APL 2022-00050

To be argued by:
Kevin C. Hu
15 minutes requested

Court of Appeals
of the State of New York

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., DOUGLAS J. HASNER, DAVID D. WINN, 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 OF THE NEW YORK STATE DEPARTMENT OF MOTOR VEHICLES,

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Petitioners-appellants Owner-Operator Independent Drivers Association ("OOIDA"), a not-for-profit association of owners and operators of commercial motor vehicles, and three commercial truck drivers brought this hybrid article 78 and declaratory judgment action to challenge New York's adoption of a federal safety standard. The standard requires commercial truck drivers to install an electronic logging device, known as an "ELD," in their trucks. This device uses GPS tracking to automatically record certain information about driving time and location to ensure the drivers' compliance with limitations on driving time, or "hours-of-service" requirements. Petitioners contend that the requirement to install and use an ELD (the "ELD rule") violates the commercial truck drivers' right to privacy guaranteed by Article I, § 12 of the New York State Constitution. Supreme Court dismissed the hybrid action, and the Appellate Division, Third Department, unanimously affirmed.

This Court should affirm. The ELD rule does not violate petitioners' State constitutional right to privacy because it authorizes a permissible warrantless administrative search. Commercial trucking is a pervasively regulated industry, hours-of-service requirements are a reasonable

method of improving highway safety, and the ELD rule helps ensure that those requirements are followed. Moreover, the ELD rule contains limitations on the use of the GPS tracking device designed to protect the privacy of commercial truck drivers. These limitations make the use of an ELD more protective of privacy than those instances where this Court has previously ruled invalid the use of warrantless GPS tracking.

QUESTION PRESENTED

Is the ELD rule facially constitutional because it allows a permissible warrantless administrative search under Article I, § 12 of the New York State Constitution?

STATEMENT OF THE CASE

A. Federal Safety Standards for Commercial Motor Vehicles

Federal law empowers the Federal Motor Carrier Safety Administration ("FMCSA") to establish and enforce federal safety standards for commercial motor vehicles and their drivers. *See* 49 C.F.R. parts 350-399. To encourage state cooperation in the enforcement of these federal safety standards, FMCSA provides grants to states that incorporate the federal rules into state law and assist in enforcing those rules pursuant to the

Motor Carrier Safety Assistance Program. *See* 49 U.S.C. § 31102. New York is a participant in the Program and receives millions of dollars annually in grant funding.[1]

Program rules require that participating states adopt the relevant FMCSA regulations, like those at issue in this case, as part of their state law, and certify that they have done so. 49 C.F.R. §§ 350.209, 350.211. New York complied with this requirement by incorporating federal requirements into its Department of Transportation regulations. *See* New York Codes, Rules, and Regulations ("N.Y.C.R.R."), title 17, part 820. New York's Department of Transportation, Department of Motor Vehicles, and State Police are the primary agencies responsible for enforcement of FMCSA rules. 17 N.Y.C.R.R. §§ 820.9, 820.12. They enforce these rules through the State's Commercial Vehicle Safety Plan, which includes a roadside safety inspection program for commercial vehicles and drivers. *See* 17 N.Y.C.R.R. § 810.12.

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[1] For example, FMCSA estimates total payments to New York for fiscal year 2021 to be $14,828,864. *See Fiscal Year (FY) 2021 Motor Carrier Safety Assistance Program (MCSAP) Funding Distribution Table*, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/2021-09/FY2021MotorCarrierSafetyAssistanceProgram-MCSAP-Funding.pdf.

B. New York Incorporates Federal Hours-of-Service Rules for Commercial Truck Drivers

Numerous studies have linked driver fatigue and fatal accidents. *See generally* NATIONAL ACADEMIES OF SCIENCE, ENGINEERING, AND MEDICINE, COMMERCIAL MOTOR VEHICLE DRIVER FATIGUE, LONG-TERM HEALTH, AND HIGHWAY SAFETY (2016), *available at* https://www.ncbi.nlm.nih.gov/books/NBK384966/pdf/Bookshelf_NBK384966.pdf. To combat these problems and promote highway safety, FMCSA promulgated "hours-of-service" regulations that limit when and for how long a commercial truck driver may drive his or her vehicle. 49 C.F.R. Part 395.

