage of the Fourth Amendment.[59] After the repeal of Prohibition, Virginia enacted a comprehensive statutory scheme to regulate the industry, and it has remained largely unchanged since then.[60] In enacting the Alcoholic Beverage Control Act and creating the ABC Board,[61] the General Assembly intended to allow unfettered access by ABC and its agents to licensees in this heavily regulated industry. The drafters of the

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[57] *Burger*, 482 U.S. at 702-03.

[58] JA 220.

[59] *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75 (1970).

[60] *See* 1934 Va. Acts ch. 94.

[61] *Id.*

original ABC Act stressed that "[t]he sale of alcoholic beverages should be brought out in the open and placed upon a decent plane."[62]

Today, provisions in Title 4.1 of the Virginia Code and Title 3 of the Virginia Administrative Code implement the highly-regulated-industry exception for Virginia's alcohol industry. Section 4.1-204(F) contains the inspection provision:

> [ABC] and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, or any applicant for such license or permit.[63]

The scheme also imposes reasonable time, place, and manner restrictions in compliance with *Burger*.[64]

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[62] Report of Liquor Control Comm., Sen. Doc. No. 5, at 2 (1934).

[63] Va. Code Ann. § 4.1-204(F) (2016).

[64] *See id.* (requiring the inspection of licensees to be conducted during "reasonable hours"); 3 Va. Admin. Code § 5-50-70(B) (same); 3 Va. Admin. Code § 5-50-70(E) (defining "the term 'reasonable hours' . . . to include all business hours of operation and any other time at which there exists any indication of activity upon the licensed premises").

B. Case-by-case consent is unnecessary, eviscerates the highly-regulated-industry exception, and needlessly burdens ABC operations.

The Supreme Court has held that when a business in a heavily regulated industry is inspected, "the legality of the search depends not on consent but on the authority of a valid statute."[65] But the Court of Appeals incorrectly read the clause in § 4.1-204(F) that "agents shall be allowed free access" as a condition that licensees must expressly "allow" the agent to have access before each and every search.[66] Requiring ABC agents to obtain consent from licensees on a case-by-case basis before conducting every administrative inspection eviscerates the heavily-regulated-industry exception to the warrant requirement and renders useless the authority granted in § 4.1-204(F).

The Court of Appeals failed to recognize that the inspections permitted by § 4.1-204(F) are—by their very nature—conducted without case-by-case consent. The Supreme Court of the United States acknowledged that in discussing the need for warrantless searches in closely regulated industries:

> [S]ubmission to *lawful* authority and [the] decision to step aside and permit the inspection rather than face a criminal prosecution is analogous to a householder's acquiescence in a search pursuant to a warrant when the alternative is a possible criminal prosecution for refusing entry or a forcible entry. *In neither case does the*

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[65] *United States v. Biswell*, 406 U.S. 311, 315 (1972).

[66] JA 220-21.

> *lawfulness of the search depend on consent*; in both, there is lawful authority independent of the will of the householder who might, other things being equal, prefer no search at all.[67]

Case-by-case consent is not required because licensees have already consented to inspections under § 4.1-204(F) as the knowing consequence of accepting a license: a "businessman in a regulated industry in effect consents to the restrictions placed upon him."[68] At the time of an inspection of a licensed establishment, consent of the licensee is implied because the licensee is actively enjoying the benefits of licensure.[69] By requiring agents to obtain consent a second time before searching a licensee's premises, the Court of Appeals misunderstood the point of the heavily-regulated-industry exception.

The Court of Appeals' interpretation of § 4.1-204(F) undermines the effectiveness of Virginia's ability to regulate the alcohol industry. ABC relies heavily on inspections of licensees to fulfill its mission of overseeing the manufacture and sale of alcohol in Virginia. Indeed, as the Supreme Court has recognized, in closely regulated industries "if inspection is to be effective and

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[67] *Biswell*, 406 U.S. at 315 (second emphasis added). *See also Holloman v. Commonwealth*, 221 Va. 947, 949, 275 S.E.2d 620, 622 (1981) (recognizing a "consent exception to the warrant requirement" in a different context).

[68] *Marshall*, 436 U.S. at 313 (quoting *Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973)).

