Case No.: 531495

To Be Argued By: Thomas R. Fallati
Time Requested: 10 Minutes

New York Supreme Court
Appellate Division - Third Department

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., DOUGLAS J. HASNER, DAVID D. WYNN, d/b/a DAVE-LIN ENTERPRISES and GARY L. O'BRIEN, d/b/a BLUE EAGLE EXPRESS,

Plaintiffs-Appellants,

-against-

NEW YORK STATE DEPARTMENT OF TRANSPORTATION, MARIE THERESE DOMINGUEZ ACTING COMMISSIONER, NEW YORK STATE DEPARTMENT OF TRANSPORTATION, GEORGE P. BEACH, II, SUPERINTENDENT OF THE NEW YORK STATE DIVISION OF STATE POLICE and MARK J.F. SCHROEDER, COMMISSIONER FOR THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Defendants-Respondents,

Brief for Plaintiffs-Appellants

Albany County Index No. 904994-19

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Plaintiffs-Appellants Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Douglas J. Hasner, David D. Wynn, and Gary L. O'Brien (collectively "Plaintiffs") appeal the Decision & Order of the Supreme Court, Albany County, New York, dated May 6, 2020, granting Defendants' motion to dismiss (Decision & Order, NYSCEF No. 32, hereinafter "May 6 Op."). *See generally* R-5–R-16. Plaintiffs are challenging the constitutionality, under Article I, Section 12 of the New York Constitution, of New York Department of Transportation's ("NYSDOT") warrantless and pervasive GPS tracking of truck drivers, regardless of whether they are on or off duty, as required by New York's electronic logging device ("ELD") Rule.

ISSUES PRESENTED

Plaintiffs' appeal presents this Court with five issues:

1. Does the mandatory inspection of GPS tracking data, conducted for the sole purpose of documenting driver compliance with hours-of-service regulations, a violation of which is a penal offence in New York, constitute an administrative search eligible for exemption from Article I, Section 12's warrant requirement?

   The Supreme Court said: Yes

2. Does the ELD Rule subvert the basic privacy values embodied in New York's Constitution because it is not part of a comprehensive administrative program unrelated to the enforcement of the criminal laws?

   The Supreme Court said: No

3. New York appellate courts have only applied the closely regulated business exception to Article I, Section 12's warrant requirement to uphold warrantless searches of business premises and records, but never to the warrantless search of *individual persons.* Does the extension of the closely regulated business exception to include the 24/7 GPS tracking of the movements of individual *persons* (drivers) violate Article I , Section 12 of New York's constitution?

   The Supreme Court said: No

4. Does the mandatory GPS tracking of truck drivers constitute a valid warrantless administrative search under Article I, Section 12 of New York's Constitution where drivers possess at least a minimal expectation of privacy, where the New York Department of Transportation has offered no justification for why *warrantless* searches are necessary, and where the ELD Rule itself contains no limitations on the time, place, frequency, or scope of the warrantless searches?

   The Supreme Court said: Yes.

5. Did Defendants violate the State Administrative Procedures Act and act in an arbitrary and capricious manner when they promulgated the ELD Rule where they responded to Plaintiffs' challenge to the constitutionality of the proposed rule under Article I, Section 12 of New York's constitution by relying upon irrelevant and inapposite case law decided under the Fourth Amendment and where Defendants wholly failed to respond meaningfully to public comments by Plaintiffs calling into question the lawfulness of the proposed rule?

   The Supreme Court said: No.

STATEMENT OF THE CASE

Background

This case stems from New York State Department of Transportation's promulgation of regulations mandating the use of electronic logging devices, the ELD Rule, that collect extensive information about a truck driver for use by law enforcement to enforce truck driver compliance with hours-of-service regulations. Pls.' Verified Pet. and Class Action Compl. ("Compl.") ¶¶ 1-2, 81-88, 99, 100,103-107 (R-19–20, R-30–31, R-32–34). The hours-of-service rules dictate how many hours a truck driver is permitted to work in a given period of time. *See* Compl. ¶¶ 58, 76-88, 108 (R-27, R-29–31, R-34); N.Y. Comp. Codes R. & Regs. tit. 17, § 820.6 (adopting, with exceptions, federal regulations found at 49 C.F.R. §§ 395.1-395.38, 395.8(a)(1)(i)). Violation of the hours-of-service regulations is a criminal offence under New York law. Compl. ¶¶ 99, 100,103-107 (R-32–34).

NYSDOT adopted the ELD Rule pursuant to a voluntary contractual agreement with the U.S. Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA"). FMCSA is responsible for establishing and enforcing federal trucking regulations. *Id.* at ¶ 54 (R-27); *see* 49 C.F.R., Parts 350-99. FMCSA enters into contractual agreements such that individual states adopt into state law federal regulations and statutes governing the trucking industry, including hours-of-service rules, and then enforce them. *See* Compl. ¶¶ 55-57 (R-27) (explaining that

Congress has not authorized states to enforce federal trucking regulations directly). In exchange, FMCSA provides monetary grants under its Motor Carrier Safety Assistance Program ("MCSAP"). *See* Compl. ¶¶ 57-58 (R-27); *see* 49 U.S.C. § 31102(b), (c); 49 C.F.R. § 350.101(a). New York has entered into a MCSAP agreement with FMCSA and receives annual federal grants under that program. *See* Compl. ¶ 58 (R-27); Compl. Ex. A ("January 16, 2019 Emergency/Proposed Rulemaking") at 8, 10 (R-56, R-58); Compl. Ex. B ("March 20, 2019 Emergency Rulemaking") at 13-14 (R-74–75); May 6 Op. at 2 (R-6). Because New York's participation in the MCSAP program is voluntary, and not federally mandated, NYDOT's promulgation of the ELD Rule is subject to the New York Constitution.

ELDs are sophisticated GPS tracking devices that integrate with the vehicle's engine to automatically record the date, time, GPS location, engine hours, and vehicle miles along with the identification of the driver and motor carrier—24 hours a day, 365 days a year—regardless of whether the driver is, for example, on or off duty, driving in a professional or personal capacity, or resting in his or her truck's sleeper berth. *See* Compl. ¶¶ 10-11, 70-72, 94-99 (R-20–21, R-29, R-32–33); N.Y. Comp. Codes R. & Regs. tit. 17, §§ 820.6, 820.13 (adopting 49 C.F.R. Part 395). The ELD Rule requires the trucker to enter additional information, such as whether he or she is still working (though not driving), engaged in off-duty personal time, or, when applicable, physically located in the truck's sleeper berth. *See* Compl. ¶¶ 71-

72 (R-29). Given the national nature of the commercial trucking industry and that ELDs are constantly recording information, ELDs track drivers' activity over extended geographic distances, including far beyond New York's borders, and when their trucks are being used for purely personal purposes. *See* Compl. ¶¶ 33, 42 (R-24, R-25).

The information recorded by ELDs is designed to aid law enforcement review, *see* Compl. ¶¶ 64, 99-100 (R-28, R-32–33), and truck drivers are required to grant access to ELD data to law enforcement officials upon demand. *See* Compl. ¶¶ 13, 65 (R-22, R-28). Law enforcement officials may demand to review ELD data on the ELD's digital display screen or to download it. *See* Compl. ¶¶ 73-74, 99-100 (R-29, R-32–33). A driver is required to have at least seven days of ELD data available for inspection upon demand by enforcement officials. N.Y. Comp. Codes R. & Regs. tit. 17, § 820.7 (adopting 49 C.F.R. § 395.24(d)). This data is also provided to the motor carrier for which the drivers work. Motor carriers must make at least six months of data available for inspection upon demand by enforcement official. *Id.* (adopting 49 C.F.R. § 395.22(i), (j)).

During NYSDOT's rulemaking process adopting the ELD requirement, OOIDA submitted comments explaining (among other problems) that the proposed ELD requirement violated Article I, Section 12 of the New York Constitution. Compl. ¶¶ 76, 80-81, 83-84 (R-29–30); *see generally* Compl. Ex. C ("Public

Comment of OOIDA in Response to an Emergency/Proposed Rulemaking") at R-80–109. In addressing OOIDA's Article I, Section 12 concerns, NYSDOT cited a decision from the United States Court of Appeals for the Seventh Circuit applying Fourth Amendment jurisprudence to a similar ELD search regime adopted by the federal government. Compl. Ex. D ("April 24, 2019 Notice of Adoption") at R-149–50. NYSDOT formally adopted the ELD requirement into New York law on April 9, 2019. *See* Compl. ¶¶ 77-87 (R-30–31). It had previously adopted the ELD requirement on an emergency basis a few months earlier. *See* Compl. ¶¶ 81-84 (R-30). Ignoring OOIDA's comments identifying Article I, Section 12's limits on the constitutionality of warrantless searches, NYSDOT did not alter its proposed language in the final rule. Compl. ¶ 86 (R-31).

Procedural History

On August 8, 2019, Plaintiffs, in their personal capacity and as representatives of a putative class comprised of similarly situated commercial truck drivers, filed a complaint in the Albany County Supreme Court alleging that Defendants had adopted and were enforcing the ELD mandate in violation of Article I, Section 12 (Search and Seizure) and Section 6 (Due Process) of the New York Constitution,

and Article 78 of New York's Civil Practice Law and Rules. *See* Compl. ¶¶ 184-99 (R-43–45).[1] No claims under the federal Constitution were asserted. *See id.*

On September 23, 2019, Defendants moved to dismiss Plaintiffs' complaint arguing that the State can use GPS devices to warrantlessly track the movements and conduct of commercial truck drivers, whether they are on or off duty, and collect that information without a warrant.