FMCSA's hours-of-service regulations generally divide a driver's time into four different statuses: (1) driving; (2) on-duty not driving; (3) off duty; and (4) sleeping in the vehicle's sleeper berth. 49 C.F.R. § 395.8(b). The regulations use those statuses to create mandatory periods of rest whose precise limits depend on the type of commercial activity involved. For instance, for property carriers (that is, carriers for hire of regulated commodities other than household goods), a driver must spend 10 consecutive hours off duty or in a sleeper berth, after which the driver is permitted to drive for no more than 11 hours in a single 14-hour period. 49 C.F.R. §§ 395.3(a)(1), (2), (3). Before the enactment of the ELD

rule, to ensure compliance with hours-of-service limitations, the regulations additionally required drivers to keep written paper logs documenting their various statuses—including when and where those statuses changed—within each 24-hour period. 49 C.F.R. §§ 395.8(a), (b), (g).

New York and other states incorporated FMCSA's hours-of-service limitations into state law as one of the qualifications for Motor Carrier Safety Assistance Program funding, and they have been in place and enforced for decades.[2] (Record on Appeal ["R."] 150.) Accordingly, both state and federal law have long required commercial drivers to keep records of their duty status—including their location during every change in status—and to produce such records for inspection upon demand by state law enforce-ment. 49 U.S.C. § 31142(d); N.Y. Transp. Law § 140(2)(b); N.Y. Transp. Law § 212; 17 N.Y.C.R.R. §§ 820.12(a), 820.6. New York has historically ensured compliance with hours-of-service rules by conducting stops and roadside safety inspections of the records of a driver's hours of service as well as on-site compliance review of motor

[2] In fact, New York has enforced hours-of-service requirements since the 1930s, well before FMCSA grants became available. *See, e.g., People, on Complaint of Kornbleit, v. Yarbrough*, 5 N.Y.S.2d 978 (N.Y. Magis. Ct. 1938).

carrier firms. *See* 17 N.Y.C.R.R. §§ 820.9, 820.12; *see also* R. 59. A driver who vio-lates hours-of-service rules or falsifies records related to hours of service may be subject to criminal and civil penalties. N.Y. Transp. Law §§ 145.3, 213.

C. Congress Requires the Electronic Recording of Hours of Service and FMCSA Updates its Regulations

In 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act, 126 Stat. 405 (2012), which required commercial motor vehicles that are used in interstate commerce and operated by drivers who are already obligated to record their hours of service to install ELDs. Prior to the Act, state and federal regulations permitted commercial truck drivers to record their hours of service via an automatic on-board recording device or by keeping a paper record. *See* former 49 C.F.R. § 395.8 (2015). Since most drivers chose to keep paper records, FMCSA found that "[a] driver who drives over hours currently can falsify any one of a number of entries on the [duty status records] to make it appear that the driver is in compliance" and that hours-of-service violations were "widespread." 65 Fed. Reg. 25540, 25558 (May 2, 2000).

In 2015, FMCSA updated its regulations in accordance with the Act, requiring most commercial drivers to have ELDs installed and in use by December 18, 2017. *See* 49 C.F.R. § 395.8, 395.15, 395.24 (2020); Final ELD Rule, 80 Fed. Reg. 78292 (Dec. 16, 2015).

ELDs are designed to integrate with a vehicle's engine, and use GPS technology to automatically record the date, time, vehicle's general geographic location, number of hours an engine has been running, and vehicle mileage. 49 C.F.R. § 395.26(b). ELDs do not record this information continuously, but only at specified times, including (1) whenever a driver logs in or out of the ELD (except that a vehicle's geographic location is not recorded at this point, *see* 49 C.F.R. § 395.26(g)); (2) whenever a driver manually enters a change in duty status; (3) whenever the vehicle's engine is powered up or down; or (4) at one hour intervals when the vehicle is in motion.[3] *See* 49 C.F.R. §§ 395.26(c), (d), (g), (h).

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[3] Although FMCSA is currently considering whether to increase the automatic recording of information when a vehicle is in motion from one-hour intervals to 15-minute intervals, 87 Fed. Reg. 56921, 56924 (Sept. 16, 2022), such a change has yet to be incorporated into federal or state regulations.

Drivers are required to manually input their identifying information and any changes in duty status into the ELDs. 49 C.F.R. §§ 395.24(b), (c). Standard duty statuses include the four primary statuses ("driving," "on-duty not driving," "off duty" and "sleeper berth"), and also special driving categories (such as "authorized personal use" and "yard moves") where driving time will not necessarily count towards a driver's available driving time. 49 C.F.R. §§ 395.24(b), 395.28(a). When a driver puts a truck in motion for personal errands, the appropriate ELD status is "authorized personal use." 49 C.F.R. § 395.28(a)(1)(i); *see* 49 C.F.R. Part 395, Appendix A, § 4.7.3. Information recorded by ELDs is made available to law enforcement personnel during roadside safety inspections and must be periodically uploaded to the drivers' employer. 49 C.F.R. §§ 395.24(d), 395.30(b)(3); 49 U.S.C. § 31137(b)(1)(B).

