SCV: Submitted on 10-16-2017 15:39:13 EDT for filing on 10-16-2017

IN THE

Supreme Court of Virginia

RECORD NO. 161777

NATHAN OSBURN,

Appellant,

v.

VIRGINIA DEPARTMENT OF
ALCOHOLIC BEVERAGE CONTROL,

Appellee.

OPENING BRIEF OF APPELLANT

James J. O'Keeffe, IV (VSB 48620)
JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue, SW
Roanoke, Virginia 24011
(540) 491-0634
Fax: (888) 500-0078
okeeffe@johnsonrosen.com

Dale W. Webb (VSB 26359)
FRANKL, MILLER, WEBB & MOYERS, LLP
Post Office Box 4126
1711 Grandin Road
Roanoke, Virginia 24015
(540) 527-3500
Fax: (540) 527-3520
webb@fmwm.law

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

Table of Contents

Table of Contents i

Table of Authorities iii

Introduction 1

Assignment of Error 2

Statement of the Case 3

1. The Parties 3

2. Linda Swim submits an application for an ABC license. 4

3. ABC suspects that Swim has misrepresented the Bistro's ownership in the application. 4

4. ABC schedules a visit to the Bistro "to conduct a site inspection as well as follow up on a suspicion that there may possibly be someone else involved with the business that had not been disclosed to [ABC] during the application investigation." 5

5. During the inspection, Osburn enters a business office and finds evidence that Swim misrepresented the Bistro's ownership in the application. 7

6. Swim complains that the agents' scheduled site inspection violated her Fourth Amendment rights. 8

7. ABC fires Osburn for violating Swim's Fourth Amendment rights.... 9

8. ABC and the Circuit Court uphold Osburn's termination. 10

9. The Court of Appeals affirms the Circuit Court's judgment based on an interpretation of Code § 4.1-204(F) that neither Osburn nor ABC advanced. 11

Argument & Authorities 13

1. The standard of review is de novo. 13

2. Osburn's search did not violate the Fourth Amendment. 14

A. The Fourth Amendment permits warrantless searches of closely regulated businesses. 14

B. The sale of alcohol is a closely regulated industry. 16

C. The Commonwealth has a substantial interest in regulating the sale of alcohol, and warrantless searches are necessary to further that regulatory program..... 18

D. Code § 4.1-204(F) provides a constitutionally adequate substitute for a warrant. 21

3. The Court of Appeals erred by affirming the Circuit Court's judgment..... 23

A. The Court of Appeals misinterpreted Code §4.1-204(F). 23

B. The Court of Appeals mistakenly concluded that Osburn's search exceeded the scope of Swim's consent. 26

4. ABC's arguments are unpersuasive..... 30

Conclusion 37

Certificate of Service 39

Table of Authorities

STATUTES

Va. Code § 1-217 36

Va. Code § 2.2-3006 13

Va. Code § 4.1-100 ..... 3, 22, 28

Va. Code § 4.1-103 3

Va. Code § 4.1-105 3

Va. Code § 4.1-204 ..... passim

Va. Code § 4.1-222 ..... 4, 20-21, 36

Va. Code § 4.1-331 25

Va. Code § 18.2-11 25

CASES

Barnhart v. Thomas, 540 U.S. 20 (2003) 34-35

Brooks v. Commonwealth, 282 Va. 90 (2011) 26-27

Butler v. Fairfax Cnty. Sch. Bd., 291 Va. 32 (2015) 31-32, 34

City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015) 18

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970)16, 17, 28

Commonwealth v. Needham, 55 Va. App. 316 (2009)..... 14

Crawford v. Haddock, 270 Va. 524 (2005) 24

Dewey v. Donovan, 452 U.S. 594 (1980)..... 14, 16

Doss v. Jamco, Inc., 254 Va. 362 (1997) 24

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 15

Melanson v. Commonwealth, 261 Va. 178 (2001) 24

New York v. Burger, 482 U.S. 691 (1987) ..... passim

Ruttenberg v. Jones, 283 Fed. Appx. 121 (4th Cir. 2008) 15, 28-29

State v. Johnson, 962 A.2d 973 (Me. 2009) 19

United States v. Biswell, 406 U.S. 311 (1972) 16, 19

Va. Polytechnic Inst. v. Quesenberry, 277 Va. 420 (2009) 13-14

REGULATIONS

3 VAC 5-10-10 3

TREATISES

Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 24, 34, 35

OTHER

List of Alcohol Laws of the United States, Wikipedia, *available at* https://en.wikipedia.org/wiki/List_of_alcohol_laws_of_the_United_States (last visited October 13, 2017) 17-18

Introduction

The Fourth Amendment permits warrantless searches of closely regulated businesses when (1) necessary to further a substantial government interest and (2) authorized by a statute that limits them in time, place, and manner.