Ruling of the Supreme Court

On May 6, 2020, the Supreme Court granted Defendants' motion to dismiss and upheld the constitutionality of the ELD Rule under Article I, Section 12. *See generally* May 6 Op. (R-5–16). The court held that the Rule was a valid administrative search, *id*. at 7 (R-11), and that Defendants' conduct was consistent with an exception to Article I, Section 12's warrant requirement. *Id.* at 8-9 (R-12–13). The court held that the ELD Rule's warrantless GPS tracking of both drivers' on-duty and off-duty movements and conduct, and the warrantless collection of that information, was reasonable. *See* May 6 Op. at 8-9 (R-12–13). The court also held

[1] Plaintiffs' challenge ensued after a prior lawsuit, filed in anticipation of the Rule's imminent adoption, was dismissed. *See OOIDA v. Calhoun*, 62 Misc.3d 909, 923-24 (Supreme Court Albany Cnty 2018). This Court held that the earlier appeal was limited to a pre-enforcement challenge and thus Plaintiffs' claims were moot as a result of NYSDOT's adoption of the ELD Rule in April. *See OOIDA v. Karas*, 13 N.Y.S.3d 681, 684 (3d Dept. 2020). This Court did not address the merits of Plaintiffs' challenge or the scope of Article I, Section 12's protections against warrantless searches or warrantless GPS tracking. *See id.*

that NYSDOT's adoption of the ELD Rule, including its inapposite response to OOIDA's rulemaking comments, was not arbitrary and capricious and satisfied its obligations under Section 202 of New York's State Administrative Procedures Act. *Id.* at 4 (R-8).

Plaintiffs filed a timely notice of appeal on June 5, 2020. Notice of Appeal at R-2. Plaintiffs requested extensions of time to perfect their appeal pursuant to 22 NYCRR 1250.9(b), which were granted by this Court. Plaintiffs perfected their appeal on March 25, 2021.

STANDARD OF REVIEW

This Court has jurisdiction to review the Supreme Court's grant of Defendants' motion to dismiss pursuant to Section 5501(c). The scope of the Appellate Division's authority is as broad as that of a trial judge—it may review both questions of law and questions of fact. *See* 8 N.Y. Prac., Civil Appellate Practice § 4:8 (2d ed.); *see also Brady v. Ottaway Newspapers*, 63 N.Y.2d 1031, 1032 (1984); *U.S. No. 1 Laffey Real Estate v. Hanna*, 215 A.D.2d 552, 553 (2d Dept. 1995). It is also free to take judicial notice of public records and "information culled from them," even if they are not part of the record on appeal. *People v. Suarez*, 51 Misc.3d 620, 624-25 (N.Y. Crim. Ct. 2016) (collecting cases). A *de novo* standard of review applies to questions of law, and the Appellate Division is not required to

show deference to the lower court's decision. *See Gulf Ins. Co. v. Transatlantic Reins Co.*, 13 A.D.3d 278, 279 (1st Dept. 2004).

Because this appeal is from a grant of a motion to dismiss, this Court must afford Plaintiffs' complaint "a liberal construction, accept the facts as alleged in the pleadings as true, and confer on [Plaintiffs] the benefit of every possible inference" to "determine whether the facts as alleged fit within any cognizable legal theory." *Graven v. Children's Home R.T.F., Inc.*, 152 A.D.3d 1152, 1153 (3d Dept. 2017); *see also Johnson v. Woodruff*, 188 A.D. 3d 1425 (3d Dept. 2020) (citing *Chanko v. Am. Broadcasting Cos.*, 27 N.Y.3d 46, 52 (2016), and *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)). The sole criterion is whether Plaintiffs have a cause of action. *See Pac. Carlton Dev. Corp. v. 752 Pacific, LLC*, 62 A.D.3d 677, 679 (2nd Dept. 2009); *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994) ("[T]he criterion is . . . not whether he has stated one."). Any presumption of constitutionality that may be applied to a state agency's rulemaking does not negate the inferences that Plaintiffs are entitled to under the motion to dismiss standard. Nor does such a presumption prevent Plaintiffs from asserting a viable constitutional claim or present an insurmountable obstacle to obtaining a favorable ruling on the merits. *See Murtaugh v. N.Y. State Dep't of Env'l Conservation*, 42 A.D.3d 986, 988-89 (4th Dept. 2007); *cf. People v. Keta*, 79 N.Y.2d 474, 499-500, 517 (1992) (holding the warrantless administrative search regime unconstitutional regardless of any

presumption of constitutionality); *Collateral Loanbrokers Ass'n of N.Y., Inc. v. City of New York*, 178 A.D.3d 598 (1st Dept. 2019) (same).

SUMMARY OF ARGUMENT

The first and most fundamental question presented is whether compelling truck drivers to record and produce GPS tracking data showing their record of duty status in order to enforce hours-of-service regulations constitutes a proper "administrative inspection." Such an administrative inspection may, under certain narrowly defined circumstances, be conducted without a warrant based upon probable cause. Here the Supreme Court ignored two disqualifying circumstances when it ruled, erroneously, that the ELD Rule constituted a proper "administrative inspection."

First, violation of the hours-of-service regulations is an offense under New York's penal code. By statute and regulation governing the administration of federal grants to New York under MCSAP, data generated by a driver's ELD device must be used *exclusively* to enforce violations of the hours-of-service regulations. 49 U.S.C. § 31137(e)(3). The Court of Appeals in *Keta* concluded that the asserted "administrative schemes . . . [were, in reality], designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property" and were not proper administrative inspections. *People v. Keta*, 79 N.Y.2d 474, 499 (citing *People v. Burger*, 67 N.Y.2d 338, 344 (1986)). Likewise here, searches

undertaken solely to uncover evidence of criminal violations of the hours-of-service regulations (and not to enforce a comprehensive administrative scheme) are not part of a valid administrative inspection that might, under limited circumstances, be implemented without a warrant.

Second, the ability to conduct warrantless administrative inspections has been limited exclusively to the inspection of business premises. In effect, Defendants here ask this Court to become the first appellate court in New York to uphold the warrantless search of *persons* within the framework of an administrative inspection. This Court should decline that invitation.

In addition to these two disqualifying circumstances, which on their own remove the ELD Rule from the exemptions available to certain warrantless administrative searches, the Supreme Court below made at least four other errors in granting Defendants' motion to dismiss. Those errors share the same predicates: disregard for binding Article I, Section 12 precedent, and failure to accept Plaintiffs' allegations as true as required under the motion to dismiss standard of review.

First, the Court failed to properly apply Article I, Section 12 to the ELD Rule's warrantless search—via pervasive GPS tracking—of truck drivers. *See* May 6 Op. at 5-6 (R-9–10) (disregarding that GPS tracking is itself a warrantless search in addition to the "warrantless retrieval of the information required to be recorded"). Neither this Court nor the Court of Appeals has ever upheld the warrantless GPS

tracking of an individual absent a specific, narrow exception to the warrant requirement. And neither Court has ever condoned the warrantless surveillance of an individual 24 hours a day, 365 days a year. The Supreme Court granted Defendants' motion to dismiss despite Plaintiffs' factual allegations that ELDs collect significantly more data than previously required, including the location and activities of drivers when they are off-duty and/or using their vehicle in a personal capacity.

Second, the Supreme Court adopted a breathtaking expansion of the closely regulated industry exception to permit the warrantless search of individuals specifically to gather evidence of penal code violations. Extending this otherwise narrow exception to the Article I, Section 12 warrant requirement is contrary to the heightened protection individual privacy receives under the New York Constitution and binding precedent.

Third, even assuming Article I, Section 12 permits the warrantless search of individuals under the closely regulated business exception to the warrant requirement, the Supreme Court failed to apply the three independent, demanding conditions that must be present for a warrantless search to be constitutional under that exception. *See* May 6 Op. at 8-9 (R-12–13). The Court ignored that truck drivers have more than a minimal expectation of privacy in their activities. It failed to assess the necessity of warrantless searches. And it ignored Plaintiffs' accurate allegations

that the Rule does not impose any of the required limits on enforcement, such as time, place, scope and frequency.

Fourth, the Court held that NYSDOT's adoption of the Rule was not arbitrary or capricious and that NYSDOT satisfied its obligations under New York's Administrative Procedures Act. *See* May 6 Op. at 3-4 (R-7–8). The Court reached this holding even though NYSDOT relied on inapposite case law and failed to address OOIDA's comments submitted during rulemaking.

Finally, the Supreme Court incorrectly asserted that facial challenges to warrantless administrative search regimes are disfavored and must overcome a burden that is near impossible to satisfy. Challenges to administrative searches are not disfavored under New York law, and Plaintiffs have clearly met their burden of demonstrating the ELD law is unconstitutional and unlawful on its face.

The ELD Rule raises a multitude of constitutional issues under Article I, Section 12, and Plaintiffs have alleged a valid cause of action consistent with longstanding, binding precedent. This Court should reverse the Supreme Court's grant of Defendants' motion to dismiss.

ARGUMENT

A. The warrantless GPS tracking mandated by the ELD Rule violates the privacy protections guaranteed by Article I, Section 12 of the New York Constitution.

In granting Defendants' motion to dismiss, the Supreme Court held what no New York appellate court has ever held: That systematic, pervasive, and warrantless GPS tracking of individuals—24 hours a day, 365 days a year—is constitutional under Article I, Section 12 of the New York Constitution solely because of their chosen profession. But binding Court of Appeals precedent has clearly established that the warrantless search of individuals, particularly through the use of GPS technology, violates the heightened privacy protection guaranteed by the New York Constitution. The Supreme Court both ignored Plaintiffs' specific allegations regarding the scope of the ELD Rule's GPS tracking and failed to apply binding Article I, Section 12 precedent.

1. The ELD Rule imposes the type of pervasive warrantless GPS tracking of individuals that has been held unconstitutional under Article I, Section 12.

