Case No.: 531495

To Be Argued By: Paul D. Cullen, Sr.
10 minutes requested

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,

Reply Brief for Plaintiffs-Appellants

Albany County Index No. 904994-19

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SUMMARY OF ARGUMENT

The use of GPS technology (the essential component of an ELD) by enforcement officials to track the activities of individuals occupies a unique and important place in New York's search and seizure jurisprudence. The reach of such devices goes well beyond the "enhancement of human sensory capacity" and their warrantless use by enforcement officers is not "compatible with any reasonable notion of personal privacy or ordered liberty." *People v. Weaver*, 12 N.Y.3d 433, 441 (2009). Despite that participants in a pervasively regulated industry may, under appropriate circumstances, have a diminished expectation of privacy in connection with the search of business premises (in the case of motor carriers, tire treads, brake linings, headlights, windshield wipers, etc.), the tracking of a truck driver's personal movements by a GPS device 24 hours a day, seven days a week, both on duty or off duty, is another matter entirely. New York law is clear that individuals retain a constitutionally significant expectation of privacy that enforcement officers must recognize and respect when it comes to continuous GPS monitoring of their activities.

No New York court has sanctioned the application of the pervasively regulated industry exception beyond application to administrative searches of business *premises*. Even if the exception could be applied to *persons* rather than *premises*, there are several prerequisites to its application that are not satisfied

here. First, neither the Administrative Record nor the Defendants-Respondents' ("Respondents") brief attempts to justify why *warrantless* searches are needed. Second, the Electronic Logging Device ("ELD") Rule fails to include explicit and meaningful limitations on warrantless searches or to protect privacy and confidentiality interests as required by statute. Third, New York case law firmly establishes that individual drivers retain more than a sufficient expectation of privacy that makes warrantless GPS monitoring of their activities—24 hours a day, seven days a week whether they are on duty or off duty—unacceptable under Article I, Section 12.

The court below erred when it held that the ELD Rule promulgated by Respondents is covered by the so-called "administrative search" exception to the warrant requirement. That ruling is in direct conflict with the Court of Appeals' decision in *People v. Scott (Keta)*, 79 N.Y.2d 474 (1992), which holds that the administrative search exception to the warrant requirement cannot be invoked when a search is conducted solely to uncover evidence of criminality. *Id.* at 498. The ELD Rule authorizes enforcement authorities to conduct warrantless searches using ELDs for the sole stated purpose of providing enhanced enforcement of Commercial Motor Vehicle Driver Hours of Service ("HOS") regulations. Violation of HOS regulations is a penal offense under New York law. To qualify for the administrative search exception, "the inspection provisions must be part of

a comprehensive administrative program that is unrelated to the enforcement of the criminal laws." *Id*. at 501-02. That cannot be said of the ELD Rule here, the purpose of which is inextricably tied to enforcement of penal statutes. The implementation of the ELD Rule through the execution of warrantless searches of drivers for the sole purpose of establishing their personal culpability for penal violations of the HOS regulations constitutes a facial violation of Article I, Section 12 of the New York Constitution. *People v. Burger*, 67 N.Y.2d 338, 345 (1986). Given these clear-cut determinations by the Court of Appeals in *Keta* and *Burger*, Respondents' assertions that Plaintiffs-Appellants ("Plaintiffs") have failed to allege facial violations of the ELD Rule and that the rule is shielded by a presumption favoring constitutionality must be put aside.

Finally, the court below committed clear error in dismissing Plaintiffs' Article 78 claim on the ground that a federal court of appeals decision relied upon by Respondent NYSDOT in adopting the ELD Rule "was binding on Plaintiffs, as they were parties to that action." Opinion at 3-4 (R-7–8). Regardless of whether a federal court decision was binding on Plaintiffs under the Fourth Amendment as a matter of *federal law*, that decision is *absolutely irrelevant* to the question of whether the ELD Rule violates the broader protections afforded under *New York State law* by Article I, Section 12.

ARGUMENT

I. THE WARRANTLESS ADMINISTRATIVE SEARCH AUTHORIZED BY THE ELD RULE VIOLATES PRIVACY RIGHTS PROTECTED BY ARTICLE I, SECTION 12.