Here, Linda Swim applied to the Virginia Department of Alcoholic Beverage Control, or "ABC," for a retail license. The sale of alcohol is a classic closely regulated business. ABC agents scheduled a meeting with Swim at her restaurant to inspect the site and confirm the restaurant's ownership. During that visit, Special Agent Nathan Osburn inspected the restaurant's kitchen and its business office; a statute, Code § 4.1-204(F), grants ABC agents like him "free access" to inspect the entire building identified in a license application. At the same time, it limits those searches in time, place, and manner. Osburn found evidence in the business office that Swim had misrepresented the restaurant's ownership in her application. When Swim complained, ABC fired Osburn for violating her constitutional rights.

The question presented is whether Osburn's scheduled, warrantless inspection of an ABC applicant's premises under Code § 4.1-204(F) violated the Fourth Amendment.

Assignment of Error[1]

1. 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.[2]

a. The Court of Appeals misinterpreted the controlling statute, Virginia Code § [4.1]-204(F).[3]

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.[4]

---

[1] Due to typographical errors in the Petition for Appeal, subparts 1(a) and 1(b) of the Assignment of Error that this Court granted mistakenly refer to "Virginia Code § 4.01-204(F)" instead of "Virginia Code § 4.1-204(F)." Osburn has filed a motion for leave to amend the Assignment of Error to correct this mistake.

[2] The Petition for Appeal indicates that this was preserved at JA 21, 189, and 201. Osburn also directs the Court to JA 201-08.

[3] The Petition for Appeal indicates that this was preserved at JA 206, 209, and 220. Osburn also directs the Court to JA 209-13.

[4] The Petition for Appeal indicates that this was preserved at JA 110 and 221.

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.[5]

Statement of the Case

1. The Parties

ABC administers Virginia's Alcoholic Beverage Control Act, Virginia Code § 4.1-100 et seq., and its attendant regulations, 3 VAC 5-10-10 et seq. It operates under the supervision of the Secretary of Public Safety and Homeland Security. Broadly speaking, ABC "[c]ontrol[s] the possession, sale, transportation and delivery of alcoholic beverages" in the Commonwealth. Va. Code § 4.1-103. ABC agents are vested with police powers. See Va. Code § 4.1-105.

Nathan Osburn worked as an ABC Special Agent. JA 214. The agency had employed him since June 2000. JA 98. Osburn's responsibilities included investigating applications for retail licenses. JA 214.

[5] The Petition for Appeal indicates that this was preserved at JA 24, 188, 204, 236. Osburn also directs the Court to JA 201-08.

2. Linda Swim submits an application for an ABC license.

In April 2013, ABC received a Retail License Application from Linda Swim for a restaurant called the "Bent Mountain Bistro." JA 98, 215, 388-94. Swim submitted the application on behalf of the Bent Mountain Agricultural Corporation d/b/a Bent Mountain Bistro as the company's president and sole shareholder. JA 389, 392-94, 436, 448. She swore that the information in the application was accurate. JA 392.

The Bistro sought a license to sell beer, wine, and mixed drinks at 9607 Bent Mountain Road in Roanoke, Virginia, and to sell wine and beer off premises. JA 389, 393.

ABC assigned Special Agent David Scott to review and investigate the application. JA 215. Osburn assisted him. JA 215.

3. ABC suspects that Swim has misrepresented the Bistro's ownership in the application.

Although Swim swore in the application that she was the Bistro's sole owner, JA 393-94, ABC's research suggested that Bistro had at least one co-owner, Benjamin Ward. JA 215, 436-37, 606. Ward was a convicted felon. JA 215. His partial ownership would therefore be grounds for denying the application under Code § 4.1-222(A).

ABC issued subpoenas that yielded evidence of Ward's undisclosed ownership. JA 215. And the Bistro's landlord called Scott and told him that Ward was the Bistro's owner. JA 98, 215. The landlord called back 20 minutes later to retract his statement, claiming that Ward was just a cook. JA 215, 606.

4. ABC schedules a visit to the Bistro "to conduct a site inspection as well as follow up on a suspicion that there may possibly be someone else involved with the business that had not been disclosed to [ABC] during the application investigation."

Scott scheduled a meeting with Swim at the Bistro for August 9, 2013. JA 98. This was a routine part of the application process. An ABC Operations Manual in effect at the time, OM-03, required agents to "conduct a thorough investigation of all applicants." JA 348. That included verifying ownership and compliance with the Act and regulations. JA 348-50. In fact, OM-03 referred to Part I of the retail license application as an "[a]pplication[] for investigation." JA 345. It advised agents that it was official policy "to conduct a detailed and thorough investigation of all persons and locations for ABC licenses in a prompt and efficient manner." JA 336. It also told them that "[b]efore a

license is issued the agent should conduct a site visit to ensure sufficient inventory of qualifying items."[6] JA 350.

The purpose of the August 9, 2013, meeting was twofold: To conduct a site visit and to pursue concerns about the application—in particular, that the Bistro might have undisclosed owners. JA 98, 215. Scott, who'd scheduled the meeting, understood that the goals of the visit were "to conduct a site inspection as well as follow up on a suspicion that there may possibly be someone else involved with the business that had not been disclosed to [ABC] during the application investigation." JA 215. In other words, the trip comprised both "a background investigation of an ABC applicant and [a] site visit." JA 105.