Article I, Section 12 of the New York Constitution guarantees a broad right to privacy. *See People v. Scott*, 79 N.Y.2d 474,486-87 (1992) (citing *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), *Matter of Doe v. Coughlin*, 71 N.Y.2d 48, 52-53 (1987), and *People v. Onofre*, 51 N.Y.2d 476, 485-88 (1980)). And the Court of Appeals has been clear that Article I, Section 12's

guarantee extends to the warrantless GPS tracking of individuals, as occurs under the ELD Rule, even when they are using public thoroughfares. *See People v. Weaver*, 12 N.Y.3d 433, 444-46 (2009) (holding that the "continuous GPS surveillance and recording by law enforcement authorities of . . . every automotive movement cannot be described except as a search of constitutional dimension and consequence"); *see also Cunningham v. N.Y. State Dep't of Labor*, 21 N.Y.3d 515, 521-23 (2013) (acknowledging that an employee has a reasonable expectation of privacy in the location of his vehicle outside working hours). Under this binding precedent, the pervasive warrantless GPS tracking of an individual is per se unconstitutional. *Accord Cici v. Chemung County*, 122 A.D.3d 1181, 1182 (3d Dept. 2014) (citing *Colao v. Mills*, 3 A.D.3d 702, 704 (3d Dept. 2004)) ("It is beyond cavil that a warrantless search is per se unreasonable.").

In *Weaver*, the Court of Appeals evaluated whether warrantless GPS tracking of an individual's vehicle, using a technology and method of collecting that data similar to what occurs under the ELD Rule, constituted a search in violation of Article I, Section 12. *See* 12 N.Y.3d at 436, 445 (explaining how the GPS tracking worked and holding that GPS tracking is a search). That the GPS tracking occurred on public thoroughfares was irrelevant because the "residual privacy expectation defendant retained in his vehicle, while perhaps small, was at least adequate to support his claim of a violation of his constitutional right to be free of unreasonable

searches and seizures." *Id.* at 444. Instead, even the "slightest reasonable expectation of privacy" is protected against the "prolonged use of" a GPS device. *Id.*; *accord People v. Lewis*, 23 N.Y.3d 179, 188-89 (2014) (declining to hold that less intrusive GPS tracking would survive constitutional scrutiny and declining to distinguish *Weaver*).

Moreover, the Court rejected the proposition that warrantless GPS tracking can be countenanced as "merely an augmentation" of existing data collection tools. *Weaver*, 12 N.Y.3d at 446 (citing *State v. Jackson*, 150 Wash.2d 251, 260 (2003)). The effectiveness and efficiency of the GPS enabled search is what triggered heightened privacy concerns and scrutiny under Article I, Section 12. Like the devices required by the ELD Rule, the quality and quantity of information collected far exceeded what was obtainable under prior methods. *Id.* at 441, 446.

Highlighting the Court's privacy concerns about GPS technology, even incidental warrantless GPS tracking constitutes an unreasonable search. In *Cunningham*, the Court extended its holding in *Weaver* to apply to a more discrete, initially constitutional, warrantless GPS search that only involved civil penalties. 21 N.Y.3d at 518, 520 (recognizing that *Weaver* did not answer the "question of when, if ever, a GPS search is permissible in the absence of a warrant"). It held that the warrantless GPS tracking of a state employee that extended beyond the workday—including evenings, weekends, and vacation time—made the entire warrantless

and Article 78 of New York's Civil Practice Law and Rules. *See* Compl. ¶¶ 184-99 (R-43–45).[1] No claims under the federal Constitution were asserted. *See id.*

On September 23, 2019, Defendants moved to dismiss Plaintiffs' complaint arguing that the State can use GPS devices to warrantlessly track the movements and conduct of commercial truck drivers, whether they are on or off duty, and collect that information without a warrant.

Ruling of the Supreme Court

On May 6, 2020, the Supreme Court granted Defendants' motion to dismiss and upheld the constitutionality of the ELD Rule under Article I, Section 12. *See generally* May 6 Op. (R-5–16). The court held that the Rule was a valid administrative search, *id.* at 7 (R-11), and that Defendants' conduct was consistent with an exception to Article I, Section 12's warrant requirement. *Id.* at 8-9 (R-12–13). The court held that the ELD Rule's warrantless GPS tracking of both drivers' on-duty and off-duty movements and conduct, and the warrantless collection of that information, was reasonable. *See* May 6 Op. at 8-9 (R-12–13). The court also held

[1] Plaintiffs' challenge ensued after a prior lawsuit, filed in anticipation of the Rule's imminent adoption, was dismissed. *See OOIDA v. Calhoun*, 62 Misc.3d 909, 923-24 (Supreme Court Albany Cnty 2018). This Court held that the earlier appeal was limited to a pre-enforcement challenge and thus Plaintiffs' claims were moot as a result of NYSDOT's adoption of the ELD Rule in April. *See OOIDA v. Karas*, 13 N.Y.S.3d 681, 684 (3d Dept. 2020). This Court did not address the merits of Plaintiffs' challenge or the scope of Article I, Section 12's protections against warrantless searches or warrantless GPS tracking. *See id.*

to which it intrudes on legitimate privacy interests." *Id.* at 68. Although teachers had a diminished expectation of privacy and the school district had a legitimate interest in ensuring the teachers' fitness, requiring urinalysis without reasonable suspicion, even if it helped achieve a legitimate goal, was an unreasonable search in violation of Article I, Section 12. *Id.* at 69-70.

Weaver, *Cunningham,* and *Patchogue-Medford Congress of Teachers* collectively stand for the principle that warrantless government searches of an individual, particularly the sustained use of GPS technology to conduct those warrantless searches, are per se unreasonable in violation of Article I, Section 12. The technology's capabilities, including the quality and quantity of information recorded, trigger heightened constitutional scrutiny even when some of same information is available through other legitimate investigatory methods.

2. The Supreme Court did not apply binding Court of Appeals Article I, Section 12 precedent rejecting the constitutionality of warrantless GPS tracking to Plaintiffs' ELD Rule challenge.

Prior to the enactment of the ELD Rule in April 2019, truck drivers enjoyed a reasonable expectation of privacy in their activity, even while traveling on the open road, and knew that they were not subject to pervasive GPS tracking by the State—just like every other individual working, living, and traveling in New York. According to the Supreme Court, that all changed after April 2019 when NYSDOT enacted the ELD Rule. *See* May 6 Op. at 5-6 (R-9–10). But the scope of Article I,

Section 12's privacy protections does not fluctuate at the whim of agency rulemaking. The Supreme Court's decision breaks new constitutional ground and contravenes established Court of Appeals precedent. Consistent with that precedent, Plaintiffs pled a valid claim under Article I, Section 12.

On its face, the ELD Rule's requirement that truck drivers are subject to constant GPS tracking cannot be squared with the Court of Appeals' analysis and holding in *Weaver*. There the Court recognized that even when an individual's expectation of privacy is diminished, it is not entirely extinguished. *See Weaver*, 12 N.Y.3d at 443-44 (noting that even before the advent of GPS people had a reasonable expectation of privacy in their activity and the "prolonged use of [a] GPS device [is] inconsistent with even the slightest reasonable expectation of privacy"). The same is true for truck drivers forced to outfit their trucks with an ELD. *Accord Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 69 (consenting to less privacy as a condition of employment is not carte blanche authority to invade one's privacy); *Carniol v. N.Y.C. Taxi & Limousine Comm'n*, 42 Misc.3d 199, 209 (N.Y. Sup. Ct. 2013) (suggesting that a taxi driver's diminished expectation of privacy would not permit warrantless searches when off-duty); *cf. Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 648 (1989) (Marshall, J., dissenting) (citing *O'Connor v. Ortega*, 480 U.S. 709, 716-18 (1987) ("[I]ndividuals do not lose Fourth Amendment rights at the workplace gate."). This privacy interest is especially strong

when a truck is a driver's home for long stretches of time on the road and is used for personal travel.

The ELDs at issue here raise the same concerns that prompted the Court of Appeals to hold warrantless GPS tracking unconstitutional in *Weaver*. *See Weaver*, 12 N.Y.3d at 441 ("GPS is not a mere enhancement . . . it facilitates a new technological perception of the world in which an object may be followed and exhaustively recorded over, in most cases, a practically unlimited period."). ELDs do not collect the same "limited" information used to monitor a "commercial driver's compliance" with hours-of-service requirements "that have been in place for years." May 6 Op. at 5 (R-9). Instead, like the GPS device in *Weaver*, ELDs collect information greater in quantity and quality than would be otherwise obtainable. *See* Compl. ¶¶ 9-11, 70, 95 (R-20–21, R-29, R-32) (detailing how ELDs collect more information and are more intrusive than the paper logbooks that were previously required); *Weaver*, 12 N.Y.3d at 441, 446.

The ELD Rule also cannot be squared with the Court of Appeals' analysis and holding in *Cunningham*. ELDs, like the GPS tracking at issue in *Cunningham*, are "excessively intrusive" because they track, on a daily basis, wholly irrelevant personal activity. *Cunningham*, 21 N.Y.3d at 522-23; Compl. ¶¶ 10-11, 95 (R-21–22, R-32). Even if there were a constitutional justification for the warrantless use of GPS technology to track the activity of truck drivers (there is not), that justification

would not authorize the unlimited use of warrantless GPS tracking. *See Cunningham*, 21 N.Y.3d at 520-22 (explaining that constitutional exceptions to the warrant requirement must be applied narrowly). ELDs collect personal information about drivers' conduct even when they are off duty, the same violation of Article I, Section 12 that prompted the Court of Appeals to invalidate overly broad GPS tracking in its entirety. *See* Compl. ¶¶ 10-11, 93-96 (R-21–22, R-32); *Cunningham*, 21 N.Y.3d at 523 (excluding all information gathered by GPS tracking due to "the extraordinary capacity of a GPS device").