A. The warrantless use of GPS monitoring devices violates Article I, Section 12.

The New York Constitution, Article I, Section 12, provides broad privacy protections. *See, e.g.*, *Keta*, 79 N.Y.2d at 487-88. Court of Appeals cases interpreting the New York Constitution "reflect[]" the "core principle" of "the 'right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'" *See id.* (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). These protections applied to continuous GPS monitoring yield a straightforward result: such monitoring constitutes a search that is prohibited by Article I, Section 12 unless the government secures a warrant or proper substitute. *See, e.g.*, *Weaver*, 12 N.Y.3d at 444-45 ("The massive invasion of privacy entailed by the prolonged use of the GPS device was inconsistent with even the slightest reasonable expectation of privacy."); *see also Cunningham v. N.Y.S. Dep't of Labor*, 21 N.Y.3d 515, 522-23 (2013)(holding that warrantless GPS monitoring was unreasonable because it extended beyond work hours).

Weaver's recognition of the enormity of the intrusion effected by continuous GPS monitoring applies with equal force here. *E.g.*, *Weaver*, 12 N.Y.3d at 444. Government inspectors reading ELD data have access to the same type of

continuous monitoring that the Court of Appeals in *Weaver* and *Cunningham* rejected, providing personal information such as the vehicle's (and driver's) identification, date, time, and GPS location. As the court below recognized, mandatory use and inspection of ELDs to enforce the HOS rules violates Article I, Section 12 unless it fits within a recognized exception to warrant requirement. *E.g.*, Decision & Order, NYSCEF No. 32 ("Opinion") at 8 (R-12). Contrary to the determination of the court below, however, the ELD Rule does not.

B. The use of ELDs constitutes a search.

Continuous GPS tracking of a heavy truck (or other vehicle) is a "search" under Article I, Section 12. Further, the prolonged use of GPS is "inconsistent with even the slightest reasonable expectation of privacy." *See, e.g.*, *Weaver*, 12 N.Y.3d at 441-42, 445 ("[The People] contend only that no search occurred [when the government used GPS tracking], a contention that we find untenable."); *see also People v. Lewis*, 23 N.Y.3d 179, 188-89 (2014) (applying *Weaver* to even "limited GPS surveillance"), as the court below acknowledged. *See, e.g.*, Opinion at 6-7 (R-11) (stating that reviewing HOS records from an ELD is a search).

ELDs are sophisticated GPS tracking devices that integrate with the vehicle's engine. They 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 on or

off duty, driving in a professional or personal capacity, or even resting in the truck's sleeper berth. *See* Verified Petition & Class Action Complaint ("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). Commercial trucking's interstate nature means that ELDs track and record drivers' activity 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 use of ELDs to further the enforcement of the HOS rules constitutes a search for the purposes of Article I, Section 12.

C. Whether truck drivers have "consented" to mandatory inspections—which they have not—does not impact their challenge under Article I, Section 12.

Respondents argue that commercial truck drivers have "consented" to ELD searches by participating in the industry. *See, e,g.*, Brief for Defendants-Respondents ("Respondents' Brief") at 35; *see also id.* at 18. But Plaintiffs and other drivers have not "consented" in any meaningful way, and such "consent" is not the relevant inquiry as to whether ELDs violate Article I, Section 12.

First, drivers have not "consented" to Respondents' unconstitutional searches. The Court of Appeals has held that the State cannot condition the continued exercise of a legitimate privilege on individuals' consent to violations of their constitutional privacy rights. *See Sokolov v. Village of Freeport*, 52 N.Y. 2d 341, 346-47 (1981) (noting that state cannot condition right to exercise privilege on

acceptance of constitutional violation); *see also id.* at 346 (noting that consent to a search is not voluntary if given as condition to earn income).

Second, the United States Supreme Court has acknowledged that the legality of administrative searches is not premised on consent. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311, 315 (1972) ("[T]he legality of the [carefully limited administrative] search depends not on consent but on the authority of a valid statute."); *see also United States v. Aukai*, 497 F.3d 955, 959 (9th Cir. 2007) (*en banc*) (noting that constitutionality of administrative searches does not depend on consent); *United States v. Burch*, 153 F.3d 1140, 1143 (10th Cir. 1998) (consent to an administrative search of a tractor/semi-trailer was "irrelevant" to authority to conduct the search).

Plaintiffs have not "consented" to GPS tracking through ELDs. But, more importantly, whether Plaintiffs and other drivers have "consented" does not bear on the constitutionality under Article I, Section 12.

II. TRUCK DRIVERS MAINTAIN SIGNIFICANT PRIVACY EXPECTATIONS THAT MAY NOT BE IGNORED UNDER THE PERVASIVELY REGULATED INDUSTRY EXCEPTION.