[6] Under a General Order promulgated in 2014, "[b]efore a license is issued the assigned territory agent shall conduct a site visit to ensure sufficient inventory of qualifying items, and other requirements relating to the licensed premises and to educate the applicant about ABC laws and regulations." JA 72. This general order was not considered below. JA 226-27.

5. During the inspection, Osburn enters a business office and finds evidence that Swim misrepresented the Bistro's ownership in the application.

On August 9, Osburn rode along with Scott to help investigate. JA 215. Osburn had previously worked with both Swim and Ward during ABC inspections of other establishments. JA 215.

As it turned out, the agents were delayed on their way to the meeting. Scott called Swim to let her know that they would be late. JA 501.

When they arrived, Scott and Osburn entered through the front door. JA 98, 215. While Scott spoke with Swim, Osburn walked back to the kitchen to begin his investigation. Osburn inspected the kitchen and storage areas, observing "the food, the equipment, the restaurant, facilities, the preparation area, [and] the storage." JA 216. This took about 10 minutes. JA 216.

Osburn then walked through an open door and into the Bistro's business office. JA 98, 216. Documents were strewn about in plain view. JA 216. Osburn looked at documents, photographed some, and opened drawers and a filing cabinet. JA 216. Consistent with ABC policy, his

search was "thorough." JA 216. Although he "went through pretty much everything" in the office, he did not remove any documents. JA 216.

Osburn found a document in the business office indicating that Ward was in fact the Bistro's owner. JA 216.

6. Swim complains that the agents' scheduled inspection violated her Fourth Amendment rights.

About two months after the site visit, Swim submitted written complaints about the investigation to the Governor and several members of the General Assembly. JA 99, 180, 216, 458-59. The media took note. JA 180, 447.

ABC summarized the issues Swim raised as follows:

> 1. Swim expected to be issued [an] ABC license when visited by agents on August 9, 2013.
>
> 2. On August 9, 2013 one agent entered through the front door and one through the back door like they were "raiding the place".
>
> 3. On August 9, 2013, agents told Swim they were "revoking [her] license privileges pending a hearing."
>
> 4. Agents issued subpoenas to Swim's bank by signing the documents themselves.
>
> 5. On August 9, 2013, agents held Swim in what they called a "criminal investigation" for three hours. Swim informed agents of her health problems but Agents "continued anyway, twisting [her] words and calling [her] a liar."

[A]gents held Swim without allowing her to leave and did not inform Swim of her rights.

6. Agents seized evidence in violation of Swim's constitutional rights.

7. Agents rummaged through Swim's business records with deliberate indifference to her rights.

8. Agents used threatening language and behavior on August 6, 2013.

9. The 2012 retail application for [another restaurant] was "lost and strung out."

JA 100-01, 448.

These complaints spurred an internal investigation, in which ABC concluded that almost all of Swim's assertions were either unfounded or unsubstantiated. JA 101, 216. ABC did, however, find that two complaints were substantiated as to Osburn: That he (1) seized evidence in violation of Swim's constitutional rights, and (2) rummaged through her business records with deliberate indifference to her rights. JA 101, 216-217.

7. ABC fires Osburn for violating Swim's Fourth Amendment rights.

On April 3, 2014, ABC fired Osburn for violating Swim's Fourth Amendment rights. JA 217-18. It gave him a Group III Written Notice—the most severe possible citation—for "Failure to Follow

Instructions and/or Policy (Offense Code 13)" and "Other — Violation of Constitutional Rights (Offense Code 99)." JA 103, 217, 287-89. The specific policies that he purportedly violated were General Order #68 (Search Warrants), General Order #10 (Code of Conduct), and General Order #12 (Code of Ethics). JA 433.

Osburn appealed this decision through an administrative grievance proceeding. He explained that he had not violated Swim's Fourth Amendment rights because his search was authorized under both (1) the "closely regulated industry" exception to the Fourth Amendment's warrant requirement and (2) a specific statute, Code § 4.1-204(F). That statute reads, in relevant part:

> 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.

Va. Code § 4.1-204(F).

8. ABC and the Circuit Court uphold Osburn's termination.

ABC's internal hearing officer upheld Osburn's termination. JA 217. Osburn appealed that decision to both the Department of Human

Resources Management ("Human Resources") and the Department of Employee Dispute Resolution ("Dispute Resolution"). JA 217. Dispute Resolution remanded the case to the hearing officer. JA 217. On remand, the hearing officer again upheld Osburn's termination. JA 217.

Osburn again appealed to the both Human Resources and Dispute Resolution. This time, both upheld the hearing officer's decision. JA 217. Osburn appealed those decisions to the Circuit Court for the City of Roanoke, which also upheld his termination. JA 195-96, 217.

9. The Court of Appeals affirms the Circuit Court's judgment based on an interpretation of Code § 4.1-204(F) that neither Osburn nor ABC advanced.

Osburn then appealed the Circuit Court's judgment to the Court of Appeals of Virginia. The Court of Appeals held that the Circuit Court had not erred by concluding that Osburn's warrantless search of the business office violated the Fourth Amendment. JA 227-28.