[69] *See id.* ("[B]usinessmen engaged in . . . licensed and regulated enterprises accept the burdens as well as the benefits of their trade . . . .").

serve as a credible deterrent, unannounced, even frequent, inspections are essential."[70]

The decision below also disrupts longstanding practice, nullifying ABC's streamlined procedures for conducting searches and requiring a host of changes to its operations. Under the Court of Appeals' interpretation, ABC agents must obtain consent from licensees before searching their premises.[71] Imposing that obstacle before every inspection delays ABC agents in performing their work and introduces unnecessary uncertainty to the process, spurring questions for agents as well as licensees, such as whether an individual at an establishment is authorized to give or refuse consent.

The better construction of Code § 4.1-204(F) thus is its natural reading—that "free access" presumptively "shall be allowed." If a licensee affirmatively refuses or prevents access by an agent, the licensee makes herself subject to punishment under Code § 4.1-331. That provision makes it a Class 1 misdemeanor for a licensee to "fail or refuse to . . . allow. . . records, invoices and accounts or his

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[70] *Biswell*, 406 U.S. at 316; *see Colonnade Catering Corp.*, 397 U.S. at 78 (Burger, C.J., dissenting) (noting that "inspection authorization would be meaningless if the agents could not open lockers, cabinets, closets, and storerooms" because "purveyors of liquor do not leave their wares or stores or reserve supplies lying casually about").

[71] In the wake of the Court of Appeals' decision, ABC agents have been forced to rely on written consent forms and required signatures to indicate consent.

place of business to be examined and inspected in accordance with § 4.1-204."[72] In other words, under this statutory scheme, ABC agents do not need a licensee's affirmative *consent* to conduct inspections of the licensee's premises; the inspection proceeds unless the licensee affirmatively *refuses* or *prevents* access, in which case penalties could apply.

If it is not corrected by this Court, the Court of Appeals' interpretation of § 4.1-204(F) will significantly weaken ABC's regulatory power. This Court should vacate that portion of the Court of Appeals' decision and restore the law to the *status quo ante*.

II. Osburn was properly terminated because his conduct violated the Fourth Amendment (Assignments of Error 1b and 1c).

Although the Court of Appeals was wrong to conclude that the Fourth Amendment prohibits warrantless searches of *licensees*, it was correct to find a violation in Osburn's warrantless search of Swim's back office. As the hearing officer and circuit court correctly held, § 4.1-204 does not permit warrantless searches of *applicants* without their consent because the heavily-regulated-industry exception to the warrant requirement does not apply until an individual actually receives a license, and Swim did not consent to the search of her back office.

[72] Va. Code Ann. § 4.1-331 (2016).

Accordingly, this Court should uphold ABC's termination of Osburn, affirming the decision below under the right-result-for-the-wrong-reason doctrine.[73]

A. The highly-regulated-industry exception to the Fourth Amendment does not apply because the "free access" granted to ABC agents by Code § 4.1-204 and 3 VAC 5-50-70(B) does not permit warrantless searches of premises of applicants like Swim.

Osburn first argues that Code § 4.1-204 authorized him to inspect Swim's back office because the statutory scheme allows warrantless searches of the premises of applicants and licensees alike.[74] But the plain language of Code § 4.1-204(F) and of the corresponding provision in the Virginia Administrative Code, the legislative history of the statute, and the rest of the statutory scheme all militate against his argument.

1. By their terms, Code § 4.1-204(F) and 3 VAC 5-50-70(B) do not apply to applicants because an applicant's premises is not a "place" where alcoholic beverages are manufactured, bottled, stored, offered for sale, or sold.

The plain language of Code § 4.1-204(F) and the implementing regulation authorizes agents to conduct inspections of the premises of licensees, but it does

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[73] *See Rives v. Commonwealth*, 284 Va. 1, 2, 726 S.E.2d 248, 250 (2012) ("An appellate court may properly affirm a judgment appealed from where the court from which the appeal was taken reached the correct result but assigned a different reason for its holding.").

[74] *See, e.g.*, Opening Br. at 23 ("Code § 4.1-204(F) thus puts ABC applicants and licensees on notice that their property will be subject to period inspection.").

not authorize them to inspect the premises of applicants merely because they have applied for a license. Section 4.1-204(F) provides, in relevant part:

> *The [ABC] Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth* and to the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee wherever located *where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold*, for the purpose of examining and inspecting such place and all records, invoices and accounts therein.[75]

Likewise, in implementing Code § 4.1-204(F) for retail licensees, the Virginia Administrative Code provides—in language identical to the italicized portion above—that the "board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold."[76]

Osburn's argument fails because these provisions, by their own terms, do not apply to applicants: only licensees can legally manufacture, bottle, store, offer for sale, or sell alcoholic beverages. Until and unless a license is granted to an applicant, an applicant's premises are not a place "where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold."[77] Indeed, had it intended to

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[75] Va. Code Ann. § 4.1-204(F) (emphasis added).