Limits are placed on both the types of information recorded by the ELD and the scope of a search permitted by the ELD rule when law enforcement performs an inspection. First, when a driver's status is entered as "on duty," the ELD records the truck's geographic location only to within a half-mile radius—which is approximately ten city blocks. *See* 49 C.F.R. Part 395, Appendix A, § 4.3.1.6(c). Second, when a driver's

status is entered as "authorized personal use," the ELD records the truck's geographic location only to within a ten-mile radius, equivalent to a circle with an area of 314 square miles. 49 C.F.R. §§ 395.26(d)(1), (i). For context, New York City is approximately 303 square miles. The ELD rule would thus reveal to an inspector that a driver on "authorized personal use" was operating his truck somewhere within or close to the New York metropolitan area but would not contain data granular enough to pinpoint his location within the City. In addition, the "authorized personal use" status will also cause the engine hours and vehicle miles to be "left blank" by the ELD. 49 C.F.R. § 395.26(d)(2). Third, the ELD rule "authorizes officers to inspect only ELD data; it does not provide discretion to search a vehicle" or its driver "more broadly." *Owner Operator Independent Drivers Ass'n v. United States DOT*, 840 F.3d 879, 895 (7th Cir. 2016) ("*OOIDA I*"), *cert. denied,* 137 S.Ct. 2246 (2017); *see also* 49 C.F.R. § 395.24(d). In fact, an officer conducting such an inspection does not enter the vehicle at all: the driver transfers his ELD data to the officer electronically (through secure web services, email, or Bluetooth) or in a USB drive. *About ELDs: Improving Safety Through Technology, Federal Motor Carrier Safety Administration* ("*About ELDs*"), FEDERAL

MOTOR CARRIER SAFETY ADMINISTRATION, https://eld.fmcsa.dot.gov/About. And the authorizing statute requires "appropriate measures to preserve the confidentiality of any personal data contained in an electronic logging device and disclosed" as part of a search. 49 U.S.C. § 31137(e).

New York was the forty-eighth state to adopt the ELD rule into its own law (R. 149). It did so via the Department of Transportation's emergency rulemaking under the State Administrative Procedure Act. (R. 74-78.) The emergency rules were permanently incorporated into New York law by a final notice of adoption promulgated on April 9, 2019, and made effective April 24, 2019. 17 N.Y.C.R.R. § 820.6. Most of the Depart-ment's Notice of Adoption was devoted to addressing petitioner OOIDA's comments. (R. 149-150.) The Department's regulations adopt the FMCSA regulations by reference, declaring that the "Commissioner of Transportation adopts Part 395 of Title 49 of the Code of Federal Regulations (CFR) with the same force and effect as though herein fully set forth at length." 17 N.Y.C.R.R. § 820.6.

D. OOIDA Sues in Federal and New York Courts to Invalidate the ELD Rule

OOIDA first filed a petition for review in federal court in an attempt to block the ELD rule from taking effect on the federal level before it was adopted into state laws. The Court of Appeals for the Seventh Circuit rejected the challenge, holding that the "ELD mandate is a 'reasonable' administrative inspection within the meaning of the Fourth Amendment." *OOIDA I*, 840 F.3d at 893.

Before the New York Department of Transportation had incorporated the ELD rule into its own regulations, OOIDA commenced an action in Supreme Court, Albany County, seeking to enjoin state officials from enforcing the ELD rule prior to its incorporation into New York law. Supreme Court rejected the challenge. *Owner Operator Indep. Drivers Ass'n v. Calhoun*, 62 Misc. 3d 909 (Sup. Ct. Albany County 2018). While OOIDA's appeal from that decision was pending, the Department incorporated the ELD rule into its regulations, rendering the proceeding moot. *See Owner Operator Indep. Drivers Ass'n v. Karas*, 188 A.D.3d 1313 (3d Dep't 2020).