The Court of Appeals found that both the closely regulated industry exception and Code § 4.1-204(F) apply to ABC licensees and license applicants alike. JA 220-221. But it read the statute to place the burden of allowing access on the licensee or applicant, "essentially requiring a case-by-case waiver of his or her Fourth Amendment rights

in order to become licensed or to retain a license." JA 221. Neither Osburn nor ABC endorsed this reading. Osburn pointed out that the statute gave ABC agents "free access" to search the premises of both licensees and applicants. ABC insisted that the statute gave agents free access to the premises of only licensees, and not applicants. JA 220. The Court of Appeals determined that both parties were wrong. On its reading, the statute did not give ABC agents free access at all, but rather made that access wholly dependent on the subject's consent. JA 220-21.

The Court of Appeals then turned to the closely regulated industry exception. It ruled that the alcoholic-beverage industry is closely regulated. The court therefore applied the three-part test laid out in *New York v. Burger*, 482 U.S. 691, 702-703 (1987), to determine whether Osburn's search was justified. JA 220-21. Under the *Burger* test, it considered whether (1) a substantial government interest informed ABC's regulatory program; (2) the warrantless inspection was necessary to further that regulatory program; and (3) Code § 4.1-204(F) provided a constitutionally adequate substitute for a warrant. JA 221.

The Court of Appeals determined that Osburn's search met the first two prongs of this test. JA 221-22. But it ruled that the search failed to meet the third prong because Code § 4.1-204(F) did not provide a constitutionally adequate substitute for warrant. On the lower court's reading, the statute didn't provide *any* substitute for a warrant other than the applicant's consent. JA 222. Earlier in the proceeding, the hearing officer had determined that the evidence was insufficient to find that Osburn had express or implied consent to search the Bistro's office. As a result, there was no substitute for a warrant and, according to the Court of Appeals, Osburn's search was illegal. JA 224-25.

Osburn appeals.

Argument & Authorities

1. The standard of review is de novo.

The Court will review the Court of Appeals' judgment de novo. In reviewing a grievance proceeding, a court may reverse or modify the hearing officer's decision only if it is contrary to law. *Va. Polytechnic Inst. v. Quesenberry*, 277 Va. 420, 429 (2009); Va. Code § 2.2-3006(B). The appealing party must identify a constitutional provision, statute, regulation, or judicial opinion that the hearing officer's decision

violated. *Quesenberry*, 277 Va. at 429. These questions of law are reviewed de novo. E.g., *Commonwealth v. Needham,* 55 Va. App. 316, 323 (2009). Otherwise, the hearing officer is to act as fact finder and the Director of Human Resources is to determine whether the hearing officer's decision is consistent with policy, with neither determination subject to judicial review. *Quesenberry*, 277 Va. at 430.

2. Osburn's search did not violate the Fourth Amendment.

A. The Fourth Amendment permits warrantless searches of closely regulated businesses.

The Fourth Amendment generally protects property owners from unreasonable government intrusions, providing that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … ." Inspections of commercial properties like the Bistro can be unreasonable if they're not authorized by law, or if they are so unpredictable that the owner has no real expectation that her property will be inspected by government agents from time to time. *Dewey v. Donovan*, 452 U.S. 594, 599 (1980). In such cases, a warrant may be necessary to protect the property owner by assuring her that any inspection will meet reasonable standards. *Ibid.*

But a warrant and its concomitant assurances of regularity may be unnecessary under certain inspection regimes. *Ibid*. That's because some industries have "such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor over the stock of such enterprise." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (internal citation omitted). The sale of alcohol is one such industry. *Ibid*. "[W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation." *Ibid.* Closely regulated enterprises differ from ordinary businesses because of their "long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware." *Ibid*. Thus, "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." *Ibid*.

The Fourth Circuit recently held, for example, that as an ABC licensee, a company "consented to allowing the Virginia ABC Board and its agents 'free access' to 'examin[e] and inspect[]' its premises for the purpose of ensuring compliance with ABC regulations." *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 133 (4th Cir. 2008) (per curiam).

Just as important, the owner or operator of a closely regulated business also has a reduced expectation of privacy. *Burger*, 482 U.S. at 699-701. When a businessperson seeks a government license to operate a closely regulated business, she does so knowing that the business's records and inventory will be subject to effective inspection. See *United States v. Biswell*, 406 U.S. 311, 316 (1972).

B. The sale of alcohol is a closely regulated industry.

As the Court of Appeals correctly recognized, JA 219, the sale of alcoholic beverages is a closely regulated industry. When determining whether an industry is closely regulated, courts consider factors including:

- The duration of the regulatory tradition. See *Burger*, 482 U.S. at 705-07; *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77 (1970); *Donovan*, 452 U.S. 594, 606 (1981);
- The comprehensiveness of the regulatory program. See *Burger*, 482 U.S. at 704-05; *Donovan*, 452 U.S. at 606; and
- Whether other jurisdictions have imposed similar regulations. See *Burger*, 482 U.S. at 705.

All three factors are present here.

As far as duration is concerned, the regulation of liquor sales predates the Fourth Amendment. *Colonnade Catering Corp.*, 397 U.S. at 75. England enacted the precursor of modern liquor legislation in 1660, authorizing commissioners to inspect brewing houses on demand at any time. *Ibid*. Massachusetts followed suit in 1692. *Ibid*. And in 1791 – the year the Fourth Amendment was ratified — Congress passed an excise tax authorizing federal officers to inspect the premises of distillers and importers. *Ibid*.