[76] 3 Va. Admin. Code § 5-50-70(B).

[77] Va. Code Ann. § 4.1-204(F).

sweep the premises of applicants into the reach of Code § 4.1-204(F), the General Assembly could have allowed inspections where alcoholic beverages "will be" or "could be" manufactured, bottled, stored, offered for sale or sold—but it did not. As written, the inspection provision logically does not extend to the premises of applicants like Swim.[78]

Osburn disagrees. Ignoring the Virginia Administrative Code provision, Osburn finds ambiguity in other language in Code § 4.1-204(F) that authorizes ABC agents also to search the premises of delivery permittees. While Osburn is correct that when the Court finds the plain language to be ambiguous, it "must resort to extrinsic evidence and the rules of construction to determine legislative intent, 'the paramount object of statutory construction,'"[79] his preferred canon of construction does not carry the day. He argues that, under the "rule of the last antecedent," the proper reading of Code § 4.1-204(F) is that ABC agents' authorization to search "every place in the Commonwealth" is not qualified by the dependent clause "where alcoholic beverages are manufactured, bottled, stored,

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[78] *See* JA 187 (circuit court's noting that § 4.1-204(F) applies to "already licensed businesses. The statute does not extend such authority to the premises of applicants. To hold otherwise would impermissibly expand the reach of § 4.1-204(F) well beyond its plain meaning.").

[79] *Va. Dep't of Labor & Indus. v. Westmoreland Coal Co.*, 233 Va. 97, 101-02, 353 S.E.2d 758, 762 (1987) (quoting *Vollin v. Arlington Cty. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976)).

offered for sale or sold."[80] In Osburn's view, that qualifying language applies only to the premises of a "delivery permittee," because it is that phrase that immediately precedes the qualifying language.[81]

But "as with any canon of statutory interpretation, the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning.'"[82] Indeed, Osburn's proposed construction would violate other principles of statutory interpretation. For instance, as this Court has long recognized, "[i]t is elementary that in searching for the intention of the legislature the court must consider the object of the statute and the purpose to be accomplished."[83] The purpose of the statute would clearly be advanced by specifying—with greater particularity than "every place in the Commonwealth"—where ABC agents have inspection authority. Applying the limiting language "where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold" provides that needed clarification.[84]

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[80] *See* Opening Br. at 33-35.

[81] Opening Br. at 34 (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)).

[82] *Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (quoting *Barnhart,* 540 U.S. at 26).

[83] *Rockingham Co-op. Farm Bureau v. City of Harrisonburg*, 171 Va. 339, 344, 198 S.E. 908, 910 (1938).

[84] *See* Opening Br. at 33-35.

Osburn's reading would also violate the principle that "statutes are to be construed so as to avoid an absurd result."[85] If agents were permitted to search every "place in the Commonwealth"—limited only by the definition of "place" in Code § 4.1-100—then agents could forever conduct warrantless searches of any premises for which a license had been sought, even if the application was denied and alcoholic beverages were never actually sold there. The logical interplay of Code §§ 4.1-100 and 4.1-204(F) is that while the latter defines the subject of the search—a licensee—the former defines the scope of a search. In other words, an applicant is required to list relevant information in her application, and she is put on notice of being subject to inspection if and when she is granted a license.

These considerations favor the natural, sensible reading of the statute (and the only reading of the regulation): "free access" is allowed "wherever alcoholic beverages are manufactured, bottled, stored, offered for sale or sold." Permitted access extends to "every place in the Commonwealth" that fits that description, as well as to "the premises of both (i) every wine shipper licensee and beer shipper licensee and (ii) every delivery permittee"—not just those "in the Commonwealth" but "wherever located"—that fit the description. Because Swim's premises did not fall in any of those categories, Osburn's search was impermissible.

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[85] *Eastlack v. Commonwealth*, 282 Va. 120, 126, 710 S.E.2d 723, 726 (2011) (citing *Commonwealth v. Doe*, 278 Va. 223, 230, 682 S.E.2d 906, 908-09 (2009)).