A. Supreme Court improperly overlooked the privacy rights of drivers even when on duty.

More than a decade ago, the Court of Appeals cautioned against the use of GPS tracking devices attached to vehicles and monitored by law enforcement. In *Weaver*, the Court discussed the invasiveness of GPS tracking devices:

> "GPS is not a mere enhancement of human sensory capacity, it facilitates a new technological perception of the world in which the situation of any object may be followed and exhaustively recorded over, in most cases, a practically unlimited period. The potential for a similar capture of information or 'seeing' by law enforcement would require, at a minimum, millions of additional police officers and cameras on every street lamp."

Id. at 441. Used "at the unsupervised discretion of agents of the state," the Court noted that GPS tracking devices are not "compatible with any reasonable notion of personal privacy or ordered liberty." *Id*. The Court recited a litany of private places a vehicle may visit that a GPS tracking device will uncover when law enforcement personnel review the data it records:

> "[T]rips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits."

Id. at 441-42.

Plaintiffs in this action challenge the warrantless collection of the same information in the form of ELDs. The court below saw no issue with the government mandating that such equipment be installed in commercial trucks, and that the information it records be provided to police officers and truck inspectors upon request, as well as to the carriers whose loads the drivers are hauling—this

despite that the devices record where the drivers are and what activities they are engaged in not only while they pursue their professional activities, but 24 hours a day, 365 days a year.

The court below disregarded the potential for abuse of a driver's privacy identified by the Court of Appeals in *Weaver*, *supra*, based on the fact that, because ELDs locate drivers to only a ten-mile radius while they log in to the ELD device under the status of "personal use," the ELD Rule eliminates the potential for abuse. Opinion at 5 (R-9). But the potential for privacy intrusions extends beyond those times when a driver may be operating his or her truck while logged in as operating for "personal use." Drivers frequently operate their vehicles while "on-duty" when moving between loads, while looking for a new load, or waiting for dispatch, etc. They need not log out to the broader level of tracking if they are accomplishing a personal errand despite being on duty, and of course, drivers have privacy expectations even when they are logged in as "on duty." During such times their GPS devices locate drivers within much narrower geographic limits than assumed by the court below.

B. The pervasively regulated industry exception applies only to purely administrative inspections of business premises—not to the search of persons designed to support the expedient enforcement of criminal sanctions.

The administrative search exception to the warrant requirement permits warrantless searches of commercial premises within pervasively regulated

industries. But the Court must not lose sight of the fundamental fact that "[t]he closely regulated industry exception applies to searches of *commercial* premises for *civil* purposes." *Rethinking Closely Regulated Industries*, 129 Harv. L. Rev. 797, 797 (2016) (emphasis in original); Plaintiffs' Brief at 33-37. Moreover, such warrantless administrative inspections must still be "reasonable" under Article 1, Section 12 of the New York Constitution.

There is no dispute that ELDs are intended to allow the authorities to monitor commercial drivers' compliance with the HOS requirements. In so doing, ELDs effect a search of a "person." The entire HOS scheme aims to monitor drivers' conduct to determine (and prevent) fatigue—goals that focus on the individual and not on any premises. That the government attempts to achieve these goals by tracking the drivers' trucks' movements does not change this fact. This search of a "person" does not fit within the administrative search exception for commercial premises. Likewise, there can be no dispute that violations of the HOS requirements are criminal violations. Plaintiffs' Brief at 27. Finally, as noted above, a truck driver's participation in a profession that is part of a closely regulated industry does not completely eradicate his expectation of privacy altogether particularly when his or her privacy is invaded by the use of a GPS device.

C. The ELD Rule fails to satisfy critical prerequisites for application of the pervasively regulated industry exception.

1. Respondents have not demonstrated a need for warrantless searches.

Plaintiffs' opening brief points out that Respondents have failed to demonstrate a specific need for a *warrantless* search. Plaintiffs' Brief at 41-43. The Court of Appeals in *Keta* made it very clear that a substantial government interest alone is not sufficient to justify a warrantless search under Article I, Section 12 of New York's Constitution:

> "Although the Supreme Court in *Burger* placed great weight on the fact that the statute is supported by a 'substantial' governmental interest and that warrantless inspections are 'necessary to further [the] regulatory scheme' ([482 U.S. at 708-10]), we deem these factors in themselves to be insufficient justification for departing from article I, § 12's general prohibition against warrantless, suspicionless searches. Such arguments are always available when the regulatory activity in question has a law enforcement-related goal. Obviously, the government's interest in law enforcement is always, by definition, 'substantial,' and tools such as unannounced general inspections, without judicial supervision or regulatory accountability, are always helpful in detecting and deterring crime. If these were the only criteria for determining when citizens' privacy rights may be curtailed there would thus be few, if any, situations in which the protections of article I, § 12 would operate. Indeed, the very purpose of including such protections in our Constitution was to provide a counterbalancing check on what may be done to individual citizens in the name of governmental goals."