E. Proceedings Below

In response to the State's incorporation of the ELD rule, OOIDA, along with three commercial truck drivers, commenced this hybrid article 78 proceeding and declaratory judgment action to challenge the rule. (R. 19-47.) Their primary claim[4] is that the ELD rule violates commercial truck drivers' right to privacy under Article I, § 12 of the New York State Constitution and is therefore facially unconstitutional.[5] (R. 31-38, 44.) Respondents moved to dismiss for failure to state a claim, defending the ELD rule's constitutionality. (R. 169-171.) In support of their motion, respondents submitted the affidavit of Raymond Weiss, a Technical Sergeant with the New York State Police's Division of Traffic Services. (R. 205-206.) Weiss explained that the New York State Police inspect ELD data "only to enforce compliance with hours-of-service rules" and do

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[4] Petitioners additionally asserted claims under Article I, § 6 of the State Constitution and the State Administrative Procedures Act. (R. 43-44.) Petitioners have abandoned any challenge to the dismissal of those claims by not raising it in their opening brief. *See* Br. at 1-2, 17-44 (arguing only that the ELD rule violates Article I, § 12).

[5] Petitioners do not challenge the validity of the hours-of-service regulations themselves, and the Department of Transportation will continue to enforce them regardless of the outcome of this proceeding.

so in accordance with federal guidance on roadside inspections for hours-of-service compliance. (R. 206.)

Supreme Court, Albany County (Cholakis, Acting J.), granted respondents' motion. (R. 5-15.) Rejecting petitioners' challenge under Article I, § 12 of the State Constitution, the court concluded that the ELD rule authorizes a permissible warrantless administrative search. (R. 8-13.)

The Third Department unanimously affirmed. (R. 214-225.) The court held that the automatic recording of data and warrantless inspection of records authorized by the ELD rule were administrative searches undertaken pursuant to a legitimate regulatory scheme and thus "do not constitute an unreasonable search within the meaning of NY Constitution, article I, § 12." (R. 224; *see also* R. 218-224.) The court reasoned that (1) the pervasive federal and state regulation of the commercial trucking industry results in a diminished expectation of privacy for its participants (R. 218-220); (2) the ELD rule furthers a substantial government interest in public highway safety by "ensuring compliance with hours of service requirements" and is a "reasonable means" of combatting the "widespread and longstanding problem of falsification" of the

paper duty status records (R. 221); and (3) the ELD rule meaningfully limits the discretion of officials performing inspections because "[b]oth the type of information recorded by the ELD and the scope of a search permitted by the rule are narrow" (R. 221-222).

Petitioners appealed as of right under C.P.L.R. 5601(b)(1). (R. 209-210.)

ARGUMENT

THE ELD RULE SURVIVES FACIAL CONSTITUTIONAL CHALLENGE BECAUSE IT ALLOWS A REASONABLE AND LIMITED WARRANTLESS ADMINISTRATIVE SEARCH

The Third Department correctly rejected petitioners' facial constitutional challenge under Article I, § 12 of the State Constitution, concluding that the ELD rule properly authorizes reasonable and limited warrantless administrative searches.

Preliminarily, and contrary to petitioners' claim (Br. at 40), the Third Department properly acknowledged that New York courts treat facial challenges as "generally disfavored." *Indep. Ins. Agents & Brokers of New York, Inc. v. New York State Dep't of Fin. Servs.*, 39 N.Y.3d 56, 64 (2022) (quoting *People v. Stuart*, 100 N.Y.2d 412, 422 (2003)). To succeed on a facial challenge, a party must carry the "extraordinary burden in

this species of litigation of proving beyond a reasonable doubt that the challenged provision 'suffers wholesale constitutional impairment.'" *Brightonian Nursing Home v. Davis*, 21 N.Y.3d 570, 577 (2013) (quoting *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 433, 448 (2003)). So long as there are circumstances under which the challenged provision "could be constitutionally applied," a facial challenge must fail. *Moran Towing Corp.*, 99 N.Y.2d at 445. Here, petitioners failed to demon-strate that the ELD rule could not be constitutionally applied under any circumstances.

A. The ELD Rule Authorizes a Permissible Warrantless Administrative Search.

Both "[t]he Fourth Amendment to the United States Constitution and Article I, § 12 of the New York State Constitution protect individuals from unreasonable government intrusions into their legitimate expectations of privacy." *People v. Quackenbush*, 88 N.Y.2d 534, 541 (1996) (internal quotation marks and citation omitted).[6] The New York State Constitution, however, provides "greater protections" than its federal counterpart "in the area of search and seizure." *People v. Weaver*,

[6] Petitioners did not raise and instead disclaimed any challenge under the Fourth Amendment in this action. (R. 19-47.)