2. The legislative history of Code § 4.1-204(F) refutes Osburn's interpretation that agents may search every "place" in the Commonwealth, regardless of whether alcohol is actually manufactured or sold there.

The history of Code § 4.1-204(F) also undercuts Osburn's interpretation that it applies to applicants. For more than 80 years, the Virginia Code has consistently granted government agents "free access" only to places in the Commonwealth where beverages are manufactured, bottled, or sold. Osburn's argument that the "free access" provision applies to "every place in the Commonwealth"—rather than "every place in the Commonwealth . . . where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold"—flies in the face of that history.

In 1934, the General Assembly enacted the Alcoholic Beverage Control Act and created the ABC Board to provide for comprehensive regulation of the alcohol industry in Virginia.[86] In addition to requiring that licensed manufacturers and retail sellers keep records of alcoholic beverages manufactured and sold, Section 29 of the Act also provided that their records and places of business be open to inspection by government agents:

> (c) All such records, invoices and accounts shall at all times be open to inspection by the Board, by the State Tax Commissioner and any person or persons that may be designated as an agent by them or either of them.

[86] 1934 Va. Acts ch. 94.

> (d) The Board, the State Tax Commissioner and the agents duly authorized by them or either of them shall at all times be allowed free access during business hours to every place in this State where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices, and accounts therein.[87]

Sixty years later, these provisions remained codified in substantively similar form.

In 1993, the General Assembly recodified the beverage-control laws in Title 4.1.[88] The language in subsection (C) making records "open to inspection" was eliminated, after the Code Commission recommended striking it and represented that its removal would work "[n]o substantive change in [the] law."[89] Following the recodification, the "free access" provision, then located at Code § 4.1-204(D), continued to limit agents' searches to places where alcohol was present:

> The Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein.[90]

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[87] *Id.*

[88] 1993 Va. Acts ch. 866.

[89] *See* Report of the Va. Code Comm'n on the Recodification of Title 4 of the Code of Virginia, Sen. Doc. No. 26, at 33 (1993), available at http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD261993/$file/SD26_1993.pdf.

[90] 1993 Va. Acts ch. 866.

The inspection provision remained mostly unchanged for another decade, until litigation invalidated a provision of the ABC Act allowing direct shipment of beer and wine to Virginia consumers from Virginia manufacturers, but prohibiting direct shipment from out-of-state beer and wine suppliers.[91]

In response to *Bolick v. Roberts*, in 2003 the General Assembly enacted a set of provisions that created "wine shipper" and "beer shipper" licenses.[92] That legislation added a new Code § 4.1-204(D), which bumped the inspection provision to Code § 4.1-204(E), and amended the new subsection (E) to ensure that ABC was given the necessary inspection authority over wine-shipper and beer-shipper licensees. Because wine-shipper and beer-shipper licensees may or may not maintain "places in the Commonwealth," the amendment made wine-shipper and beer-shipper licensees subject to search "wherever located";[93] the amendment also authorized ABC to engage with enforcement authorities outside of the Commonwealth to inspect their premises of licensees and applicants for beer- and wine-shipper permits.[94] Following the changes, the statute provided as follows:

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[91] *See Bolick v. Roberts*, 199 F. Supp. 2d 397, 2001 U.S. Dist. LEXIS 11118 (E.D. Va. 2001), *modified and approved*, *Bolick v. Roberts*, 199 F. Supp. 2d 397, 2002 U.S. Dist. LEXIS 6376 (E.D. Va. 2002), *vacated and remanded sub nom. Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003).

[92] 2003 Va. Acts chs. 1029, 1030.

[93] *Id.*

[94] *Id.*

> E. Inspection. – The Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth *and to the premises of every wine shipper licensee and beer shipper licensee wherever located* where alcoholic beverages are manufactured, bottled stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. *The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee or a beer shipper licensee or any applicant for such licensee.*[95]

Accepting Osburn's reading of the statute would require the Court to conclude that, in enacting these amendments, the General Assembly not only gave ABC inspection authority over out-of-State wine-shipper and beer-shipper licensees, it eliminated the "where alcoholic beverages are manufactured" qualifier from ABC's authority to search "every place in the Commonwealth" and applied that qualifier only to searches of beer and wine shippers.