In fact, the GPS tracking of truck drivers is even more egregious than the tracking that occurred in *Weaver* and *Cunningham* in at least three ways. First, it occurs absent any suspicion of wrongdoing. *Compare Weaver*, 12 N.Y.3d at 436 (explaining that the defendant was under criminal investigation), *and Cunningham*, 21 N.Y.3d at 518 (explaining that the petitioner was subject of an employer investigation), *with* Compl. ¶¶ 59-60, 63-65, 70, 73, 96-97, 99 (R-27– 29, R-32–33) (alleging that the ELDs automatically record the GPS location of the vehicle, along with other data, that must be made available upon request). Second, it occurs over a far greater geographic area, including interstate travel. *Id.* at ¶¶ 33, 37, 42, 93-94 (R-24, R-25, R-32) (explaining that long-haul truckers operate within and outside of New York and that their vehicles function as much more than trucks when they are on the road). Finally, ELD monitoring never stops. *Compare id.* at ¶¶ 94-96 (R-32)

(explaining that the ELD constantly records truck drivers regardless of how their vehicle is being used), *with Weaver*, 12 N.Y.3d at 436 (explaining that the GPS device was used for 65 days), *and Cunningham*, 21 N.Y.3d at 518-19, 523 (explaining that the GPS tracking occurred for approximately one month).

But the Supreme Court disregarded that using a GPS device to track truck drivers, as required by the ELD Rule, is a warrantless search of an individual, and it failed to address, let alone apply, *Weaver* or *Cunningham*. *See* May 6 Op. at 5 (R-9). To the extent the court concerned itself with the ELD Rule's mandate that drivers be relentlessly tracked—including when they are in the sleeper berth, when they are off-duty, even when they are not on dispatch—it held that the collection of that information was "limited in scope to data relevant to effectively monitoring a commercial driver's compliance with [hours-of-service] guidelines." *Id.* Not only is that false—the GPS location of a driver when off duty, for example, is generally irrelevant to hours-of-service compliance—that is also not the standard established in *Weaver*, *Cunningham*, or even *Patchogue-Medford Congress of Teachers*, for evaluating the constitutionality of a warrantless search. *See Weaver*, 12 N.Y.3d at 445-46; *Cunningham*, 21 N.Y.3d at 522-23; *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 70 ("If random searches of those apparently above suspicion were not effective, there would be little need to place constitutional limits upon the government's power to do so.").

The Court of Appeals in *Weaver*, *Cunningham*, and *Patchogue-Medford Congress of Teachers* affirmed the same principles that the Supreme Court should have applied here but did not: warrantless searches are per se unconstitutional under Article I, Section 12, and warrantless GPS searches trigger heightened protection. This precedent is sufficient to overcome any presumption of constitutionality relied upon by the Supreme Court, *see* May 6 Op. at 6 (R-10), and demonstrates the viability of Plaintiffs' allegations.

B. The Supreme Court ignored disqualifying circumstances that preclude Defendants from circumventing the warrant requirement when conducting ELD inspections.

1. Administrative searches designed specifically to uncover evidence of penal violations are subject to the traditional warrant upon probable cause requirements of Article I, Section 12.

a. The Court of Appeals in *Keta* has designated *People v. Burger* as the controlling judicial precedent addressing warrantless administrative searches/inspections under Article I, Section 12.

In *People v. Burger*, 67 N.Y.2d 338 (1986), the Court of Appeals addressed the constitutionality of New York's statutes authorizing warrantless searches of vehicle dismantling businesses ("chop shops") under the Fourth Amendment's search and seizure clause. The question presented was whether such searches constituted valid administrative inspections that, under certain narrowly defined conditions, may proceed without a warrant issued upon probable cause.

Alternatively, the Court examined whether such inspections were used to "obtain evidence of crimes where traditional requirements of the Fourth Amendment apply." 67 N.Y.2d at 343. The Court of Appeals concluded:

> The fundamental defect in the statutes before us is that they authorize searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme. *The asserted "administrative schemes" here are, in reality, designed simply to give the police an expedient means of enforcing penal sanctions for possession of stolen property.* Furthermore, an otherwise invalid search of private property is not rendered reasonable merely because it is authorized by a statute, for to so hold would allow legislative bodies to override the constitutional protections against unlawful searches.

Id. at 344 (emphasis added). Subsequently, the U.S. Supreme Court granted *certiorari* and reversed. *See New York v. Burger*, 482 U.S. 691 (1987). The Court held that the statute authorizing administrative inspections and the separate statute imposing penal sanctions were sufficiently separate so as to permit the administrative ("chop shop") search to be evaluated under the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. A closely divided Court concluded that, so long as the *separate* regulatory scheme was properly administrative, the discovery of evidence of crimes did not render the search illegal. 482 U.S. at 716.

Five years after the *Burger* case was decided, a second "chop shop" case came before the Court of Appeals. *Keta,* 79 N.Y.2d at 491. The statutory provisions applicable in *Keta* and the general facts of the case were, for all practical purposes,

identical to those in *Burger*. The most significant difference was that *Keta* addressed the constitutionality of New York's "chop shop" statutes under Article I, Section 12 of the New York Constitution. No claims were raised under the Fourth Amendment. It is a fundamental principle of state constitutional interpretation that the United States Constitution sets the floor, not the ceiling for the scope of protection that individual rights receive. *See People v. LaValle*, 3 N.Y.3d 88, 129 & n.20 (2004); *Keta*, 79 N.Y.2d at 504-06 (Kaye, J., concurring). With this principle in mind, and faced with the task of establishing sound constitutional principles for the execution of warrantless "administrative inspections" under the New York Constitution, the *Keta* Court rejected the U.S. Supreme Court's Fourth Amendment *Burger* opinion in clear and unambiguous language:

> As Justice O'Connor has observed, statutes authorizing "administrative searches" are "the 20th-century equivalent" of colonial writs of assistance *(Illinois v Krull*, 480 US 340, 364 [O'Connor, J., dissenting]) . . . . Given this history and the potential similarity between writs of assistance and statutorily authorized administrative searches, the constitutional rules governing the latter must be *narrowly and precisely* tailored to prevent the subversion of the basic privacy values embodied in our Constitution. *Because the principles and standards set forth in* New York v Burger . . . *do not adequately serve those values, we decline to accept them as controlling in interpreting our own constitutional guarantees.*

Keta, 79 N.Y.2d at 497-98 (emphasis added).

Having rejected the Supreme Court's Fourth Amendment analysis in *Burger* as a basis for its Article I, Section 12 analysis in the case before it, the *Keta* Court substituted in its place its own prior analysis in *Burger*:

> Thus, we adhere to the view expressed in *People v Burger* (67 NY2d, at 344 . . .) that the so-called "administrative search" exception to the Fourth Amendment's probable cause and warrant requirements cannot be invoked where, as here, the search is "undertaken solely to uncover evidence of criminality" and the underlying regulatory scheme is "in reality, designed simply to give the police an expedient means of enforcing penal sanctions."

Keta, 79 N.Y.2d at 498.

b. The ELD Rule is undertaken solely to uncover evidence of violations of the penal code and therefore does not qualify as an administrative inspection exempt from the warrant requirement.

The ELD regulatory structure applicable here suffers from the same defects identified by the *Keta* court in its analysis of the chop shop statutes applicable in the *Burger* cases. The principal issue in this case involves whether New York's ELD Rule authorizes an "administrative search" of a business potentially exempt from a warrant requirement, or is it one conducted to directly support an investigation into activity prohibited under the penal code. The Supreme Court below held that an inspection under the ELD Rule constitutes an administrative search exempt from the warrant requirement. A careful review of the relevant ELD regulations shows, however, that the lower court's conclusion is erroneous.

The proposition that violations of the hours-of-service regulations in New York are criminal offenses is beyond question. Compl. ¶¶ 99, 100, 103-07. Part 820 sets out regulations, in addition to those promulgated pursuant to the Vehicle and Traffic Law, "applicable to motor carriers and drivers" operating in the State. As relevant here, the Part 820 regulations are promulgated by NYSDOT pursuant to the Transportation Law. NYSDOT authorizes "all police officers" and "any duly authorized employee or agent" of NYSDOT to enforce Part 820. N.Y. Comp. Codes R. & Regs. tit. 17, § 820.12. In addition, the "Commissioner of Transportation and the Commissioner of Motor Vehicles" may "examine or investigate the operation of motor carriers and their compliance with rules and regulations." *Id*. § 820.9. Violation of Part 820 is a traffic infraction, misdemeanor, or felony that may result in fines, imprisonment, or a vehicle or driver being placed out of service-which prevents operation (driving) until the violation is remedied. *See* N.Y. Comp. Codes R. & Regs. tit. 17, § 820.10. The NY ELD Rule was incorporated into Part 820, thus making it subject to the investigative search and seizure and criminal provisions of Part 820. Violation of hours-of-service rules is a misdemeanor under New York law. N.Y. Transp. Law § 213. Violation of hours-of-service rules also subjects drivers to potential criminal penalties under federal law. 49 C.F.R. § 390.37; 49 U.S.C. § 521(b)(6).

Under the federal ELD regulations, (incorporated into New York law by the ELD Rule) and subject to limited exceptions and transition rules not applicable here, a driver hauling freight is required to install and maintain a fully functional ELD on his/her truck and to use the ELD to record his/her "record of duty status" ("RODS") covering both on duty and off duty activities. 49 C.F.R. § 395.8(a)(1). A driver has two responsibilities with respect to the data recorded. First, the driver is required to have at least 7 days of current RODS data available for a roadside inspection upon demand by enforcement officers. § 395.24(d). These officers are responsible for enforcing the hours-of-service regulations. § 395.8(k)(2). Second, the driver is required to accumulate all ELD data and to turn such data over to his/her employer (motor carrier) within 13 days of the completion of a particular driving event. § 395.8(a)(2). The driver's employer (motor carrier) must retain the RODS (including a duplicate backup) for not less than six months (§ 395.8(k) for inspection by federal, state or local enforcement officers. § 395.22(i), (j).

49 U.S.C. § 31137(e)(3) provides that the U.S. Secretary of Transportation shall "institute appropriate measures to ensure any information collected by electronic logging devices is used by enforcement personnel ***only*** for the purpose of determining compliance with hours-of-service requirements." (emphasis added). Thus, driver tracking data gathered under the ELD Rule must be used *solely* for the purpose of gathering evidence of hours-of-service violations under New York's

penal code. 49 U.S.C. § 31137 binds not only the Secretary, but also each of the States the Secretary funds under the MCSAP program to implement the ELD Rule at the state level.