12 N.Y.3d 433, 445 (2009). To comply with both federal and state protections, government actors must "obtain advance judicial approval of searches and seizures through the warrant procedure." *Quackenbush*, 88 N.Y.2d at 541 (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). But the warrant requirement is not absolute. Thus, "[w]arrantless administrative searches may be upheld in the limited category of cases where the activity or premises sought to be inspected is subject to a long tradition of pervasive government regulation" and the regulatory scheme authorizing the search "prescribes specific rules to govern the manner in which the search is conducted." *Id*. For this exception to apply, there must be a "compelling need for the governmental intrusion" and the search authorized must be "limited in scope to that necessary to meet the interest that legitimized the search in the first place." *Id.* at 542.

The Third Department correctly held that the type of search authorized by the ELD rule falls under the administrative search exception to the warrant requirement.

First, commercial trucking has been "regulated by detailed government standards" for decades. *Id*. Federal regulation of commercial trucking, including regulation of "the maximum hours of service for

commercial drivers" with the goal of promoting highway safety, extends back more than eighty years. *OOIDA I,* 840 F.3d at 885-887 (detailing the history of hours-of-service requirements, starting with the Federal Motor Carrier Act of 1935). New York has similarly enforced hour-of-service limitations and record keeping requirements for that same amount of time. *See, e.g., People, on Complaint of Kornbleit, v. Yarbrough*, 5 N.Y.S.2d 978 (N.Y. Magis. Ct. 1938). In addition, federal and state regulations governing commercial trucking touch nearly every aspect of the industry. *See* 49 C.F.R. Parts 301-399. The regulations govern the hours of service at issue in this case, 49 C.F.R. Part 395, as well as driver qualifications, 49 C.F.R. Part 391, mandated drug and alcohol testing, 49 C.F.R. Part 382, technical specifications of the vehicles (including the furnishing of sleeper berths), 49 C.F.R. Part 393, and much more.

As the Third Department aptly observed, "one would be hard-pressed to find an industry more pervasively regulated than the trucking industry." (R. 220 (internal quotation marks omitted)). Accordingly, in addition to the decision below, numerous federal and state courts in other jurisdictions have held that commercial trucking is a pervasively regulated industry for which warrantless administrative searches may be

authorized. *See United States v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004); *United States v. Castelo*, 415 F.3d 407, 410 (5th Cir. 2005); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468 (6th Cir. 1991); *OOIDA I*, 840 F.3d at 885-887; *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004); *United States v. Delgado*, 545 F.3d 1195, 1201-02 (9th Cir, 2008); *United States v. Mitchell*, 518 F.3d 740, 751 (10th Cir. 2008*); United States v. Ponce-Aldona*, 579 F.3d 1218, 1222-23 (11th Cir. 2009); *State v. Jean*, 243 Ariz. 331, 337 (2018); *State v. Beaver*, 386 Mont. 12, 15-16 (2016); *State v. Hewitt*, 400 N.J. Super. 376 (2008); *State v. Melvin*, 2008 ME 118 (2008); *Commonwealth v. Leboeuf*, 78 Mass. App. Ct. 45, 49 (2010). Petitioners have not identified any contrary authority, and nor have respondents.

Under New York constitutional principles, individuals involved in pervasively regulated activities generally have "a diminished expectation of privacy in the conduct of that business because of the degree of governmental regulation." *Quackenbush*, 88 N.Y.2d at 541. By choosing to engage in a pervasively regulated business, individuals "may reasonably be deemed to have relinquished a privacy-based objection" to the "intrusion that will foreseeably occur incident" to the applicable

regulations. *Matter of Ford v. N.Y.S. Racing & Wagering Bd.*, 24 N.Y.3d 488, 498 (2014). Similarly, "there is generally only a diminished expectation of privacy in an automobile." *Quackenbush*, 88 N.Y.2d at 543 n.4 (internal quotation marks omitted). Petitioners dispute this standard, contending that a warrantless administrative search is permissible only when the target of the search possesses not just a "diminished" but a "minimal" expectation of privacy. (Br. at 27-29.) But their only authority for that formulation is a single trial court decision, *People v. Davis,* 156 Misc. 2d 926 (Sup. Ct. Bronx Cnty. 1993), which was decided three years before this Court set forth the governing standard for warrantless administrative searches in *People v. Quackenbush*, 88 N.Y.2d 534 (1996). To the extent the standard in *Davis* diverges from that in *Quackenbush*, the latter controls.

Commercial truck drivers therefore have a diminished expectation of privacy in the whereabouts of their vehicles because they are voluntary participants in an industry that is pervasively regulated and involves the operation of motor vehicles. *See, e.g., United States v. Navas*, 597 F.3d 492, 501 (2d Cir. 2010) (reduced expectation of privacy because of perva-

sive regulation of commercial trucking informed the application of the automobile exception to the warrant requirement).