Keta, 79 N.Y.2d at 500. Critically, the administrative record does not attempt to establish a need for a *warrantless* search. Respondents' Brief likewise fails to offer justification for a *warrantless* search. The pronouncement of the Court of Appeals

in *Keta* controls. Plaintiffs have set forth a cause of action arising out of Respondents' failure to offer justification for the *warrantless* searches authorized by the ELD Rule.

2. The ELD Rule does not include explicit, meaningful limitations on warrantless searches.

Plaintiffs' opening brief demonstrated that Respondents' ELD Rule fails to include explicit and meaningful limitations on the warrantless searches it authorizes. Plaintiffs' Brief at 43-46. The Court of Appeals in *Keta* made it abundantly clear that an authorizing statute must set forth "a minimum or maximum number of times that a particular establishment may be searched within a given time period." *Id*. 79 N.Y.2d at 499, 500. The Appellate Division, First Judicial Department provided additional scope to this holding:

> "NY City Charter § 436 is facially unconstitutional … because it is unlimited in scope, and provides 'no meaningful limitation on the discretion of inspecting officers' (*id.* at 497). NY City Charter § 436 contains no limits on the time, place, and scope of searches of persons or property."

Collateral Loanbrokers Ass'n of N.Y., Inc. v. City of New York, 178 A.D.3d 598, 600 (1st Dept. 2019), *appeal dismissed*, 36 N.Y.3d 933 (2020).

The court below did not adequately distinguish these holdings. Advising drivers generally that they may be subject to frequent inspections is no substitute for the detailed notice required under *Keta* for warrantless inspections to support law enforcement.

The court below instead pointed to a driver's diminished expectation of privacy arising from the pervasive regulation of the industry. The court, for example, cited to regulations on mattress thickness in the truck's sleeper berths, on truck weight limitations, and on materials used in brake hoses as reasons why privacy protections against warrantless searches under Article I, Section 12 may be diminished. Opinion at 8 (R-12). But accepting straight-forward safety rules does not strip drivers of important constitutional protections particularly when GPS surveillance is involved.

United States v. Knight, 306 F.3d 534 (8th Cir. 2002) (cited by Respondents), demonstrates this dichotomy. After an Iowa State Trooper stopped a commercial truck driver for having a radar detector, the trooper began a North American Standard Level III inspection. *See Knight*, 306 F.3d at 535; Commercial Vehicle Safety Alliance, *Truck Inspection Program, North American Standard Level III Driver–Only Inspection Procedure* (1996); *see also* 49 C.F.R. § 350.115. The inspection guidelines permitted the trooper to examine the driver's "driver's license; medical examiner's certificate (and waiver, if applicable); records of duty status; driver's daily vehicle inspection report; documentation of periodic inspections; shipping papers and/or bills of lading, and receipts or other documents that may be used to verify the log." *Knight*, 306 F.3d at 535. Soon after the search was underway, the trooper sought permission to search the driver's locked

briefcase. The driver refused, but the trooper searched the briefcase anyway and found a firearm. Because the driver was a felon, he could not lawfully possess a gun.

The trial court denied the driver's request to suppress the evidence of the gun. On appeal, the Eighth Circuit reversed his conviction, noting:

> "The relevant guidelines, however, do not permit the search of personal belongings, and we believe that they could not constitutionally do so, because in the context they would not sufficiently limit officer discretion as *Burger* requires."

Knight, 306 F.3d at 535-36. Even under the relatively weaker privacy protections provided by the Fourth Amendment, administrative search schemes must provide adequate limitations on scope and frequency. That a driver may be subject to a general safety inspection including his mattress thickness, worn tire treads, etc. does not open the door to warrantless intrusion under GPS tracking.

The court below contends that other provisions in the ELD Rule supposedly limit officer discretion. For example, data collected under the ELD Rule only involves driver duty status and may only be used to aid enforcement of the HOS regulations. Opinion at 8-9 (R-12–13). In truth, directives on ELD specifications and how ELDs must be installed and what the data generated by the ELD may be used for were intended to establish the authority of enforcement officers to act to enforce HOS regulations. Those provisions were never intended to limit the circumstances of use for the protection of drivers.