Violation of the hours-of-service regulations is addressed in New York's penal code. The federal ELD regulations, found in Title 49, Part 395, Code of Federal Regulations, were adopted in full by New York. May 6 Op. at 2. When Congress directed the Secretary to mandate the use of electronic logging devises, its purpose was to "improve compliance by an operator of a vehicle with hours of service regulations" (49 U.S.C. § 31137 (a)(1)) and to provide "law enforcement with access to ELD data during roadside inspections." *Id*. at (b)(1)(B). Of particular importance is 49 U.S.C. § 31137(e)(1): "In general.--The Secretary may utilize information contained in an electronic logging device *only to enforce* the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations." (emphasis added). Section (e)(3) goes on to provide: "Enforcement.--The Secretary shall institute appropriate measures to ensure *any information collected* by electronic logging devices *is used* by enforcement personnel *only for the purpose of determining compliance with hours of service requirements*." 49 U.S.C. § 31137(e)(3) (emphasis added). Thus, the ELD regulations mandated by Congress were intended to support penal hours of service enforcement directly and

exclusively. Use of an ELDs for these purposes does not constitute an administrative inspection.

These statutory provisions restricting the use of ELD data to support *only* hours of service *enforcement* are applicable to law enforcement activity undertaken by New York and other states participating in MCSAP. The Secretary has no authority to fund state programs under MCSAP that undertake activities that he is forbidden to do directly. 49 U.S.C. § 31102 provides:

> (a) In general.--The Secretary of Transportation shall administer a motor carrier safety assistance program funded under section 31104.
>
> (b) Goal.--The goal of the program is to *ensure that the Secretary, States*, local governments, other political jurisdictions, federally recognized Indian tribes, *and other persons work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety* to support a safe and efficient surface transportation system by--
>
> . . .
>
> (3) adopting and enforcing effective motor carrier, commercial motor vehicle, and driver safety regulations and practices *consistent with Federal requirements* . . . .

In order to ensure such compatibility among the states receiving MCSAP funds, 49 U.S.C. § 31102 (c)(1) requires the Secretary to enter into agreements with individual states in which *each state must agree* to enforce programs that are compatible with federal legal standards:

(c) State plans.--

> (1) In general.--In carrying out the program, the Secretary shall prescribe procedures for a State to submit a multiple-year plan, and annual updates thereto, under which *the State agrees to assume responsibility for improving motor carrier safety by adopting and enforcing State regulations, standards, and orders that are compatible with the regulations, standards, and orders of the Federal Government on commercial motor vehicle safety and hazardous materials transportation safety.*

(Emphasis added). Thus, the ELD Rule promulgated by New York limits the use of ELD data obtained from drivers to support enforcement of hours-of-service violations established under the penal code.

The Decision and Order below observes that, unlike *Keta*, the ELD Rule does not circumvent constitutional standards by using an otherwise valid administrative program as a *pretext* for gathering evidence of criminal activity. May 6 Op. at 9. This attempt to distinguish *Keta* (where pretext was an issue) is meaningless here where the statutory provisions establishing the ELD Rule specifically require law officers to gather record of duty status information directly and exclusively for the purpose of enforcing violations of the hours-of-service rules that appear in New York's penal code. Such direct authority eliminates the need to proceed by pretext.

The lower court's effort to distinguish *Keta* fails. May 6 Op. at 9-10. First, that the regulatory goal here of reducing accidents has been in effect "for decades" provides no basis to ignore the controlling fact that both *Keta* and this case involve warrantless searches specifically designed to uncover penal code violations. Second,

the fact that this case does not involve a pretextual use of an administrative search/inspection is also irrelevant. May 6 Op. at 9. Here, there is no need to proceed under pretext because the ELD regulatory scheme directly (but improperly) purports to authorize searches/inspections of drivers to identify hours-of-service violations under the penal code. The underlying constitutional issue here is present whether it arises through pretextual use of an administrative search as argued in *Keta*, or through direct statutory or regulatory sanctioning of such searches as is the case here. Third, the lower court's conclusion that Appellants are unable to establish a facial violation of Article I, Section 12 is simply wrong. As noted above, the *Keta* Court reaffirmed its own prior analysis in *People v. Burger* for application to cases arising under New York's Constitution. *People v. Burger* found a facial violation of Article 1, Section 12 under circumstances also present here. 67 N.Y. 2d at 345 ("Because [the statutes] permit such warrantless searches, they are facially unconstitutional.").

As in *Burger*, every warrantless, roadside ELD inspection conducted in pursuit of evidence of a penal code violation would constitute a facial violation of Article I, Section 12. Likewise, the extension of the pervasively regulated industry exception to the warrant requirement to include the search of *persons* in addition to *business premises* (discussed below) would also support a claim of facial unconstitutionality. Finally, the lower court's references to the presumption of statutory constitutionality (May 6 Op. at 6) finds no support either in *Keta* or *Burger*.

Assertions of presumptive constitutionality must be put to one side when confronted with warrantless searches "undertaken solely to uncover evidence of criminality." 67 N.Y. 2d at 344. The fundamental defect in the ELD Rule here is that it is "designed simply to give the police an expedient means of enforcing penal sanctions for" hours-of-service violations. *Id*.

2. Warrantless administrative searches have been approved by courts only for business *premises* and records, *not persons*. The warrantless search of persons under the ELD Rule violates important rights of privacy guaranteed by Article I, Section 12.

Warrantless searches found to be constitutional fall under narrow exceptions to the New York Constitution. *See Keta*, 79 N.Y.2d at 501-02 (emphasizing the narrowness of exceptions to the warrant requirement and the importance of limiting those exceptions). This Court must confront and reject the Supreme Court's breathtaking expansion of that exception to include the search of persons.

No New York appellate court (nor the U.S. Supreme Court) has ever held that the closely regulated business exception applies generally to the search of an individual. Instead, the application of the exception has been exceedingly rare and, since the Court of Appeals' seminal *Keta* decision, has only ever been applied to the warrantless search of commercial premises and business records.[2] Even the U.S.

[2] *See, e.g., Collateral Loanbrokers Ass'n of N.Y., Inc. v. City of New York*, 178 A.D.3d 598 (1st Dept. 2019) (applying the exception to pawnbroker businesses); *Karakus v. N.Y.C. Dep't of Consumer Affairs*, 114 A.D.3d 422 (1st Dept. 2014) (applying the exception to pedicabs); *Murtaugh*, 42 A.D.3d 986 (4th Dept. 2007) (applying the exception to vehicle dismantling businesses); *8th Street Parking Corp. v. Dep't of Consumer Affairs of New York*, 159 A.D.2d 205

Supreme Court, applying the Fourth Amendment's more lenient standard[3], has not stretched the closely regulated business exception to such an extreme.[4] As illustrated in *New York v. Burger*, 482 U.S. 691 (1987), the pervasively regulated industry exception under the Fourth Amendment rests on a long line of Supreme Court cases dealing exclusively with administrative inspections of *commercial premises*. *See, e.g.*, *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (approving warrantless inspection of stone-quarry); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 322-325 (1978) (disapproving warrantless inspection of a factory); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (approving warrantless inspection of premises on which firearms were sold); *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970) (disapproving warrantless inspection of premises on which liquor was sold); *see also Serpas v. Schmidt*, 827 F.2d 23, 34-35 (7th Cir. 1987) (Easterbrook, Judge, dissenting from denial of *en banc* review) ("But *Burger* does not deal with searches of persons . . . and sooner or later the Court will have to do so."); *Whren v. United States*, 517 U.S.

(1st Dept. 1990) (applying the exception to the parking garages); *People v. McIver*, 124 A.D.2d 520 (1st Dept. 1986) (applying the exception to junkyards).

[3] *See 5 Borough Pawn, LLC v. City of New York*, 640 F. Supp. 2d 268, 279 (S.D.N.Y. 2009) (stating that "the *Keta* court concluded that the warrantless exception requirement of New York's Constitution was narrower than its federal counterpart" (internal quotation marks omitted)).

[4] *See City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015) (identifying only liquor sales, firearms dealing, mining, and automobile junkyards as industries found to be pervasively regulated under the Fourth Amendment).

806, 819 n.2 (1996) ("An administrative inspection is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme."). Justice Scalia's unanimous opinion in *Whren* goes on to note that "exemption from the need for probable cause (and warrant) which is accorded to searches made for the purpose of inventory or administrative regulation is not accorded to searches that are not made for those purposes." *Id*. at 811-12.

Limiting the closely regulated business exception to the search of commercial premises or business records is consistent with the Court of Appeals' "firm and continuing commitment to protecting the privacy rights embodied in Article I, Section 12." *Keta*, 79 N.Y.2d at 497. The underlying premise of the closely regulated business exception is that the expectation of privacy in commercial premises, which are generally open to the public and subject to routine government regulation, is diminished and may be open to warrantless searches if accompanied by a proper regulatory scheme protecting privacy interests. *People v. Pace*, 101 A.D.2d 336, 338 (2d Dept. 1984), *aff'd* 65 N.Y.2d 684 (1985); *cf. Donovan v Dewey*, 452 U.S. 594, 598 (1981).

In other words, warrantless searches of commercial premises or business records are only potentially tolerable because they are distinct from those areas of life that receive heightened protection because of their private nature. *See, e.g.*, *Glenwood TV, Inc. v. Ratner*, 103 A.D.2d 322, 327-28 (2d Dept. 1984) (drawing a

distinction between the warrantless administrative search of commercial property and the warrantless search of a private home); *cf. People v. Calhoun*, 49 N.Y.2d 398, 402 (1980) (emphasizing that an individual has a protectable expectation of privacy in his or her home even against "government officials who function in areas of public health and safety"). One's person is such an area, and the routine warrantless search of an individual is only permitted under extraordinary circumstances. *See, e.g.*, *Caruso v. Ward*, 72 N.Y.2d 432, 439 (1988) (permitting warrantless searches that were otherwise held unconstitutional in *Patchogue-Medford Congress of Teachers* because it involved "membership in a paramilitary force").