Petitioners also argue (Br. at 30) in favor of a greater expectation of privacy on the ground that some commercial truck drivers live in their trucks. That consideration cannot sustain petitioners' facial challenge, where their burden is to show that the ELD rule is unconstitutional in all its applications, including where drivers do not live in their trucks. *See People v. Stevens*, 28 N.Y.3d 307, 311-12 (2016) (facial constitutional challenges necessarily fail where there is at least one person to whom the provision may be applied constitutionally); *Stuart*, 100 N.Y.2d at 422-423 (same). In any event, it is difficult to see why truck drivers may reasonably expect a greater degree of privacy by choosing to live in a space which enjoys a reduced expectation of privacy. *See Navas*, 597 F.3d at 501; *United States v. Lee*, 2016 WL 4046967, at *11 (S.D. Ill. 2016) ("[R]elevant case law suggests the reduced expectation of privacy applies even more forcefully with regard to commercial trucks, regardless of whether the drivers sleep in them or not.").

Second, the ELD rule serves the compelling government interest in ensuring highway safety by reducing the number of accidents. *Quacken-*

bush, 88 N.Y.2d at 543 (there is a "compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways."). As the Seventh Circuit concluded in rejected OOIDA's Fourth Amendment claim, "[t]he public safety concerns inherent in commercial trucking give the government a substantial interest" in regulating the industry generally, and in enforcing hours-of-service requirements in particular. *OOIDA I*, 840 F.3d at 895. And the ELD rule is narrowly designed to serve that interest. To this end, FMCSA's findings demonstrate that the ELD rule was a response to "widespread" and longstanding "falsification and errors" under the old system of using paper records to document hours of service. *Id.* (citing 65 Fed. Reg. 25540, 25558). Commercial truck drivers reported that carriers would pressure them to alter paper records in a way that could not be done if hours of service were automatically recorded by ELD. *Id.* at 890 (citing 80 Fed. Reg. 78292, 78320, 78323, 78325). As the Department of Transportation observed, the use of ELD devices "makes it more difficult for carriers to evade responsibility" for hours-of-service violations. (R150.) The Seventh Circuit likewise stated that "ELDs should not only help discover hours-

of-service violations but also deter such violations." *OOIDA I*, 840 F.3d at 895; *see also* 80 Fed. Reg. 78292, 78352-78353.

Petitioners nevertheless contend (Br. at 5-8, 32-33) that ELDs do not actually further these policy goals and are therefore unnecessary to the hours-of-service regulatory scheme. Petitioners argue that (1) drivers can still falsify their records because changes in duty status must be manually entered into the ELD, and (2) the location data recorded by the ELD is not directly used to calculate a driver's compliance with hours-of-service regulations. (Br. 5-8.)

Petitioners' arguments ignore how the automatic recording of location and other information by ELDs greatly reduces the opportunities for commercial truck drivers to falsify duty status records and evade hours-of-service limitations. By automatically recording a vehicle's engine hours and general location, the ELD creates "a clear history of where the driver and vehicle have been" that cannot be subsequently edited by the driver. 80 Fed. Reg. 78292, 78328. This feature of ELDs will defeat most obvious ways of cheating. For example, if a driver attempted to drive while "off duty"—when the vehicle is not supposed to be in motion—the ELD would record the vehicle's movement. 49 C.F.R.

§ 395.26(d)(1); *see also* 80 Fed. Reg. 78292, 78367. And if a driver put the ELD in "authorized personal use" status while actually "on duty," the ELD would record the vehicle's general location. 49 C.F.R. § 395.26(d)(2); *see also* 80 Fed. Reg. 78292, 78367. Tracking changes in location over time serves "as a cross check to verify that [the ELD] data has not been manipulated." 80 Fed. Reg. 78292, 78328; *see also* 79 Fed. Reg. 17656, 17668 (explaining that some of the "tamper-resistance measures" in the ELDs "would use location information in consistency-check algorithms").