The court below attempts to distinguish *Keta* on the grounds that it is a *pretext* case where administrative searches were being used as a pretext for criminal enforcement. Opinion at 9 (R-13). But *Keta*'s holding is not so limited. The Court made clear that the government cannot use warrantless searches to gather evidence to enforce crimes, whether pretextual or otherwise. *See Keta*, 79 N.Y.2d at 498 (holding that administrative search exception "cannot be invoked" where the warrantless search is being used to uncover evidence of a crime in support of penal enforcement). Searches using ELDs fit well within *Keta*'s admonishment, as the ELD Rule's authorizing statutes and regulations specifically direct the use of ELD data to support enforcement of penal provisions under New York Law.

3. The ELD Rule fails to include basic measures required by federal statute and regulations including measures to preserve confidentiality and limit the use of data obtained by ELDs.

The ELD Rule fails to contain even minimal limits on law enforcement discretion, or any privacy right protections required under Article I, Section 12. The complete absence of protections under the ELD Rule is further evidenced by the rule's disregard of important federal mandates:

- No regulation addresses reciprocity with other states concerning potentially unnecessary and duplicative inspections as required by 49 C.F.R. § 350.201(k).

- Nothing limits the use of ELD data to hours-of-service enforcement as required by 49 U.S.C. § 31137(e)(1), (3).

- No measures have been instituted to preserve the confidentiality of personal ELD data as required by 49 U.S.C. § 31137(e)(2).

- No measures have been instituted to protect the privacy of CMV drivers as required by 49 U.S.C. § 31137(d)(2).

Respondents, as participants under the Motor Carrier Safety Assistance Program ("MCSAP"), are obligated to include such measures when incorporating the federal ELD rule into state law. Plaintiffs' Brief at 30-31. The ELD Rule demonstrates no proper regard for fundamental principles ensuring privacy, whether developed through New York judicial precedent or federal statutes or regulations that New York is obliged to follow under its MCSAP agreement. Respondents ignore fundamental protections with serious implications for their responsibilities under Article I, Section 12.

III. THE ELD RULE VIOLATES ARTICLE I, SECTION 12 BECAUSE IT AUTHORIZES WARRANTLESS USE OF GPS TRACKING TO ENFORCE PENAL OFFENSES.

Plaintiffs advance a straightforward application of the *Keta* Court of Appeals decision and ask this Court to reject Defendants' attempt to expand the narrow, limited exception to the warrant and probable cause requirements which is available for proper administrative searches, but not for the type of search authorized here.

A. Respondents mischaracterize the legal theory upon which Plaintiffs proceed.

Respondents seriously mischaracterize the legal theory upon which Plaintiffs proceed and fail to address the underlying merits of Plaintiffs' actual position. Respondents assert that Plaintiffs' position is "that an administrative search is unconstitutional simply because the consequences for violations of the administrative scheme include criminal offenses – a common feature of many regulatory inspection regimes." Respondents' Brief at 25-26. Plaintiffs do not contest the proposition that the imposition of penal sanctions for failure of a person to comply with the record-keeping and reporting requirements of a *proper administrative program* does not, standing alone, render that program unconstitutional. That proposition does not apply where, as here, the relevant program is not properly administrative. The actual theory of Plaintiffs' case is that, contrary to the finding of the court below, the ELD Rule does not include a proper administrative program. Plaintiffs' Brief at 23-26. Administrative searches, like the ones at issue here, that are designed specifically to uncover evidence of penal violations, are subject to traditional warrant upon probable cause requirements of Article I, Section 12. The Court of Appeals in *Keta* specifically held that a proper program "must be part of a comprehensive administrative program that is *unrelated* to the enforcement of criminal laws." 79 N.Y.2d 474, 502-03 (emphasis added).

The ELD Rule, however, is specifically designed to enforce HOS regulations, which are punishable by penal sanctions, based upon data (evidence) acquired pursuant to warrantless searches. The central purpose of the ELD Rule is to gather evidence to support directly "the enforcement of criminal laws." *Id.* *Keta*'s holding did not address potential penal sanctions imposed for failure to maintain proper administrative records as asserted by Respondents. Respondents' Brief at 25-26.

B. Respondents fail to address *Keta*'s application to Plaintiffs' claims.

Having rejected the U.S. Supreme Court's Fourth Amendment analysis in *Burger* as a basis for its Article I, Section 12 analysis in the case then before it, the *Keta* Court reaffirmed its own *Burger* analysis:

> "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.