Nor can there be any question about the rigor of the Commonwealth's regulatory program. The Alcoholic Beverage Control Act, Title 4.1 of the Virginia Code, and its attendant regulations, Title 3 of the Virginia Administrative Code, comprehensively regulate the sale of alcoholic beverages. ABC reports that the Commonwealth's current statutory scheme has been in place since the repeal of Prohibition and has remained largely unchanged. Brief in Response to Petition for Appeal 10 (Jan. 5, 2017) [hereinafter BIO]. Sister states and the federal government likewise regulate the sale of alcohol. E.g., *List of Alcohol Laws of the United States*, Wikipedia, *available at*

https://en.wikipedia.org/wiki/List_of_alcohol_laws_of_the_United_States (last visited October 13, 2017).

C. The Commonwealth has a substantial interest in regulating the sale of alcohol, and warrantless searches are necessary to further that regulatory program.

This is not the end of the analysis, however, because warrantless searches of closely regulated businesses may still become unreasonable if they're conducted arbitrarily. *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2459 (Scalia, J., dissenting). Laws authorizing such searches must therefore satisfy three criteria: (1) There must be a "substantial government interest that informs the regulatory scheme pursuant to which the inspection is made"; (2) "the warrantless inspections must be necessary to further the regulatory scheme"; and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Burger*, 482 U.S. at 702-03 (cleaned up).

Here, Code § 4.1-204(F) authorized Osburn's search, and that statute meets all three criteria. As to the first, Virginia's government plainly has a substantial interest in regulating the sale of alcoholic beverages.

As to the second, warrantless searches are necessary to further this program. As a general matter, "if inspection is to serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Biswell*, 406 U.S. at 316. Requiring a warrant "could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." *Ibid*.

These concerns are only heightened in the context of alcoholic beverage control. The Supreme Court of Maine recently held that "[t]he spontaneous and unannounced nature of the inspection is essential to the enforcement function of the statutes and regulations." *State v. Johnson*, 962 A.2d 973, 983 (Me. 2009). Violations of an alcoholic beverage control statute could be quickly concealed from a scheduled inspection. *Ibid*. "Bottles of liquor could be moved, illegal substances could be discarded or hidden, bathroom signs could be moved or altered, records not normally kept current could be hurriedly updated, or chronically unsanitary locations could be cleaned to conceal the violation during the inspection." *Ibid*. This is as true in Virginia as it is in New England.

And in the specific context of license applicants, Code § 4.1-222(A) specifies the conditions under which ABC may refuse to grant a license. These conditions include situations where the applicant or a shareholder owning more than 10% of an applicant company:

- Has maintained a noisy, lewd, disorderly or unsanitary establishment;
- Is violating or allowing the violation of any provision of the ABC Act in his establishment at the time his application for a license is pending;
- Has misrepresented a material fact in applying to the Board for a license; or
- Is physically unable to carry on the business for which the application for a license.

Va. Code § 4.1-222(A)(1). ABC may also refuse to grant a license where the place to be occupied by the applicant:

- Does not conform to laws governing sanitation, health, construction or equipment; or

- Is so arranged or illuminated that ABC agents are prevented from ready access to, and reasonable observation of, any room or area within which alcoholic beverages are to be sold or consumed.

Va. Code § 4.1-222(A)(2). These violations, too, could be hidden from a scheduled inspection.

D. Code § 4.1-204(F) provides a constitutionally adequate substitute for a warrant.

Third, Code § 4.1-204(F) provides a constitutionally adequate substitute for a warrant. To meet this test, the statute must perform the two basic functions of a warrant: It must (1) advise the property owner that the search is being made under the law, with a properly defined scope; and (2) limit the inspecting officer's discretion. *Burger*, 482 U.S. at 703. To perform the first function, the statute must be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Ibid*. To perform the second, it must be "carefully limited in time, place, and scope." *Ibid.*

Code § 4.1-204(F) checks these boxes. It allows the Board and its agents free access during reasonable hours to:

- Every place in the Commonwealth;

- The premises of every wine shipper licensee and beer shipper licensee; and
- The premises of every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold;

in each case to inspect and examine the location and the records it contains.

"Place" and "premises" are defined terms under the Act. They mean "the real estate, together with any buildings or other improvements thereon, designated in the application for a license as the place at which the manufacture, bottling, distribution, use or sale of alcoholic beverages shall be performed," excluding any portion that is used as a private residence. Va. Code § 4.1-100. This reference to an application—as opposed to a license—suggests that the search regime covers applicants as well as licensees. That conclusion is buttressed by the definition's use of the future tense: Defining "place" as the location where the sale of alcoholic beverages "*shall be* performed" picks up applicants and licensees alike.

Code § 4.1-204(F) thus puts ABC applicants and licensees on notice that their property will be subject to periodic inspection. It limits those inspections in time to reasonable hours. It limits them in place to the location designated in the application for an ABC license. And it limits them in purpose to inspecting the premises and the records it contains.