Petitioners' highly strained attempt (Br. at 6-7) to devise a cheating scenario only confirms the effectiveness of ELDs at preventing manipulation: petitioners imagine a driver who manually entered "off duty" while he was not operating the vehicle, but nonetheless continued to work during the required 10 consecutive non-driving hours. It is true that an ELD would not prevent this attempt to evade hours-of-service rules.[7] But petitioners notably fail to explain just what non-driving "work" the

[7] Although technology exists that could more closely monitor a driver's personal movements (such as in-cab video cameras or biomonitors outfitted on the drivers), FMCSA rejected its use as "too invasive of personal privacy." 75 Fed. Reg. 17208, 17238 (Apr. 5, 2010); *see also* 80 Fed. Reg. 78292, 78368.

commercial truck driver in their example was performing that would have deprived him of the 10 hours of required rest. In any event, no system is proof against all attempts at evasion. That does not show that ELDs are ineffective in enforcing hours-of-service requirements. *See, e.g.*, 80 Fed. Reg. 78292, 78306 (FMCSA acknowledging that "there can still be falsification of time" but explaining that "the opportunities for such fraud are drastically reduced when vehicles are equipped by ELDs").

Petitioners additionally overlook the ways in which the ELD rule benefits the commercial truck drivers themselves by reducing the cost of compliance with the hours-of-service regulations. As the Department of Transportation correctly observed, the ELDs' automatic recording and electronic retention of duty status data "eliminate[s] clerical tasks associated with the [records of duty status] and significantly reduce[s] the time drivers spend recording their [hours of service]." (R. 60.) And because forty-seven other states had already adopted ELD rule (R. 149), truck drivers engaged in interstate commerce can additionally enjoy the benefits of predictability and uniformity in the enforcement of hours of service regulations while engaged in business in New York.

Finally, once pervasive regulation pursuant to a substantial government interest is established, an administrative search regime will "constitute 'a constitutionally adequate substitute for a warrant'" so long as the authorized search is "governed by specific rules designed 'to guarantee the certainty and regularity of application'" that provide a "meaningful limitation" on the discretion of the officials performing the search. *Quackenbush*, 88 N.Y.2d at 542 (quoting *People v. Scott (Keta)*, 79 N.Y.2d 474, 499, 500, 502 (1994) (hereinafter "*Keta*")).

The limitations on the data recorded by ELDs and the scope of the search authorized by the rule meaningfully limit the discretion of the officials performing the search. The ELD rule puts drivers and motor carriers on notice that they must install and maintain the ELD device and produce the ELD records as part of an administrative search. 49 C.F.R. § 395.24(d) ("On request by an authorized safety official, a driver must produce and transfer from an ELD the driver's hours-of-service records in accordance with the instruction sheet provided by the motor carrier."); *id*. § 395.22(f) ("A motor carrier must ensure that an ELD is calibrated and maintained in accordance with the provider's specifications.") Moreover, ELDs record only limited data relating to the

location and movement of the vehicle and identity and duty status of the driver. *See* 49 C.F.R. §§ 395.24, 395.26. When the driver is on-duty, that data is not so granular as to allow an inspecting officer to determine where the truck is, or has been, to within less than half a mile. *See* 49 C.F.R. Part 395, Appendix A, § 4.3.1.6(c). And as the Seventh Circuit explained, the ELD rule does not permit the inspecting officer to extend any search beyond inspection of the recorded ELD data. *OOIDA I*, 840 F.3d at 896 ("the ELD mandate authorizes officers to inspect only ELD data; it does not provide discretion to search a vehicle more broadly.") Inspecting officers receive the ELD data electronically without entering the vehicle, *About ELDs*, https://eld.fmcsa.dot.gov/About, and the ELD rule does not authorize an inspecting official to search either the cab of the truck or the driver for contraband. *See* 49 C.F.R. § 395.24(d).

There is no merit to petitioners' contention (Br. at 35) that a regulatory scheme authorizing warrantless administrative searches must fail unless it limits the frequency of the authorized searches. In *Keta*, this Court relied on the absence of standards governing search frequency as one piece of evidence that the challenged scheme provided insufficient safeguards against arbitrary or abusive enforcement.

79 N.Y.2d at 499-500. But this Court did not hold that standards for search frequency were required elements of a valid scheme. *Id.* Instead, the Court observed that clear standards for what constitutes a violation and when searches are permissible could adequately substitute for a search warrant, and ultimately concluded that the challenged scheme at issue in that case "prescribes no standards or required practices other than the maintenance of a 'police book'" and so "there are no real *administrative* violations that could be uncovered in a search." *Id.* (emphasis in original). In contrast, the hours-of-service requirements here set forth precise rules governing commercial truck drivers' driving time, and the ELD rule places meaningful limitations on the type and amount of information recorded by the ELD and the scope of any searches carried out by state agents.

Accordingly, the ELD rule authorizes permissible warrantless administrative searches under Article I, § 12 of the New York State Constitution.