In 2007, again in response to litigation,[96] the General Assembly enacted a set of provisions creating a "delivery permit" system allowing in-State and out-of-

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[95] 2003 Va. Acts ch. 1030.

[96] *See* Va. Bill Summary, 2007 Reg. Sess., H.B. 1784 ("Allows a brewery, winery, or farm winery located within or outside the Commonwealth that is authorized to engage in the retail sale of wine or beer, after obtaining a delivery permit from the ABC Board, to deliver wine and beer to consumers. Such privilege was removed as a result of recent federal litigation challenging the constitutionality of Virginia's ABC law."), *available at* http://lis.virginia.gov/cgi-bin/legp604.exe?ses=071&typ=bil&val=hb1784. *See Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006).

State breweries and wineries to deliver products to consumers in Virginia.[97] That legislation added a new Code § 4.1-204(E), which pushed the inspection provision to Code § 4.1-204(F), and amended the new subsection (F) to ensure that ABC was given the necessary inspection authority over deliver permittees, whether located inside or outside the Commonwealth.[98] The changes were as follows:

> F. Inspection. – The Board and its special agents shall be allowed free access during reasonable hours to every place in the Commonwealth and to the premises of *both (i)* every wine shipper licensee and beer shipper licensee *and (ii) every delivery permittee* wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and all records, invoices and accounts therein. The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee*, or delivery permittee,* or any applicant for such license or permit.[99]

Under Osburn's reading, by adding this language the General Assembly did more than give ABC inspection authority over delivery permittees. According to Osburn, the General Assembly also shifted again the operation of the "where alcoholic beverages are manufactured" qualifier, so that it no longer applied to the

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[97] 2007 Va. Acts ch. 797.

[98] *See* 2007 Va. Acts chs. 99, 799. (creating § 4.1-212.1, which allows for "[a]ny brewery, winery, or farm winery located within or outside the Commonwealth" to apply for a delivery permit)).

[99] 2007 Va. Acts chs. 99, 798.

premises of beer and wine shippers and henceforth applied only to premises of "delivery permittees." Moreover, if Osburn is right, then the legislation also stripped the "wherever located" designation from wine and beer shippers—thereby leaving in doubt whether Code § 4.1-204(F) applies to out-of-State shippers—and applied it only to delivery permittees.[100]

This history demonstrates the error in Osburn's interpretation and the interpretive gymnastics required to adopt it. The General Assembly clearly intended the 2003 and 2007 amendments to provide equal access to in-State and out-of-State shippers and delivery permittees—not to expand the range of "place[s] in the Commonwealth" that are subject to ABC search. Adopting Osburn's reading would turn a blind eye to the 80 years of statutes that consistently apply the "free access" provisions only to places "where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold."

3. Other elements of the statutory scheme defeat Osburn's interpretation.

At least two other features of the statutory structure undermine Osburn's claim that Code § 4.1-204 authorizes the search of applicants and licensees alike.

First, his assumption that the premises of applicants are implicitly subject to the inspection provision in Code § 4.1-204(F) is undercut by the General

[100] *See* Opening Br. at 33.

Assembly's use of the word "applicant" in another part of Code § 4.1-204(F). "'[W]hen the General Assembly has used specific language in one instance, but omits that language or uses different language when addressing a similar subject elsewhere in the Code, [the Court] must presume that the difference in the choice of language was intentional.'"[101]

With an amendment in 2003, the General Assembly inserted the only mention of applicants in Code § 4.1-204, giving the ABC the authority to coordinate with the regulatory agencies of other States to conduct inspections of certain licensees and applicants:

> The Board may engage the services of alcoholic beverage control authorities in any state to assist with the inspection of the premises of a wine shipper licensee, a beer shipper licensee, or delivery permittee, *or any applicant for such license or permit*.[102]

Osburn correctly concedes that this provision cannot be read to give the ABC authority to inspect "in-state applicants for retail licenses like Swim."[103] But that understates the critical point: the statute's express authorization to search the premises of "any applicant" for certain licenses makes conspicuous the absence of authorization to search the premises of applicants for retail licenses like Swim.

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[101] *See Rives*, 284 Va. at 3, 726 S.E.2d at 250 (quoting *Zinone v. Lee's Crossing Homeowners Ass'n*, 282 Va. 330, 337, 714 S.E.2d 922, 925 (2011)).

[102] Va. Code Ann. § 4.1-204(F) (emphasis added).

[103] Opening Br. at 32.