But the ELD Rule exclusively concerns the search of individuals, who have long been free from warrantless searches outside of specific, narrow, and often exigent circumstances. *See Weaver*, 12 N.Y.3d at 444 (affirming that warrantless searches are per se unreasonable "subject only to a few specifically established and well-delineated exceptions"). And here, a particularly intrusive search is at issue: the purpose of the Rule is to constantly monitor the activity of truck drivers, both on duty and off duty. *See* Compl. ¶¶ 71-73, 95-97 (explaining that drivers are required to annotate the engine and GPS information ELDs automatically record, including the time they are not behind the wheel, revealing where and how they are spending their time). As the Court of Appeals has repeatedly asserted, how and where individuals spend their time is afforded a substantially higher degree of protection

from government intrusion. *See Weaver*, 12 N.Y.3d at 444; *Cunningham*, 21 N.Y.3d at 521-23 (holding that a diminished expectation of privacy in the workplace does not extend to an individual's personal conduct outside of work); *accord Skinner*, 489 U.S. at 648 (Marshall, J., dissenting). This even more true when the warrantless searches occur under the threat of criminal penalties. *See* Compl. ¶¶ 102-06, 129.

The closely regulated business exception is inapplicable given the heightened protection individuals receive from warrantless searches under Article I, Section 12. Consistent with Article I, Section 12 precedent, this Court should not be the first New York appellate court to extend the closely regulated business exception to the warrant requirement to justify the search of an individual.

Thus, this Court's analysis of the constitutionality of the ELD Rule under Article I, Section 12 should be guided by the Court of Appeals' prior ruling in *People v. Burger* with no deference afforded to the Supreme Court's subsequent disposition of *Burger* under the Fourth Amendment. By the same token, the lower court's holding that Appellants are bound *here* by earlier Fourth Amendment litigation in the Seventh Circuit (May 6 Op. at 3 (citing *Owner Operator Individual [sic] Drivers Ass'n, Inc. v U.S. Dep't of Transp.*, 840 F.3d 879 (7th Cir. 2016)) must also be rejected because this case does not arise under the Fourth Amendment.

C. Even if the closely regulated business exception to Article I, Section 12 could be applied, the ELD Rule fails to satisfy the three independent, demanding conditions for the use of that exception.

Even if the closely regulated business exception could be applied under threat of criminal enforcement and to the search of individuals, the ELD Rule can only be constitutional if it satisfies the three demanding conditions set out in *Keta*. 79 N.Y.2d at 498-99, 502. Those demanding conditions have guided New York courts in construing this narrow exception to the warrant requirement and have led them to invalidate numerous warrantless searches.

For a warrantless search to be constitutional under the closely regulated business exception to Article I, Section 12, it must satisfy three conditions. First, the expectation of privacy must at least be minimal. *People v. Davis*, 156 Misc.2d 926, 931 (Sup. Ct. 1993). Second, a warrantless search must be necessary to further the regulatory scheme. *See Keta*, 79 N.Y.2d at 500 (holding that necessity of warrantless searches is a prerequisite but insufficient on its own). Finally, the warrantless search regime must delineate rules that guarantee "certainty and regularity" of application to protect against the risk of arbitrary or abusive enforcement.[5] *See id.* at 499-500;

[5] This Court should not assume, as the Supreme Court did, that the closely regulated exception applies here. *See* May 6 Op. at 8 (R-12). The applicability of the closely regulated business exception to some aspects of the trucking industry does not give government carte blanche to engage in unbounded warrantless searches in all aspects of trucking. *See, e.g.*, *People v. Reyes*, 154 Misc.2d 476, 478 (Crim Ct. 1993) (explaining that authorization to conduct a warrantless safety inspection of a commercial motor vehicle did not extend to a search of the driver's cab); *Davis*, 156 Misc.2d at 933-34 (explaining that the warrantless search of a social club did not extend

see also Davis, 156 Misc.2d at 931 ("The intrusions must be constrained by regulations embodying explicit, neutral limitations on the conduct of individual officers, providing meaningful limitations on otherwise unlimited discretion and minimizing the risk of arbitrary or abusive enforcement.").

Plaintiffs' allegations are dispositive: The Rule meets none of the conditions required under *Keta* and the failure to meet any one condition is fatal to the constitutionality of the warrantless ELD inspection under Article I, Section 12. The Supreme Court failed to apply these conditions consistent binding precedent and Plaintiffs' allegations.

1. Truck drivers have a sufficient expectation of privacy that may not be invaded under the closely regulated business exception.

If the closely regulated business exception to the warrant requirement can be applied to individuals, it is not the case here that truck drivers have only the minimal expectation of privacy as required under *Keta*. *See Davis*, 156 Misc.2d at 931 (citing *Keta*, 79 N.Y.2d at 500).

It is erroneous to equate the privacy interests of drivers with those at issue in the commercial premises of other regulated businesses. *See* May 6 Op. at 8 (R-12).

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to all parts of the premise); *accord People v. Quackenbush*, 88 N.Y.2d 534, 544 (1996) (applying the "closely regulated business" analysis to a warrantless vehicle search limited to its mechanical areas because "different and more stringent rules apply" to the "private areas of the car"); *Matter of Finn's Liquor Shop v. State Liquor Auth.*, 4 N.Y.2d 647, 657-58 (1969) (inspection of a premises does not include the search of a person).

Drivers, who use their trucks in both a commercial and personal capacity, are unlike any other profession that New York courts have addressed under this exception to the warrant requirement. For example, unlike taxi drivers, *see Carniol v. N.Y.C. Taxi & Limousine Comm'n*, 42 Misc.3d 199, 209 (N.Y. Sup. Ct. 2013) (noting that the GPS technology only collects driver information when they are on duty and is not designed "to collect personal information about the driver"), truck drivers' vehicles are both vehicles of personal conveyance and where they rest their heads at night. *See* Compl. ¶¶ 93-95 (R-32). For some drivers, their truck is their only home. *See id.* at ¶ 93 (R-32). Even if drivers have a diminished expectation of privacy on the open road, it cannot be said that they have a minimal expectation of privacy in all aspects of their lives. *Id.* at ¶¶ 33, 37 42, 93-94 (R-24–25, R-33); *cf. Quackenbush*, 88 N.Y.2d at 542-44 (explaining that a driver does not have a diminished expectation of privacy in a vehicle's private areas "where personal effects would be expected"); *Reyes*, 154 Misc.2d at 478-79 (evaluating a warrantless search regime for the purpose of ensuring compliance with only safety requirements). The Court of Appeals has also recognized the substantial privacy interests that truck drivers retain, even when operating on public thoroughfares, involving similar GPS search cases. *See supra* at 15-17 (discussing *Weaver* and *Cunningham*).

Plaintiffs have sufficiently alleged a viable claim under Article I, Section 12 given the reasonable expectation of privacy that truck drivers retain. The

unconstitutional intrusion into a person's right to privacy "is not rendered reasonable merely because it is authorized by a [regulation], for to so hold would allow [regulatory] bodies to override the constitutional protections against unlawful searches. *Burger*, 67 N.Y.2d at 344. A diminished expectation of privacy did not keep the Court of Appeals in *Weaver* and *Cunningham* from holding warrantless searches unconstitutional. Nor should a diminished expectation of privacy keep this Court from reversing the Supreme Court's dismissal. *See supra* Section A.2 (applying *Weaver* and *Cunningham* decisions).

2. NYSDOT has failed to demonstrate that warrantless searches are necessary.

An examination of the ELD Rule shows that NYSDOT failed to demonstrate that *warrantless* searches are necessary to further the regulatory regime. But that is precisely NYSDOT's burden and the inquiry required by New York courts, including the Supreme Court below, under the closely regulated business exception. Whether the ELD Rule is intended to "further a goal . . . to reduce accidents attributable to driver fatigue," May 6 Op. at 9 (R-13), is not determinative of the ELD Rule's constitutionality. *See Keta*, 79 N.Y.2d at 500 (stating that a *warrantless* search must also be necessary because a substantial government interest alone is not sufficient to justify the search). Nor is it determinative that a search is necessary to further the government objective. Instead, the inquiry is why a *warrantless* search is necessary.

If the Supreme Court determined that warrantless GPS tracking is necessary, it did not do so based on any argument offered by Defendants or any explanation provided in NYSDOT's rulemaking. *See* May 6 Op. at 8-9 (R-12–13); March 20, 2019 Emergency Rule Making at R-75–76 (describing the needs and benefits of adopting the ELD mandate); April 24, 2019 Notice of Adoption at R-150 (explaining the adoption of the ELD mandate without change in response to OOIDA's comments). It is difficult to imagine one. *Cf. Patel*, 576 U.S. at 427 (rejecting the argument that requiring a warrant will undermine the enforcement regime when there are other mechanisms to achieve the requisite judicial oversight). To the extent that NYSDOT offered any justification for authorizing warrantless searches—other than relying on inapposite Fourth Amendment case law—it asserted that it was required to do so under federal law and its MCSAP contract with FMCSA. April 24, 2019 Notice of Adoption at R-149–150 (explaining the adoption of the ELD mandate without change in response to OOIDA's comments). Neither is true. NYSDOT was not required under federal law to adopt the ELD Rule or to adopt it without a warrant requirement. And NYSDOT's voluntary assumption of MCSAP contractual obligations does not abrogate the protections guaranteed by and NYSDOT's obligations under Article I, Section 12 of the New York Constitution.

3. The ELD Rule does not include explicit, meaningful limitations on its warrantless searches, which are required to provide a constitutionally adequate substitute for a warrant.

If this Court were to find that truck drivers have a minimal expectation of privacy (they do not) and that warrantless searches are necessary (they are not), the ELD Rule still fails to satisfy the condition that it must be circumscribed by explicit, meaningful limitations to provide "certainty and regularity of application." *Keta*, 79 N.Y.2d at 502; *see* Compl. ¶¶ 7, 12-13, 130-34 (R-21, R-22, R-36–37). Contrary to the Supreme Court's assessment of the ELD Rule, the constitutionality of a warrantless search regime turns on much more than the "quantity and quality of information to be recorded by the ELD." May 6 Op. at 8 (R-12).