Osburn's search of the Bistro's business office under Code § 4.1-204(F) therefore satisfied the *Burger* test. It was a valid warrantless search of a closely regulated business.

3. The Court of Appeals erred by affirming the Circuit Court's judgment.

A. The Court of Appeals misinterpreted Code § 4.1-204(F).

The Court of Appeals disagreed, but its analysis was based on a misinterpretation of Code § 4.1-204(F). The lower court correctly ruled that the sale of alcohol was a closely regulated industry, JA 219, and that Osburn's search met the first two prongs of the *Burger* test, JA 221-22. It also correctly determined that Code § 4.1-204(F) applied to both licensees and applicants. But it incorrectly ruled that Code § 4.1-204(F) did not provide a constitutionally adequate alternative to a warrant. That's because, on the lower court's reading, the statute

provided no alternative other than the applicant or licensee's consent, which was to be secured on a case-by-case basis. JA 220-22.

The Court of Appeals simply misinterpreted the statute. The primary goal of statutory interpretation is to give effect to the legislature's intent. *Melanson v. Commonwealth*, 261 Va. 178, 183 (2001). That intent is to be deduced from the words used, unless a literal interpretation would result in a manifest absurdity. *Crawford v. Haddock*, 270 Va. 524, 528 (2005). When interpreting an unambiguous statute, courts are governed by the plain meaning of the text. *Doss v. Jamco, Inc.*, 254 Va. 362, 370 (1997). They cannot resort to legislative history or extrinsic evidence. *Ibid.* Nor may they adopt a reading that makes a portion of the statute useless, repetitive, or absurd. Rather, they must give reasonable effect to each word in the statute. *Id.* at 371; see also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012) (explaining that every word in every provision should be given effect; none should needlessly be given an interpretation that robs it of consequence) [hereinafter Scalia & Garner].

Here, Code § 4.1-204(F)'s meaning is plain: ABC agents "shall be allowed free access during reasonable hours to every place in the Commonwealth." This access is not to be given or withheld at the applicant or licensee's whim, as the Court of Appeals thought, on pain of forfeiting a license. JA 221. Just the opposite, it is a criminal offense for a licensee to deny access under Code § 4.1-204(F) — a Class 1 misdemeanor, Code § 4.1-331, punishable by up to a year in jail, a $2,500 fine, or both, Code §18.2-11. Granting "free access" to ABC agents is mandatory under the Act, and the law puts every licensee and applicant on notice of this fact.

Code § 4.1-204(F) has a clear purpose: To facilitate the administrative the searches needed to effect the Commonwealth's alcoholic-beverage-control regime. The Court of Appeals' reading would not just defeat that purpose; it would render the statute entirely useless. An ABC agent can *always* search a location with the owner's consent. The General Assembly does not need to pass a statute to give him that power. Any reading that so limits Code § 4.1-204(F) renders it surplusage, in violation of basic principles of statutory interpretation.

Properly understood, the statute authorizes warrantless searches of the premises of ABC applicants and license.

B. The Court of Appeals mistakenly concluded that Osburn's search exceeded the scope of Swim's consent.

Even if the Court of Appeals' interpretation of the statute were correct, and Osburn needed Swim's affirmative consent, its judgment would still be mistaken. The lower court was wrong to conclude that Osburn's search exceeded the scope of Swim's consent.

At first blush, the Court of Appeals' result might seem almost foreordained by the hearing officer's determination that there was insufficient evidence to find that Swim consented to a search of the business office. JA 113. But as the lower court recognized, while the hearing officer's fact findings are binding, the application of legal standards of consent to those facts is reviewed de novo. JA 223; see *Brooks v. Commonwealth,* 282 Va. 90, 94-95 (2011) (claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of fact and law that is reviewed de novo on appeal).

The standard for measuring consent under the Fourth Amendment is objective reasonableness: What would a typical person have understood based on the exchange between the subject and the

law-enforcement officer? *Brooks,* 282 Va. at 95. The scope of a search is generally defined by its expressed object. *Ibid*.

Here, the hearing officer found as fact that the purpose of the August 9, 2013, meeting was "to conduct a site visit and follow up on concerns as to the application." JA 98. He further determined that Osburn was conducting both "a background investigation of an ABC applicant and site visit." JA 105; see also *ibid*. ("On 8/9/13 Special Agent and Grievant went to establishment for a site visit and, among other matters, to follow up on the information being gathered pertaining to ownership of the business.").

When Swim invited the agents into the Bistro for the scheduled investigation, she knew what she was getting into. Swim was a repeat player who had been involved with earlier ABC investigations—and, notably, with inspections run by Osburn. JA 215. Beyond that, Code § 4.1-204(F) authorized the inspection of every part of the building designated in the application. That included the business office. And Code § 4.1-204(F) authorized *inspection*, not just entry. "Inspection authorization would be meaningless if the agents could not open lockers, cabinets, closets, and storerooms and indeed pry open cases of

liquor to see the contents." *Colonnade Catering Corp.*, 397 U.S. at 78 (Burger, J., dissenting).