Nor could Osburn claim support by drawing a parallel between retail-license applicants and shipping-license applicants; presumably, most of the latter are already licensees subject to inspection by virtue of the products they seek permission to ship.[104]

Second, Osburn's claim that searches of applicants stand on equal footing as searches of licensees is not borne out when Code § 4.1-204 is read as a whole. To begin with, the term "applicant" is simply not used in the headline: "Records of licensees; inspection of records and places of business." Anticipating the argument, Osburn dismisses that fact as meaningless, citing language in Code § 1-217 that characterizes headlines "as mere catchwords [intended] to indicate the contents of the sections."[105] But although a headline "do[es] not constitute part of the act,"[106] this Court has recognized that it can serve a valuable function in discerning legislative intent because "[i]t tells us what the legislature had in

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[104] *See* Va. Code Ann. § 4.1-209.1(A) (2016) (authorizing "[a]ny winery or farm winery located within or outside the Commonwealth" to apply for a wine shipper's license; "[a]ny brewery located within or outside the Commonwealth" to apply for a beer shipper's license; and "[a]ny person located within or outside the Commonwealth who is authorized to sell wine or beer at retail in their state of domicile and who is not a winery, farm winery, or brewery" to "apply for a wine or beer shipper's license, or both").

[105] Opening Br. at 36 (quoting Va. Code Ann. § 1-217).

[106] Va. Code Ann. § 1-217 (2017).

mind."[107] For instance, in *Jordan v. Town of South Boston*,[108] the Court consulted a bill's headline to help determine whether the mayor of a town—not a city—was authorized to enforce Prohibition-era ordinances within a certain range of the town. The relevant headline was "Enforcement of City Ordinance; Territory Contiguous to Cities." The Court noted that "[i]f we look to the headline . . . , we find no reference to towns, but distinct reference to cities," and that weighed in its ultimate determination that the bill "did not extend the jurisdictional limit of towns, but was restricted to cities."[109] Similarly, here the headline undercuts Osburn's claim that the General Assembly intended Code § 4.1-204's inspection provision to apply equally to applicants and licensees.

Considering Code § 4.1-204(F) alongside the other subsections in the statute also undermines Osburn's preferred interpretation. For instance, Code § 4.1-204(B) ("Retailers") provides that "[e]very retail licensee shall keep . . . records" of certain purchases, "preserve all invoices showing his purchases," and "keep an accurate account of daily sales."[110] These requirements imposed on a "licensee" mirror what ABC agents are entitled to inspect under Code § 4.1-204(F); they are

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[107] *Chambers v. Higgins*, 169 Va. 345, 351, 193 S.E. 531, 533 (1937).

[108] 138 Va. 838, 122 S.E. 265 (1924).

[109] *Id.*, 122 S.E. at 267, 268.

[110] Va. Code Ann. § 4.1-204(B) (2016).

granted "free access to every place in the Commonwealth . . . where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, for the purpose of examining and inspecting such place and *all records, invoices and accounts therein*."[111] There simply is no corresponding requirement imposed on retail license "applicants."

B. Osburn lacked consent to search the back office.

Osburn next contends that, even if Code § 4.1-204 applies only to the premises of licensees, his search of Swim's back office was nonetheless permitted because Swim consented to the search.[112] That argument fails both because, as a matter of fact, Swim did not affirmatively consent to Osburn's search, and because she did not impliedly consent to the search merely by agreeing to a site visit.

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[111] Va. Code Ann. § 4.1-204(F).

[112] *See* Opening Br. at 26-30. Osburn has apparently abandoned the alternative argument he advanced in his petition, that another owner of the business, Powell, gave his implied consent to the search of the premises. *See* Pet. at 28 ("Powell's failure to object to the known search being conducted by SA Osburn constitutes implied consent in accordance to the Thriftimart test. . . . Powell, as owner, acknowledged his consent for the agents to have any documents they needed."). Even if he did not waive it, the argument would lack merit, because Osburn did not ask Powell for permission to conduct the search, JA 668, and because the Court of Appeals correctly recognized that Osburn's evidence in support consisted of his own conflicting statements about his interactions with Powell, *see* JA 225.