The Court of Appeals in *Keta* makes it abundantly clear that, in New York, administrative inspections may not be *designed* to uncover evidence of crime. But under 49 U.S.C. § 31137(e), that is the *sole* purpose of the ELD Rule, since driver tracking data may only be used to enforce the HOS regulations and failure to comply with the HOS regulations constitutes a penal violation in New York. *See*

Plaintiffs' Brief at 28-31; *see also* N.Y. Comp. Codes R. & Regs. tit. 17, § 820.10. The *Keta* Court firmly rejected the majority opinion of the U.S. Supreme Court in *Burger* and aligned itself—and New York law—with the views of the dissenting opinion in *Burger.*

The *Keta* opinion and the theory of Plaintiffs' claim here fully align with the dissenting opinion in the U.S. Supreme Court's *Burger* case, which addresses problems arising with regulatory programs that include both administrative inspections *and* criminal investigations. *Keta* recognizes that the New York Constitution protects persons in these situations, whereas the *Burger* majority opinion (rejected in *Keta*) held that the Fourth Amendment does not provide such protections. The mandate that ELD data be used *only* for enforcement of the HOS rules (49 U.S.C. § 31137(e)), which carry penal sanctions, eliminates any ambiguity or uncertainty as to the fact that the investigative activity established in the ELD Rule is aimed directly and exclusively at uncovering criminal violations.

Most penal statutes serve one or more societal interests in addition to providing a criminal penalty for individual misconduct. That a warrantless search designed to uncover evidence of a penal infraction may also serve some broadly identified public policy does not, as Respondents contend, exempt that search from constitutional restraints. Respondents' Brief at 28. Both the U.S. Supreme Court and New York's Court of Appeals recognized that a state may authorize dual

approaches to important problems like automobile theft. Part of the enforcement scheme may lie outside the criminal code; that does not exempt the criminal aspect from Article I, Section 12's restraints.

The *Keta* opinion recognizes that New York has taken a dual approach to the problem of automobile theft. *Keta* requires New York courts to balance the overlapping approaches between the penal law and administrative regulation. It concluded ultimately that the balancing exercise undertaken by the U.S. Supreme Court under the Fourth Amendment in *Burger* did "not adequately serve" the values embodied in Article I, Section 12 of the New York Constitution. *Keta*, 79 N.Y.2d at 451. Thus, the Court in *Keta* does not support Respondents' position that a regulatory scheme "not created solely to uncover evidence of criminality" may proceed with warrantless administrative searches. Respondents' Brief at 28.

Rather, the Court unequivocally rejects this position: a proper program "must be part of a comprehensive administrative program that is *unrelated* to the enforcement of criminal laws." *Keta*, 79 N.Y.2d at 502-03 (emphasis added). The Court in *Keta* made it clear that "the administrative search exception should remain a narrow and carefully circumscribed one." *Id*. at 499. Moreover, the Court of Appeals has "never suggested the existence of a generalized, wholesale exception to the warrant and probable cause requirements that may be invoked whenever

necessary to enhance the effectiveness of the State's law enforcement efforts." *Id.* at 501.

Respondents' repeated invocation of *People v. Quackenbush*, 88 N.Y.2d 534 (1996), to support a vastly expanded exception to the warrant requirement is contrary to *Keta*'s "narrow and carefully circumscribed" admonishment. *Quackenbush* involved statutory inspection of vehicles involved in accidents resulting in death or serious bodily injury. The purpose of the inspection was to identify causes of accidents and to remove defective vehicles from the road to avoid further accidents. While some of the vehicle inspections might reveal defects that could subject the owners to potential penal charges, the purpose of the statutory provision authorizing the inspections was not aimed directly at criminal enforcement. The narrow set of facts in *Quackenbush* hardly supports a vastly expanded exception to the warrant requirement that would swallow up the ELD Rule at issue here and other regulatory schemes aimed directly at penal enforcement.

The ELD Rule here fails here under Article I, Section 12 because it is not "part of a comprehensive administrative program that is *unrelated* to the enforcement of criminal laws." *Keta*, 79 N.Y. 2d at 502-03 (emphasis added). None of the cases cited by Respondents supports their proposed expansion of the

administrative search exception to apply to administrative programs directly related to the enforcement of criminal laws.

C. The Court of Appeals decision in *Keta* rebuts any presumption of constitutionality asserted by Respondents and supports the facial application of Plaintiffs' claims under Article I, Section 12.

Respondents and the court below both cite the general proposition that statutes and regulations are presumed to be constitutional. Respondents' Brief at 14-15; Opinion at 6. But it is equally well established that the presumption *can* be rebutted, and that the courts *will* strike down plainly unconstitutional statutes. *See, e.g., People v. Viviani,* 36 N.Y.3d 564, 576, (2021) ("Despite that appropriately heavy burden, we conclude that the challenged portions of Executive Law § 552 … are facially unconstitutional."); *see also Owner Operator Indep. Drivers Ass'n v. N.Y.S. Dep't of Taxation & Fin.*, 52 Misc.3d 855, 857, 858-59 (N.Y. Sup. Ct. 2016) (noting presumption but granting summary judgment to truckers upon finding that New York truck tax violated Commerce Clause).