Consider, for example, *Ruttenberg v. Jones*, 283 Fed. Appx. 121, 134-35 (4th Cir. 2008), where an ABC licensee similarly insisted that his "private office" was outside the scope of ABC's inspection authority because no alcoholic beverages were stored or sold in that room. The Fourth Circuit disagreed. Reading the ABC agents' authorization to inspect "every place in the Commonwealth" in light of Code § 4.1-100's definition of "place," the court concluded that ABC agents were authorized to search the entire building designated in the application. It noted that this result made perfect sense: "[I]f so-called 'private offices' located on the premises of liquor establishments were immune from administrative inspection, ABC licensees … could utilize such spaces as sanctuaries for illegal activity." *Id.* at 135. In fact, the licensee in *Ruttenberg* had stored two bottles of contraband alcohol in his private office. *Ibid.* An ABC search that couldn't reach a private office would be toothless, and a regulatory regime based on such searches would be easily manipulated.

The Court of Appeals relied heavily on an ABC Operations Manual, OM-03, which it tried to use to limit the expected scope of any "site visit" to a cursory check for a sufficient inventory of qualifying items. JA 224. The court posited that an objectively reasonable person in Swim's position "would have believed the scope of their consent to be limited to a site visit search of the kitchen—and other areas where alcohol would be kept and served—and no more." JA 224.

This reasoning fails. As *Ruttenberg* shows, an ABC search is not limited to the particular rooms where alcohol will be kept and served. Even if it were, the lower court suggests no reason why alcohol might not be kept in a business office, as it was in *Ruttenberg*. And the Court of Appeals' position overlooks the obvious point that one way to ensure a sufficient inventory of qualifying items is by checking purchases orders, invoices, and other records that would ordinarily be kept in a business office. OM-03 itself directs agents to "[v]erify and obtain monthly sales (less sales tax) and inventory (cost) figures of qualifying items as well as alcoholic beverages if applicable." JA 350.

Aside from these problems, OM-03 simply won't do the limiting work the Court of Appeals asks of it. The manual required agents to

"conduct a thorough investigation of all applicants," verifying ownership and compliance with the Act and ABC regulations. JA 348-50. It also announced agency policy "to conduct a detailed and thorough investigation of all persons and locations for ABC licenses …." JA 336. These directives suggest much more than a quick sweep of the kitchen.

A reasonable person in Swim's position would thus have understood that the agents' investigation would extend beyond the kitchen. Her consent to a site visit and inspection authorized Osburn's investigation of the business office.

4. ABC's arguments are unpersuasive.

ABC agrees that the Court of Appeals misinterpreted Code § 4.1-204(F). The agency urges the Court to adopt a different but equally flawed interpretation the statute, under which it authorizes searches of the premises of licensees but not applicants. E.g., BIO 1-2, 6, 17-20. Indeed, ABC has maintained throughout this proceeding that Osburn's search would have been fully permissible if Swim had possessed an ABC license; it was only her status as an applicant that rendered the search in any way problematic. See, e.g., BIO 1-2 ("While the Court was correct that the statute does not authorize a warrantless search without

consent of the premises of *applicants*, it was wrong about *licensees*.") (emphasis in original); JA 110 ("Agency was concerned that while Grievant's actions and inspection would have been authorized for an ABC Licensee, they were not authorized for an investigation of an applicant for an ABC license.").

The Court should not adopt this interpretation. Code § 4.1-204(F)'s operative provision does not distinguish between applicants and licensees. Far from it; the language refers to "place," which is a defined term under the Act—and one that turns on the terms of the *application*, not the license.

ABC contends that this creates an ambiguity, because another provision in the statute does refer to applicants. BIO 9-10. That provision says: "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."

This does not create an ambiguity. A statute is ambiguous if its text can be understood more than one way, or if its language is difficult to comprehend or lacks clarity. *Butler v. Fairfax Cnty. Sch. Bd.*, 291 Va.

32, 37 (2015). That's not a problem here. The natural reading of Code § 4.1-204(F) is that "free access to every place in the Commonwealth" means "free access to every place in the Commonwealth," irrespective of whether it is owned by a licensee or applicant. When the General Assembly later uses more targeted language specifying categories like "wine shipper licensee[s]," "beer shipper licensee[s]," "delivery permittee[s]," and applicants for such licenses and permits, it is granting ABC agents more targeted authority to facilitate out-of-state inspections. That authority has nothing to do with in-state applicants for retail licenses like Swim. It certainly doesn't render ABC's authority to inspect their premises somehow ambiguous.

ABC also insists that Code § 4.1-204(F) cannot apply to applicants, because it authorizes searches of only those places in the Commonwealth "where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold." ABC correctly notes that an applicant cannot manufacture, bottle, store, offer for sale, or sell alcoholic beverages before obtaining a license. Thus, on its reading, the statute cannot apply to applicants. BIO 18.

ABC misreads the statute. With apologies for the repetition, here (again) is the controlling text, with the relevant language highlighted:

> 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.

On its face, the statute allows the Board and its agents free access to:

- Every place in the Commonwealth, as highlighted in **red**;
- The premises of every wine shipper licensee and beer shipper licensee, as highlighted in **blue**; and
- The premises of every delivery permittee wherever located where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold, as highlighted in **green**.