This final condition is particularly demanding. Numerous cases make clear that a warrantless administrative search regime is unconstitutional if the authorizing statute does "not set forth a minimum or maximum number of times that a particular establishment may be searched within a given time period" and if it does not "furnish guidelines for determining which establishments may be targeted." *Keta*, 79 N.Y.2d at 499-500. Similarly, a statute authorizing warrantless searches under the closely regulated business exception is facially unconstitutional if it does not contain "limits on the time, place, and scope of searches." *Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600 (holding the warrantless search regime of pawnbroker business facially unconstitutional); *see also Karakus*, 114 A.D.3d at 423 ("Even assuming a

compelling government interest in surprise inspections of pedicabs in the absence of particularized suspicion, such stops do not meet constitutional standards unless 'undertaken by some system or uniform procedure, and not gratuitously or by individually discriminatory selection.'" (quoting *Quackenbush*, 88 N.Y.2d at 544 n.5)); *Reyes*, 154 Misc.2d at 479-80 (citing *Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 70, and *People v. Ingle*, 36 N.Y.2d 413, 419 (1975). These limitations are necessary to ensure that enforcement does not occur purely based on the discretion of enforcement officials. *See Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600-01; *Matter of Casalino Interior Demolition Corp. v. Martinez*, 29 A.D.3d 691, 692 (2d Dept. 2006) (holding a search unconstitutional because it was not conducted "according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations"); *Davis*, 156 Misc.2d at 930-31, 933.

Yet the ELD Rule, on its face and consistent with Plaintiffs' allegations, lacks any constraints on the discretion of enforcement officials. There are no limits as to the time, location, or frequency of an enforcement official's request to inspect and/or download ELD-recorded information. *See* Compl. ¶¶ 133, 143-44, 155, 158-59, 167-69, 174 (R-37, R-38–39, R-40, R-41). The ELD Rule also does not refer, even obtusely, to other regulations that might limit the discretion of enforcement officials. *See id.* at ¶¶ 66, 132, 134-35, 159, 169 (R-28, R-37–38, R-40, R-41); March 20, 2019 Emergency Rule Making at R-75–76; April 24, 2019 Notice of Adoption at R-149–

150; *Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600 ("Contrary to defendants' argument, [the law] is not merely a general authorizing statute that looks to other sources to articulate and refine specific legal standards for searches.").

The Supreme Court ignored Plaintiffs' allegations and the considerations that numerous New York courts have consistently applied to evaluate the constitutionality of warrantless searches under the closely regulated business exception. *See* May 6 Op. at 8-9 (R-12–13). Instead, the Supreme Court, in granting Defendants' motion to dismiss, advanced a breathtaking expansion of this narrow exception to Article I, Section 12's warrant requirement. This Court should not affirm the Supreme Court's dismissal and the constitutionally of a warrantless search regime that so casually ignores limits designed to protect an individual's constitutional right.

D. NYSDOT failed to comply with the New York Administrative Procedures Act in promulgating the ELD Rule.

The Supreme Court committed reversible error in dismissing Plaintiffs' Article 78 cause of action and concluding that Defendants complied with SAPA § 202. May 6 Op. at 3-4 (R-7–8). When promulgating the ELD Rule, Defendant NYSDOT did not take into account, or demonstrate that it had considered, Plaintiffs' extensive comments detailing the proposed Rule's incongruity with New York State constitutional law, and the dearth of a factual record supporting the need for, and merits of, such a rule.

An action taken by an administrative agency is subject to review in an Article 78 proceeding and must be reversed if it is "arbitrary and capricious" and/or when "it is taken without sound basis in reason or regard to the facts." *Resto v. State of New York, Dep't of Motor Vehicles*, 135 A.D.3d 772, 773 (2d Dept. 2016); *see also Pell v. Board of Ed. of Union Free School Dist.*, 34 N.Y.2d 222, 231-32 (1974). SAPA § 202 also establishes two relevant agency obligations during the rulemaking process. First, the agency must provide a summary and analysis of the issues raised by public comments and the alternatives suggested by such comments. *See* SAPA § 202(5)(b)(i). Second, the agency must provide a statement of the reasons why any significant alternatives were not incorporated into the rule. *Id.* § 202(5)(b)(ii). In this case, Defendant NYSDOT did not satisfy either its Article 78 or SAPA § 202 obligations.

In dismissing Plaintiffs' Article 78 challenge to Defendants' adoption of the Rule, the Supreme Court summarily concluded that NYSDOT "addressed each of [plaintiffs'] concerns" that had been set forth in Plaintiffs' 28-page public comments on the proposed rule. May 6 Op. at 3-4 (R-7–8). But an examination of NYSDOT's Notice of Adoption readily demonstrates that it did *not* address many of Plaintiffs' comments—the agency failed to make findings required under SAPA § 202(5)(i)-(ii). *See* April 24, 2019 Notice of Adoption at R-149–150. To the extent that NYSDOT did address Plaintiffs' constitutional challenges, its adoption of the Rule

was arbitrary and capricious because it was predicated on federal Fourth Amendment law—contravening binding Article I, Section 12 precedent—thus depriving thousands of truckers using New York roads of their heightened protections against warrantless searches guaranteed by the New York Constitution. NYSDOT's failure to address OOIDA's comments deprived the Supreme Court (and deprives this Court) of a meaningful administrative record upon which to determine compliance with SAPA § 202(5)(b)(i)-(ii). Accordingly, this Court should reverse the Supreme Court's dismissal of Plaintiffs' Article 78 action.

1. Because the NYSDOT failed to consider controlling law and Plaintiffs' substantive comments in its promulgation of the ELD Rule, its adoption of the rule was arbitrary and capricious.

Whether an action taken by an administrative agency is arbitrary and capricious includes an assessment of whether the action was taken consistent with prevailing case law. *See, e.g., Civil Serv. Employees Ass'n, Inc., v. City of Schenectady*, 178 A.D.3d 1329, 1332 (3d Dept. 2019) (reversing the dismissal of an Article 78 arbitrary and capricious claim because it was "not precluded as a matter of law by the relevant precedent from the Court of Appeals"); *Inc. Vill. of Hempstead v. Pub. Emp't Relations Bd.*, 137 A.D.2d 378, 383-84 (3d Dept. 1988) (holding that a line of cases was distinguishable and thus did not demonstrate that the agency's actions were arbitrary and capricious). Accordingly, the administrative agency is responsible for considering binding precedent when promulgating new regulations.

See Huff v. Dep't of Corrections, 52 A.D.3d 1003, 1005 (3d Dept. 2008) (overturning an agency decision because it erroneously departed from its own prior precedent based on "a perceived change in decisional law").

During the lengthy rulemaking process that culminated in the adoption of the ELD Rule in April 2019, Plaintiffs submitted comments to NYSDOT establishing that there were numerous constitutional defects which precluded its adoption under the New York Constitution and prevailing New York caselaw. *See* Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-85–86, R-102–03. Most importantly, Plaintiffs explained the longstanding expansive construction that Article I, Section 12 has been afforded by New York courts, and the narrow exceptions that have been permitted for warrantless searches. *Id.* at R-87–R-103.[6] Plaintiffs further demonstrated that the ELD Rule's authorization of pervasive warrantless searches was antithetical to those core protections. *Id.*

[6] Plaintiffs also challenged the New York ELD Rule under Article I, Section 6 alleging that the Rule is not rationally related to any legitimate public interest. *See* Compl. ¶¶ 139-41 (R-38). In fact, there is evidence, which was also brought to NYDOT's attention, that incidents of accidents had increased after the adoption of the federal ELD Rule. Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-98–99 (citing Alex Scott, Andrew Balthrop, & Jason Miller, *Did the Electronic Logging Device Mandate Reduce Accidents?* (Jan. 11, 2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3314308). Plaintiffs adequately alleged a violation of Article I, Section 6 to prevail against Defendants' motion to dismiss and Plaintiffs are entitled to discovery to demonstrate that the ELD Rule has been entirely ineffective in furthering New York's safety interests. This Court need not reach Plaintiffs' Article I, Section 6 claim, however, because of the New York ELD Rule is facially unconstitutional under Article I, Section 12 and consistent with *Weaver*, *Cunningham*, *Keta*, and *Collateral Loanbrokers*.

In response, NYSDOT chose not to discuss or distinguish Article I, Section 12 caselaw to justify the ELD Rule but to ignore it entirely. Instead, relying on a Seventh Circuit decision decided under the federal Constitution, and the New York Supreme Court's decision in *Calhoun*, which also applied the Seventh Circuit's analysis, NYSDOT concluded that OOIDA's "arguments lack merit under the controlling legal authority." *See* April 24, 2019 Notice of Adoption at R-149–150.[7] In dismissing Plaintiffs' Article 78 challenge, the Supreme Court similarly concluded that the Seventh Circuit's decision was "binding" on Plaintiffs, and that *Calhoun* "constituted persuasive and rational authority for the position taken by respondents." May 6 Op. at 4 (R-8).

This was error. Neither case constitutes "controlling legal authority." First, both NYSDOT's and the Supreme Court's reliance upon *Calhoun* has now been entirely *nullified* by this Court's dismissal of that case as "moot." *Karas*, 133 N.Y.S.3d at 684. Second, as explained in OOIDA's comments before both the agency and the Supreme Court below, federal Fourth Amendment jurisprudence is not controlling for determining the scope of Article I, Section 12's privacy protections. *See* Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-102–03; *see also supra* at 23-26. In fact, the Court of Appeals

[7] The Notice of Adoption cited *OOIDA v. U.S. Dep't of Transp.*, 840 F.3d 879, 892-96 (7th Cir. 2016) (upholding the federal ELD Rule under the Fourth Amendment) and *OOIDA v. Calhoun*, 62 Misc.3d 909 (N.Y. Sup. Ct. 2018).

expressly rejected an interpretation of Article I, Section 12 consistent with the Fourth Amendment because "the principles and standards set forth in *New York v. Burger* do not adequately serve" the privacy values instilled in the New York Constitution. *Keta*, 79 N.Y.2d at 498. Thus, NYSDOT was bound by the Court of Appeals' prior ruling in *Burger*, not the Seventh Circuit's application of Fourth Amendment jurisprudence under *New York v. Burger*. *Keta*, 79 N.Y.2d at 499 (citing *Burger*, 67 N.Y.2d 338 (1986)).