The implementation of the ELD Rule through the execution of warrantless searches of drivers for the sole purpose of establishing their personal culpability for penal violations of the HOS regulations constitutes a facial violation of Article I, Section 12. *Burger*, 67 N.Y.2d at 345 ("Because New York City Charter §436 and Vehicle and Traffic Law § 415-a(5)(a) permit such warrantless searches, they are facially unconstitutional."). Given these clear-cut determinations by the Court

of Appeals in *Keta* and *Burger*, Respondents' assertions that Plaintiffs have failed to allege facial violations of the ELD Rule and that the rule is shielded by a presumption favoring constitutionality must be rejected.

IV. NYSDOT FAILED TO COMPLY WITH THE ADMINISTRATIVE PROCEDURES ACT WHEN PROMULGATING THE ELD RULE.

Respondents' perfunctory response to Plaintiffs' detailed discussion of the numerous defects in the ELD rulemaking proceeding, and the errors in the analysis of the court below of those deficiencies, further demonstrates why this Court should reverse the court below and remand this matter to the Department for proceedings in compliance with SAPA.

Respondents sidestep the merits of the substantive arguments, facts, and SAPA cases discussed in Plaintiffs' opening brief, by asserting that it "substantially complied," with its SAPA obligations. Respondents' Brief at 38. NYSDOT does not specifically explain how it "substantially complied" with SAPA; rather, it states in conclusory fashion, that "the Department summarized and responded to OOIDA's constitutional challenges." Respondents' Brief at 38 (citing R-149–50). NYSDOT's actual decision, however, demonstrates that its response to Plaintiffs' comments was far less substantial than it suggests, stating: "The Department has analyzed and assessed the objections raised by the OOIDA in their comment and concludes that the arguments lack merit under the controlling legal authority." R-150. Rather than providing the public–or the courts—with any

substantive explanation of its reasoning, NYSDOT rejected Plaintiffs' comments out of hand, primarily based upon its incorrect legal conclusion that Plaintiffs' objections under Article I, Section 12 of the New York State Constitution had been undercut by the Seventh Circuit's ruling under the Fourth Amendment in *OOIDA v. U.S. Dep't Transp*., 840 F. 3d 879 (7th Cir. 2016) (R-150). Its constitutionally defective conclusion further elucidates how the remainder of the rulemaking proceedings violated SAPA, and how the court below erred in dismissing Plaintiffs' Article 78 claim.

First, as demonstrated in Plaintiffs' opening brief, and again here, NYSDOT and the court below erred as a matter of law in conflating the protections afforded by the Fourth Amendment with the more expansive protections afforded by Article I, Section 12. It is a well-established axiom of constitutional law that "the New York Constitution can offer broader protections for its citizens than is afforded by the Federal Constitution, which sets the floor rather than the ceiling for an individual's rights." *People v. Sanad*, 47 Misc.3d 783, 790 (Crim. Ct. Bronx Co. 2015). Plaintiffs' comments before both NYSDOT and the court below explained that federal Fourth Amendment jurisprudence is insufficient in assessing the scope of Article I, Section 12's privacy protections.[1] The court below repeated this error in dismissing Plaintiffs' Article 78 claim concluding: "[I]t cannot be argued that

[1] *See* Comment of OOIDA in Response to an Emergency/Proposed Rulemaking at R-102–03.

the Seventh Circuit decision was binding on Plaintiffs, as they were parties to that action…." R-7–8. Again, regardless of whether the Seventh Circuit's decision was binding on Plaintiffs under the Fourth Amendment as a matter of *federal law*, it is completely *irrelevant* to the question of whether the Department's adoption of the ELD rule violates the broader protections afforded under *New York State law* by Article I, Section 12. This error alone requires reversal of the dismissal of Plaintiffs' Article 78 claim.[2]

The court below further stated that while NYSDOT's fleeting reference to *OOIDA v. Calhoun*, 62 Misc.3d 909 (Sup Ct. Albany Cty. 2018), provided the Department with authority for its rejection of Plaintiffs' comments, it acknowledged that these statements were "perhaps dicta in the *Calhoun* matter." R-7–8. As particularly relevant here, not only were they nonbinding dicta—at that time—subsequently on appeal, in *Owner-Operator Indep. Drivers Ass'n, Inc. v. Karas,* 188 A.D.3d 1313 (3d Dept. 2020), this Court dismissed *Calhoun* in its entirety as *moot.* Notably, it was NYSDOT, represented by the New York Attorney General (its counsel here), who prevailed in obtaining that dismissal. Accordingly,

[2] *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"); *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").

it should now be judicially estopped from placing any *ex-post* reliance on *Calhoun* dicta.