The modifier "where alcoholic beverages are manufactured, bottled, stored, offered for sale or sold" does not modify every item in the list. It modifies only the immediately preceding item: The premises of every delivery permittee wherever located.

That's because under the "rule of the last antecedent," where no contrary intention appears, modifiers refer solely to the last antecedent — that is, the last word, phrase, or clause that can be made an antecedent without changing the meaning of the sentence. *Butler*, 291 Va. at 37. Put slightly differently, a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); see also Scalia & Garner 140-43 (2012) (explaining that a pronoun, relative pronoun, or demonstrative adjective generally refers to the nearest reasonable antecedent); *id.* at 152-53 (observing that when syntax involves something other than a parallel series of nouns and verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent).

The classic example is the case of parents who, before leaving their teenage son alone for the weekend, warn him that he'll be punished if he throws a party or engages in any other foolishness that damages the house. See *Barnhart,* 540 U.S. at 27. When the boy is inevitably caught hosting a party, it will be no excuse to point out that

he didn't damage the house. *Ibid*. His parents proscribed (1) throwing a party and (2) engaging in any other foolishness that damages the house.

To be sure, this rule is not without exceptions. When a straightforward, parallel construction involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the whole series. This concept also has a fancy name, the "series-qualifier canon." Scalia & Garner 147-51. But that canon doesn't apply here, because Code § 4.1-204(F) doesn't allow a natural parallel construction. Instead, the General Assembly grants free access to every place in the Commonwealth in one clause, and then uses both textual signals ("and to the premises of both") and structural signals (romanettes (i) and (ii)) to break out later items in the list.

Also, "[t]he typical way in which syntax suggests no carryover modification is that a determiner (*a*, *some*, *the*, etc.) will be repeated before the second element." Scalia & Garner 148 (emphasis in original). Here, the General Assembly repeats the determiner "every" before the second element, romanette (ii), signaling that the modifier does not carry over to the first element, romanette (i)—much less to an earlier clause that precedes the numbered list altogether.

ABC also argues that Code § 4.1-204(F) cannot apply to applicants, because the title of the Code section is "Records of licensees; inspection of records and places of business." BIO 18. The agency forgets that "[t]he headlines of the sections printed in black-face type are intended as mere catchwords to indicate the contents of the sections and do not constitute part of the act of the General Assembly." Va. Code § 1-217. And another part of Code § 4.1-204, subsection 204(B), defines the records that licensees must maintain. It's hardly remarkable that the word "licensees" made it into the statute's headline.

Similarly, ABC claims that Code § 4.1-204(F) cannot apply to applicants because it appears in Chapter 2 of the Alcoholic Beverage Control Act, which addresses "Administration of Licenses." BIO 20. But Chapter 2 also covers applications for licenses. It devotes all of Article 3 to "Applications for Licenses and Permits; Fees; Taxes." While Article 2 of the Chapter nominally concerns "Licenses Granted by Board; Limitations; Revocation and Suspension," even that Article is not strictly limited to licensees. It contains a statute controlling applications, Code § 4.1-222, which defines the conditions under which ABC may refuse to grant licenses. Code § 4.1-222(n) allows ABC to

refuse to grant a license if it has reasonable cause to believe that the applicant "[i]s violating or allowing the violation of any provision of this title in his establishment at the time his application for a license is pending." This subjects ABC applicants to the whole smorgasbord of requirements set forth in the Act.

In short, none of ABC's textual arguments are compelling. They cannot defeat the plain meaning and obvious legislative purpose of Code § 4.1-204(F).

Conclusion

ABC fired Osburn for violating Swim's constitutional rights. But his actions were fully consistent with the Fourth Amendment and the Alcoholic Beverage Control Act. There was no legal basis for his termination. The Court should reverse the judgment of the Court of Appeals and remand this case for further proceedings.

/s/ James J. O'Keeffe, IV
James J. O'Keeffe, IV (VSB# 48620)
JOHNSON, ROSEN & O'KEEFFE, LLC
131 Kirk Avenue SW
Roanoke, Virginia 24011
540-491-0634
Fax: 1-888-500-0078

okeeffe@johnsonrosen.com

Dale W. Webb (VSB# 26359)
FRANKL, MILLER, WEBB &
MOYERS, LLP
1711 Grandin Road
Roanoke, Virginia 24015
540-527-3500
Fax: 540-527-3520
webb@fmwm.law

Certificate

I certify that on this 16th day of October, 2017, pursuant to Rules 5:26 and 5:32, three paper copies of this Opening Brief of Appellant and the Joint Appendix were hand-filed with the Clerk of the Supreme Court of Virginia, and electronic copies of the Brief and Appendix were filed via VACES. On the same day, copies were served by email on:

Trevor S. Cox
Matthew R. McGuire
Ryan S. Hardy
OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
804-786-2071
Fax: 804-786-1991
TCox@oag.state.va.us
MMcGuire@oag.state.va.us
RHardy@oag.state.va.us

/s/ James J. O'Keeffe, IV
James J. O'Keeffe