

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

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ANTONIO MUSUMECI,

Plaintiff,

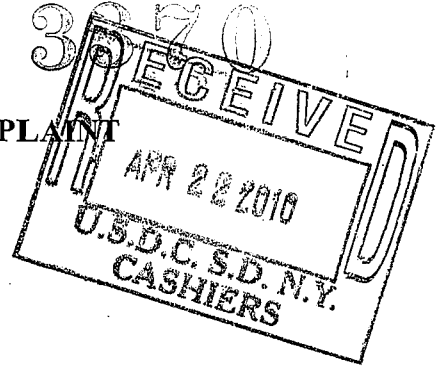
-versus-

THE UNITED STATES DEPARTMENT
OF HOMELAND SECURITY; THE FEDERAL
PROTECTIVE SERVICE; INSPECTOR
CLIFFORD BARNES, of the Federal Protective
Service; and JOHN DOE, an unidentified federal
agent,

Defendants.
-----X

10 CIV 3070

COMPLAINT



PRELIMINARY STATEMENT

1. This is a civil rights action to vindicate the constitutional right of New Yorkers and others to take photographs or video in outdoor areas that are open to the public and that are near federal courthouses, office buildings, and other federal property. The Plaintiff Antonio Musumeci was arrested in November 2009 while videotaping a political protest in a public plaza outside of the federal courthouse in lower Manhattan. Mr. Musumeci was charged with violating a vague federal regulation that restricts photography and that appears to be inconsistently enforced.
2. This regulation is unconstitutional to the extent that it in fact regulates non-commercial photography in outdoor areas -- like sidewalks and plazas -- to which the public has unrestricted access. To the extent it does not regulate such activity, federal law-enforcement officials are improperly using the regulation as an excuse to arrest and harass law-abiding photographers.

3. Mr. Musumeci would like to safely film future political activities outside the Manhattan federal courthouse but fears further detention and harassment, a concern exacerbated by subsequent threats by federal officers. He seeks declaratory and injunctive relief that will allow him to film and take photographs in public areas outside federal buildings where pedestrians have unrestricted access, as well as compensatory damages for his unlawful arrest.

JURISDICTION AND VENUE

4. This Court has subject-matter jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. § 1331.
5. Venue is proper pursuant to 28 U.S.C. § 1391(b) in that plaintiff's claims arise in the Southern District of New York.
6. Jurisdiction to grant a declaratory judgment is conferred by 28 U.S.C. §§ 2201, 2202. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure. An award of costs and attorneys' fees is authorized pursuant to 28 U.S.C. § 2412(d).

PARTIES

7. Plaintiff ANTONIO MUSUMECI is a resident of New Jersey who works as a software developer for an investment bank.
8. Defendant the UNITED STATES DEPARTMENT OF HOMELAND SECURITY is an administrative agency of the United States.
9. Defendant the FEDERAL PROTECTIVE SERVICE is a component of the U.S. Department of Homeland Security that provides law enforcement services to federal property and buildings.

10. Defendant CLIFFORD BARNES is an Inspector with the Federal Protective Service. He is sued in his individual capacity.
11. Defendant JOHN DOE is an unidentified federal agent who participated in plaintiff Musumeci's arrest. He is sued in his individual capacity.

FACTS

Antonio Musumeci

12. Plaintiff Antonio Musumeci is a twenty-nine year-old, life-long resident of New Jersey who lives with his girlfriend in Edgewater. Mr. Musumeci holds a B.S. in Computer Science and currently works as a software developer for an investment bank.
13. Mr. Musumeci is an active member of the Manhattan Libertarian Party. He regularly reads libertarian newspapers and blogs and listens to libertarian radio programs. While not a professional photographer, Mr. Musumeci uses photography to record political speeches and to document instances of police misconduct.
14. In early November 2009, Mr. Musumeci heard about Julian Heicklen, a libertarian activist who had advocated for jury nullification outside of the federal courthouse at 500 Pearl Street. Mr. Musumeci learned that Mr. Heicklen had appeared outside of the courthouse multiple times in consecutive weeks, starting in October 2009, and that on each occasion Mr. Heicklen had been arrested for distributing pamphlets to potential jurors.
15. Concerned about the possible mistreatment of Mr. Heicklen by law-enforcement personnel, Mr. Musumeci contacted Mr. Heicklen and offered to observe and record a future protest at the courthouse.