1. There was no evidence that Swim was even aware of her back office until it had occurred.

The hearing officer in this case found as a factual matter that "there is no evidence [Swim] or any other person knew or was even aware that [Osburn] had entered the office and/or was searching/opening drawers and/or cabinets."[113] That finding is binding on appeal. Swim was meeting with Agent Scott at the time Osburn was conducting his warrantless search. In fact, there is no evidence that Swim knew Osburn was in the building until he later joined Swim and Scott in the dining area. Swim's complaint makes clear that she believed Osburn had entered the restaurant through the rear of the building,[114] and Osburn admitted that he did not see Swim when he first entered the premises.[115] If Swim was unaware of Osburn's presence, she could not have given contemporaneous consent to search the back office.

2. Swim did not consent to Osburn's search of her office by agreeing to the site visit.

Unable to dispute that Swim did not provide contemporaneous consent, Osburn argues that Swim "knew what she was getting into" with the site visit because she "was a repeat player who had been involved with earlier ABC

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[113] JA 117.

[114] JA 458.

[115] JA 650-51.

investigations."[116] Accordingly, Osburn argues, Swim consented to the search of her back office merely by scheduling the site visit. This argument fails for two reasons.

First, Osburn asserts that Swim's previous experience with ABC inspections means that she understood that "Code § 4.1-204(F) authorized the inspection of every part of the building designated in the application . . . includ[ing] the business office."[117] But that presupposes the correctness of his position—that ABC's inspection powers extend to the premises of *applicants* as fully as they do to premises of *licensees*. Indeed, if Osburn were right on that point, then no other consent was necessary from Swim.[118] But because Swim was an applicant who was *not* already subject to the regulatory scheme, Osburn needed further consent to conduct a warrantless search. For that same reason, Osburn's reliance on *Ruttenberg v. Jones* is misplaced. Although *Ruttenberg* concerned the search of a private office, it was held permissible because the office was on the premises of a *licensee*: "[a]s a licensee, RNR [had] consented to allowing the Virginia ABC

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[116] Opening Br. at 27.

[117] *Id*.

[118] *See supra* Part I.

Board and its agents 'free access' to 'examin[e] and inspect[ ]' its premises for the purpose of ensuring compliance with ABC regulations."[119]

Second, Osburn criticizes the Court of Appeals' consultation of OM-03, the operations manual in effect at the time of the incident, to determine what an objectively reasonable applicant might have understood the scope of the site visit to be.[120] Again, his citation to *Ruttenberg* is inapt,[121] because that involved a licensee. And he cannot dispute that, in the case of applicants, OM-03 allows for only a high-level "site visit to ensure sufficient inventory of qualifying items" to be considered for the appropriate license.[122] The Court of Appeals merely concluded what was obvious: Osburn's entry into the business office and rummaging through cabinets was entirely unconnected to the permissible task of "ensur[ing] sufficient inventory of qualifying items."[123] Moreover, although OM-03 does call for a

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[119] 283 F. App'x at 133 (quoting 3 Va. Admin. Code § 5-50-70(B)). *See also id.* at 135 (reasoning that "if so-called 'private offices' located on the premises of liquor establishments were immune from administrative inspection, ABC licensees such as Ruttenberg and RNR could utilize such spaces as sanctuaries for illegal activity").

[120] Opening Br. at 29.

[121] *See id.*

[122] JA 350 (OM-03 § III(A)(19) (2009)). OM-03 also requires "[v]erify[ing] and obtain[ing] from Applicant . . . current monthly sales (less sales tax) and inventory (cost) figures of qualifying items"). JA 350 (OM-03 § III(A)(17)).

[123] JA 350 (OM-03 § III(A)(19)).

"thorough investigation of all applicants,"[124] invoking a high standard of review hardly entitles an agent to conduct searches in violation of the Fourth Amendment. An illegal search of an applicant is never justified as necessary for a "thorough investigation," given the other investigative tools available to ABC agents. Moreover, because it can withhold a license from an applicant until it is satisfied, the ABC can make its investigation as "thorough" as necessary in the circumstances.

CONCLUSION

This Court should affirm the result reached by the Court of Appeals and uphold Osburn's termination, but vacate the Court of Appeals' opinion and set aside its unwarranted conclusion that Code § 4.1-204(F) requires the ABC and its agents to secure case-by-case consent before conducting searches of licensees' premises.

Respectfully submitted,

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[124] *See* Opening Br. at 30 (citing JA 348-50).

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CERTIFICATE OF SERVICE AND FILING

I certify that, on November 13, 2017, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand-delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was also electronically mailed to:

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