Second, while NYSDOT acknowledges that SAPA requires an agency to respond to public comment by producing "a summary and analysis of the issues raised and significant alternatives suggested by any such comments" as well as "a statement of the reasons why any significant alternatives were not incorporated into the rule, SAPA § 202(5)(b)," it nevertheless argues that "SAPA does not require an agency to independently devise and discuss alternatives to a proposed rule based on objections that it has rejected." Respondents' Brief at 39. Respondents fail to cite any authority for its startling proposition. New York case law is decidedly to the contrary. In *Matter of Medical Soc'y. of State of N.Y. v. Levin*, 185 Misc.2d 536, (Sup. Ct. N.Y. Cty. 2000), *aff'd* 280 A.D.2d 309 (1st Dept. 2001), the court found that the agency violated SAPA for failing to provide a statement of alternatives.

Finally, while NYSDOT's attorneys argued before the court below, and again here, that Plaintiffs failed to offer "substantial alternatives" to NYSDOT, Respondents' Brief at 39, it is imperative to note that NYSDOT made no such finding during the rulemaking proceeding.[3] Indeed, its ELD rule was completely

[3] NYSDOT's *attorneys'* assertions about what the agency found absent from public comments—but did not publish or explain in the final rule—should be disregarded because they are outside the administrative record. *Fanelli v. N.Y.C. Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1st

silent on the subject of alternatives. R-149–50. Furthermore, the decision of the court below also failed even to mention NYSDOT's noncompliance with SAPA § 202(5)(ii). R-7–8. Finally, NYSDOT's position is completely undermined because in its initial January 16, 2019 "Emergency Rulemaking," it explicitly indicated that it had no intention to consider *any* alternatives:

> "There is no alternative to adoption of the [ELD] rules. New York is required to apply the federal rules and has agreed to do so under the MCSAP agreement. Failure to timely adopt the update will put New York in violation of the federal law and constitute a breach of the MCSAP agreement and result in the loss of federal assistance estimated to be $14,775, 210 for the current fiscal year."

R-59. NYSDOT conveniently omitted this declaration from its subsequent final adoption of the rule on March 20, 2019 (R-149–50), further evincing its bias and predisposition to reject *any* alternatives presented by Plaintiffs' comments, or otherwise available to it from the record.

In the final analysis, by NYSDOT's own admission, its *sole* concern in adopting the ELD rule was *money*, i.e., the potential loss of $14.7 million in federal

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Dept. 1982), *aff'd* 58 N.Y.2d 952 (1983) ("The function of the court upon an application for relief under CPLR article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered" (citing *Matter of Levine v. N.Y.S. Liq. Auth.*, 23 N.Y.2d 863 (1969)); *Tilles v Williams*, 119 A.D.2d 233, 241 (2d Dept. 1986) ("A fundamental principle of administrative law … limits judicial review of an administrative determination solely to the grounds invoked by the agency, and if those grounds are insufficient or improper, the court is powerless to sanction the determination by substituting what it deems a more appropriate or proper basis ….").

assistance funds. Even if that rationale was acceptable—it is not—the agency never placed any facts or analysis in the administrative record establishing that its MCSAP agreement with the federal government required it to violate the New York Constitution, or to refuse to consider other constitutional alternatives.

For the foregoing reasons, the Court should therefore order, adjudge, and declare that the regulations are "null and void as contrary to law and lawful procedure, and their promulgation in violation of the State Administrative Procedure Act was unlawful, arbitrary, capricious and an abuse of discretion." *Levin*, 185 Misc.2d at 548.

CONCLUSION

For the foregoing reasons, the Decision and Order of the Supreme Court of the State of New York, County of Albany, dated May 1, 2020 and entered in the Office of the Albany County Clerk on May 7, 2020 granting the motion to dismiss the petition/complaint should be reversed and the matter remanded to the Supreme Court for further proceedings in accordance with this Court's Opinion.

Dated: November 23, 2021
Albany, New York

Respectfully submitted,

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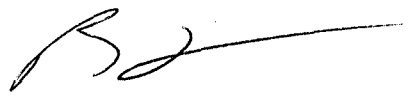
CERTIFICATE OF COMPLIANCE

The undersigned attorney, Brian M. Quinn, 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 6,651 words.



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