Arrest on November 9, 2009

16. On the morning of November 9, 2009, Mr. Musumeci traveled to the Moynihan Federal Courthouse at 500 Pearl Street during his lunch break to document Mr. Hecklen's political activities. For this purpose, he brought a hand-held video camera. Mr. Musumeci arrived at the plaza in front of the Pearl Street entrance at about 11:30 a.m.
17. The courthouse sits between Pearl Street on the south and Worth Street on the north. A plaza lies immediately to the west of the courthouse, running the length of the courthouse between Pearl Street and Worth Street. The southern edge of the plaza is contiguous with the sidewalk on Pearl Street. Throughout the day, the plaza is frequently full of people who use it to enter the courthouse, eat lunch, smoke, or to walk between Pearl Street and Worth Street. There are no signs in the plaza indicating that the plaza is federal property or that federal regulations restrict photography in the area. Upon information and belief, the public has unrestricted access to the plaza twenty-four hours a day.
18. At approximately 11:45 a.m. on November 9, Mr. Hecklen entered the plaza at the southern end near the courthouse steps and began to distribute pamphlets.
19. About ten minutes later, Mr. Musumeci introduced himself to Mr. Hecklen, whom he had not previously met in person, and conducted an interview that he recorded with his video camera.
20. While Mr. Musumeci and Mr. Hecklen were talking, Defendant Inspector Clifford Barnes of the Federal Protective Service emerged from behind Mr. Musumeci and confronted Mr. Hecklen.

21. Mr. Musumeci stepped back about ten feet to record Inspector Barnes's arrest of Mr. Heicklen.
22. Once Mr. Heicklen was arrested, Inspector Barnes approached Mr. Musumeci and told him that he was in violation of a federal regulation governing photography on federal property. Inspector Barnes then informed Mr. Musumeci that he was under arrest.
23. Inspector Barnes and Defendant John Doe, another officer in plainclothes, detained Mr. Musumeci, forced him to sit on the pavement, and confiscated his camera's memory card for evidence.
24. Mr. Musumeci next asked why he had been arrested. Inspector Barnes showed him a copy of a federal regulation, stating that it governed photography on federal property.
25. When Mr. Musumeci asked whether notice was required, Inspector Barnes responded by saying, in essence, "No notice. You knew what you were doing." Mr. Musumeci explained that he did not know about the regulation. Inspector Barnes responded that Mr. Musumeci was learning "the hard way."
26. While Inspector Barnes prepared a ticket for violating the regulation, Officer John Doe told Mr. Musumeci that he should have stopped recording when he was asked. Inspector Barnes corrected the officer and told him that he had not warned Mr. Musumeci to turn his camera off.
27. After being arrested and detained for approximately 20 minutes, Mr. Musumeci was released with a ticket for violating the photography regulation, identified on the

ticket as 41 C.F.R. § 102-74.420. When asked, Officer John Doe refused to provide his name or badge number to Mr. Musumeci.

28. On March 23, 2010, the photography charge against Mr. Musumeci was dismissed.

Subsequent Harassment

29. On November 16, 2009, Mr. Musumeci returned to the plaza again to witness Mr. Hecklen's political activity and possible arrest. Mr. Musumeci arrived at about 11:45 a.m. This time, however, Mr. Musumeci stood outside the plaza, on an adjacent sidewalk, in an attempt to avoid arrest.
30. Inspector Barnes later arrived and arrested Mr. Hecklen. While Inspector Barnes did not detain or arrest Mr. Musumeci, a U.S. Marshal approached Mr. Musumeci and warned that he would be charged with an offense for his photography.
31. Another photographer in the plaza observed Mr. Hecklen being arrested and began taking photographs of the arrest. Inspector Barnes noticed the photographer and threatened to arrest him. Upon information and belief, although Inspector Barnes ultimately released the photographer, he warned him that photography in the plaza without permission was illegal.
32. In the months since these events, as a result of this harassment and the earlier arrest, when Mr. Musumeci has returned to observe protests outside the courthouse, he has been afraid to bring his camcorder because he does not want to be arrested again.
33. On April 19, 2010, Mr. Musumeci returned to observe and report on a protest. While standing on the sidewalk, he was singled out by Defendant Barnes and other federal agents. Inspector Barnes asked him, "Having fun yet?", and an unidentified

agent photographed Mr. Musumeci. This experience has heightened Mr. Musumeci's anxiety about recording video of future protests at the courthouse.