NYSDOT's reliance on federal Fourth Amendment case law was all the more inappropriate because OOIDA's comments specifically explained that Article I, Section 12 provides greater privacy protection than the Fourth Amendment. *See* Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-84–104. In particular, OOIDA cautioned that the Court of Appeals in *Weaver* prohibited precisely the type of GPS monitoring of an individual mandated by the ELD Rule. *See id.* at R-89.

Based upon the foregoing, NYSDOT's willful disregard of New York Court of Appeals precedent was arbitrary and capricious, and it was plain error for the Supreme Court to approve of NYSDOT's reliance on the Seventh Circuit decision as binding or its reasoning as "persuasive and rational."

2. NYSDOT failed to comply with New York's Administrative Procedures Act when it failed address or incorporate alternatives in its promulgation of the ELD Rule.

The Supreme Court also erroneously dismissed Plaintiffs' Article 78 challenge demonstrating that NYSDOT failed to comply with its obligations under SAPA to provide a statement of the reasons why any significant alternatives were not incorporated into the rule. SAPA § 202(5)(b)(ii). In that regard, Plaintiffs' comments explained that the rule imposed unreasonable burdens and costs, without any commensurate benefit, as follows:

- "The ELD mandate does little more than substitute one method of recording duty status for another – manual ELD entries of changes in duty status for manual log book entries – *but at a greater monetary and privacy cost than paper logbooks*." *See* Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-100 (emphasis added).

- The proposed rule lacked any procedures or safeguards for the use of the captured data, and would thus fail "to protect drivers' privacy and limit the use of ELD data disclosed to law enforcement officers." *See id.* at R-103–04 ("[N]ew York must protect drivers' privacy and limit use of data recovered during out of service inspections. NYSDOT's proposed regulation does neither.").

NYSDOT failed to respond to any of these comments or specify any mitigating alternatives of any kind. Instead, it referenced conclusions reached by the Federal Motor Carrier Safety Administration—in a separate federal proceeding—as an excuse for failing to conduct an appropriate analysis of Plaintiffs' comments to the proposed ELD rule. *See* April 24, 2019 Notice of Adoption at R-150. Thus, in clear dereliction of its duties under SAPA § 202, Defendant NYSDOT failed to

consider *any* alternatives to its adoption of the ELD Rule. Additionally, Defendant NYSDOT could have analyzed and adopted the constitutionally mandated alternative of requiring a warrant, or the requisite limitations discussed above, *see supra* Section C.3, for a constitutionally defensible warrantless administrative search regime. Contrary to these requirements, NYSDOT neither discussed nor provided any alternatives, but instead summarily adopted the ELD Rule, without even attempting to modify or harmonize it with the New York Constitution.

Based on the foregoing, NYSDOT's adoption of the rule was in patent violation of its obligations under SAPA § 202, and the Supreme Court committed error in dismissing Plaintiffs' Article 78 challenge.

E. Plaintiffs' facial challenge to the constitutionality of the ELD Rule is consistent with established, binding Article I, Section 12 precedent.

Contrary to the Supreme Court's assessment, it is of no consequence, certainly not at the motion to dismiss stage, that Plaintiffs have brought a facial challenge to the ELD Rule. *See* May 6 Op. at 6 (R-10). Plaintiffs' facial challenge is consistent with established precedent invaliding similar warrantless search regimes. While facial legal challenges may impose a "heavy burden" on Plaintiffs, that burden is not impossible to satisfy, and such challenges are not disfavored. *See Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dept. 2010); *Patel*, 576 U.S. at 417-19. New York courts have long entertained them, *see People v. Stuart*, 100 N.Y.2d 412, 429 (2003) (Kaye, J., concurring), including those brought

under Article I, Section 12. *See, e.g., Patchogue-Medford Congress of Teachers*, 70 N.Y.2d 57 (1987); *Collateral Loanbrokers Ass'n of New York, Inc. v. City of New York*, 178 A.D.3d 598 (1st Dept. 2019); *accord supra* at 32 (discussing the holding of *People v. Burger*).

The Appellate Division First Department's recent decision in *Collateral Loanbrokers* should guide this Court's analysis. There, the First Department held a warrantless administrative search regime of pawn brokers facially unconstitutional even while recognizing that pawn brokers are subject to the closely regulated business exception. *See Collateral Loanbrokers Ass'n*, 178 A.D.3d at 599-600. Because it was a facial challenge, the court examined "the words of the statute on a cold page and without reference to defendant's conduct." *Stuart,* 100 N.Y.2d at 421. The authorizing statute was facially unconstitutional because it contained "no limits on time, place, and scope" for enforcement—constitutional prerequisites for warrantless administrative searches. *Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600. And the statute was not saved by other "limiting rules and procedures" because they were not incorporated explicitly or by reference. *Id.* (citing *Gem. Fin. Serv., Inc. v. City of New York*, 298 F. Supp. 3d 464, 499 (E.D.NY. 2018)). The Court opined that those rules may mitigate an as-applied challenge, but do not change the unconstitutional "facial overbreadth" of the authorizing statute. *Id.*

The U.S. Supreme Court's recent analysis of facial challenges also provides additional useful guidance, even if it is not binding. *Cf. Stuart*, 100 N.Y.2d at 421 (relying on the Court's analysis in *United States v. Salerno*, 481 U.S. 739 (1987) and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). In *Patel*, the Court assessed a facial challenge to a Los Angeles ordinance that required hotel guest records to be made available for inspection upon request. 576 U.S. at 412-13. In holding that the ordinance was a warrantless search in violation of the Fourth Amendment, the Court made clear three important principles of facial challenges to warrantless search regimes. *See id.* at 419, 426-27.

First, facial challenges to warrantless search regimes "are not categorically barred or especially disfavored." *Id.* at 415. As evidence of their viability, the United States Supreme Court has repeatedly entertained facial challenges to such searches, and those challenges have been successful. *Id.* at 416-17 (collecting cases). Second, "when assessing whether a statute is [unconstitutional in all its applications], the [courts have] considered only applications of the statute in which it actually authorizes or prohibits conduct." *Id.* at 418. A facial challenge is not defeated because the warrantless search would be permissible where the enforcement officials conducted the search under exigent circumstances or under a local policy that created the predictability required by the Constitution. *See id.* at 417-18. Finally, facial challenges to warrantless search regimes conducted under the pervasively regulated

industry exception, pursuant to Fourth Amendment nomenclature, can be successful where the authorizing statute fails to ensure, at least under the federal standard, "certainty and regularity." *Id.* at 427-28.

Whatever Plaintiffs' burden is in bringing a facial challenge to the ELD Rule under Article I, Section 12, that burden does not present an obstacle for this Court to reverse the Supreme Court's dismissal in light of Plaintiffs' allegations and established precedent. The case law discussed above demonstrates that warrantless searches, including searches almost identical to the GPS tracking mandated by the ELD Rule, have been held unconstitutional under the New York Constitution.

CONCLUSION

It is crystal clear that 24/7 GPS tracking of individuals is a *per se* a violation of privacy protections under Article I, Section 12 of New York's constitution. Legitimate concerns about truck driver safety and efforts to further hours-of-service compliance do not excuse the abject violation of constitutionally protected privacy rights. New York courts have never tolerated the warrantless wide-spread tracking of individuals urged by Defendants and upheld by the Supreme Court. It should not start doing so now. This Court should reverse the dismissal of Plaintiffs' claims and instruct the Supreme Court to apply the standard as set forth by controlling Court of Appeals precedent in *Weaver*, *Cunningham*, and *Keta*.

The fundamental error made by the court below in depriving drivers of these constitutional protections rests on its conclusion that the ELD Rule authorizes an *administrative* inspection of GPS tracking data. Under certain limited circumstances, participants in a qualifying pervasively regulated industry can fall outside of these constitutional protections. The court below made several serious errors, however, in concluding that the ELD Rule gives rise to this exception.

GPS tracking data is gathered to document movements of individual drivers in order to support enforcement of hours-of-service regulations violation of which is a penal offence under New York law. The court below ignored two disqualifying circumstances that prevent the ELD Rule from being treated as an *administrative* inspection. First, inspections specifically designed to uncover evidence of penal violations are not properly classified as administrative inspections and are always subject to a warrant requirement. Second, administrative inspections are universally understood to be limited to the inspection of business *premises*. No appellate court in New York has ever held that administrative inspections include the search of persons. Finding either of these disqualifying conditions warrants reversal of the court below.

Further, even if these disqualifying circumstances are ignored, the warrantless search regime here contains insufficient regulatory provisions protecting drivers against arbitrary or abusive enforcement. In constitutional terms, the regulatory

regime fails to include protections to serve as a constitutionally adequate substitute for a warrant. Further, Defendants have never offered justification that a *warrantless* inspection of driver tracking data is needed. *Post hoc* rationalization now by opposing counsel will simply come too late to save Defendants from deficiencies in the administrative record of the rule's promulgation.

The Defendants acted arbitrarily and capriciously when promulgating the ELD Rule. The administrative record failed to address Plaintiffs' concerns with the proposed rule and now fails to assist this Court in any meaningful way in dealing with the important issues raised in this litigation. The ELD Rule should also be overturned for deficiencies in its promulgation.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney, Thomas R. Fallati, Esq., hereby certifies that this brief complies with the printing requirements and other specifications of Part 1250. This brief was prepared on a computer using Times New Roman typeface, 14-point size, and double line spacing. According to the word processing system used by this office, this brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, and proof of service, contains 13,675 words.

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