Photography Regulation 41 C.F.R. § 102-74.420

34. The federal regulation Mr. Musumeci was charged with violating was 41 C.F.R. § 102-74.420, which regulates photography on federal property. The regulation requires advance permission for taking photographs in certain agency occupied areas. The regulation also identifies specific areas that are exempt from this requirement, provided the photography is for a news purpose. An accompanying regulation states that notice of the restriction must be posted at the entrance to each facility in which it operates.
35. The regulation states in relevant part: "persons entering in or on Federal property may take photographs of—(a) Space occupied by a tenant agency for non-commercial purposes only with the permission of the occupying agency concerned; (b) Space occupied by a tenant agency for commercial purposes only with written permission of an authorized official of the occupying agency concerned; and (c) Building entrances, lobbies, foyers, corridors, or auditoriums for news purposes."
36. This regulation has been included in the Code of Federal Regulations in various forms since at least 1957. Authority for the regulation is provided in 40 U.S.C. § 1315. This statute delegates authority for enforcement of this regulation to the Secretary of the Department of Homeland Security, under whose direction defendants operate.

37. A limiting regulation governs the applicability of the photography regulation by requiring that notice be posted in areas where it applies. The notice regulation, 41 C.F.R. § 102-74.365, states in part that “Federal agencies must post the notice in the Appendix to this part at each public entrance to each Federal facility.” The text of the Appendix includes a copy of the text of regulation 41 C.F.R. § 102-74.420.
38. Notice was not posted in the areas where Mr. Musumeci was arrested pursuant to § 102-74.420.
39. Upon information and belief, defendants have arrested at least one other photographer pursuant to the regulation on a sidewalk outside a federal building in lower Manhattan.
40. Upon information and belief, this regulation is enforced differently in other federal jurisdictions and with other populations in the same jurisdiction. First, upon information and belief, federal agents in Philadelphia permit photographers to take photographs and record video on federal property outside the James A. Byrne Federal Courthouse. Second, upon information and belief, it is the practice of the Supreme Court Police to allow photography with “personal cameras” on the steps of the United States Supreme Court in Washington, D.C. Finally, in the plaza outside 500 Pearl Street in Manhattan, people departing the citizenship naturalization ceremony held at the Moynihan Courthouse on Friday mornings have been allowed to take photos in the plaza without interference.

FIRST CAUSE OF ACTION

41. The Defendants' actions violated Plaintiff Musumeci's rights under the First Amendment to the United States Constitution.

SECOND CAUSE OF ACTION

42. The Defendants' actions violated Plaintiff Musumeci's rights under the Fourth Amendment to the United States Constitution.

WHEREFORE, Plaintiff requests that this Court:

- (1) Assume jurisdiction over this matter;
- (2) Issue a declaratory judgment that Defendants' actions violated the First and Fourth Amendments to the United States Constitution;
- (3) Issue a declaratory judgment that Regulation 41 C.F.R. § 102-74.420 cannot constitutionally be enforced to restrict non-commercial photography in outdoor public areas where pedestrians have an unrestricted right of access, such as plazas, sidewalks and parks or, to the extent the regulation does not apply to such photography, a declaration that such photography is lawful;
- (4) Issue an injunction requiring the Defendants to cease enforcement of 41 C.F.R. § 102-74.420 to restrict non-commercial photography in outdoor public areas where pedestrians have an unrestricted right of access, such as plazas, sidewalks and parks or, to the extent the regulation does not apply to such photography, an injunction requiring the defendants to cease enforcement action against such photography;

- (5) Award compensatory damages for the Defendants' Fourth Amendment violations;
- (6) Award attorney fees pursuant to 28 U.S.C. § 2412(d); and
- (7) Grant any other relief the Court deems appropriate.

Respectfully Submitted,



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Dated: April 22, 2010
New York, N.Y.

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On the Complaint:

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* The Plaintiff and the New York Civil Liberties Union Foundation will be seeking leave of court to permit these students to serve as attorneys in this matter pursuant to the Southern District's Plan for Student Practice in Civil Actions.