B. The ELD Rule Is Not a Pretext for Enforcement of Unrelated Criminal Laws.

Petitioners erroneously argue (Br. at 20-24) that this Court has held that that a regulatory scheme permitting an administrative search is facially unconstitutional under Article I, § 12 so long as it is designed to uncover violations of the Penal Law—even if those violations relate directly to the regulatory scheme. As an initial matter, petitioners overlook that the ELD rule also prescribes civil sanctions: violations of the hours-of-service regulations can constitute traffic infractions, *see* 17 N.Y.C.R.R. § 820.10(a), and can also lead to the imposition of civil penalties of up to $10,000, *see* N.Y. Transp. Law § 145.3. (*See also* R. 33-34, 39 (petitioners conceding that violations of the hours-of-service rules result in "civil and criminal sanctions")).

In any event, petitioners misread *Keta* and *People v. Burger*, 67 N.Y.2d 338 (1996). In *Keta*, this Court readopted its analysis in *Burger* under state constitutional principles after the U.S. Supreme Court rejected that analysis as an interpretation of the Fourth Amendment of the U.S. Constitution. *Keta*, 79 N.Y.2d at 498. Both decisions involved challenges to the constitutionality of Vehicle and Traffic Law (VTL) § 415-a(5)(a), a provision which did "little more than authorize general

searches, including those conducted by the police, of certain commercial premises," specifically vehicle dismantling businesses or 'chop shops.' *Burger*, 67 N.Y.2d at 344.

Under *Keta* and *Burger*, "the fundamental defect in" VTL § 415-a(5)(a) was that it "authorize[d] searches undertaken solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." *Burger*, 67 N.Y.2d at 344. This Court explained that the searches permitted under VTL § 415-a(5)(a) were not truly in the service of the regulatory scheme contained in that provision, which imposed licensing and record-keeping requirements on chop shops. *Burger*, 67 N.Y.2d at 345. But the permitted searches could be, and were conceded in practice to be, conducted without checking the chop shop's inventory against the records that were required to be maintained under the regulatory scheme. *Id*. Instead, the administrative searches were merely pretext for searches "undertaken solely to discover whether defendant was storing stolen property on his premises." *Id*.

Thus, the unconstitutional flaw in this inspection regime was the mismatch between the inspections and the regulatory scheme allegedly being enforced, rather than the mere possibility of criminal penalties for

discovered violations. In fact, the regulatory scheme *did* contain criminal penalties for non-compliance that were directly related to violations of the record-keeping requirements. *See* VTL § 415-a(5)(a) (1991). For example, VTL §§ 415-a(5)(a) and (b) required that chop shops be registered, display their registration number according to regulation, and "maintain a record of all vehicles" and parts, as well as "a record of the disposition" and proof of ownership of vehicles and parts. Failing to be registered was a felony, VTL § 415-a(1) (1991), and failing to produce the required records was a misdemeanor, VTL § 415-a(5)(a) (1991).

Yet this Court did not identify the presence of these criminal offenses within the scheme as the source of the constitutional defect. Rather, the problem arose from the fact that the searches permitted under VTL § 415-a(5)(a) were concededly not undertaken to enforce the regulatory record-keeping requirements themselves; they were undertaken to enforce the separate general criminal prohibition on possession of stolen property. In other words, the regulatory requirements were "in reality, designed simply to give the police an expedient means of enforcing penal sanctions.' *Keta*, 79 N.Y.2d at 498 (quoting *Burger*, 67 N.Y.2d at 344). Petitioners' characterization of *Keta* and *Burger* as

cases where warrantless administrative searches were impermissibly used to find evidence of "the crimes meant to be deterred by the regulatory scheme" itself (Br. at 22) is therefore incorrect.

Accordingly, *Keta* and *Burger* do not stand for the proposition petitioners advance: 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. *See, e.g.,* Tax Law § 474 (commissioner of taxation and finance authorized to inspect premises where cigarettes are placed or sold); Tax Law § 1814 (establishing criminal offenses involving the possession of unstamped or counterfeit-stamped cigarettes). Rather, those cases are properly read as the Third Department read them: that an administrative search is unconstitutional if the administrative scheme the search is nominally designed to advance is merely a pretext for the enforcement of other criminal laws.

Indeed, this Court made clear in its subsequent decision in *People v. Quackenbush*, 88 N.Y.2d 534 (1996), that the administrative search exception to the warrant requirement under Article I, § 12 is not nearly so narrow as petitioners suggest and is not offended simply because the

results of an administrative search may yield evidence of unrelated criminality. In *Quackenbush*, the criminal defendant was charged with operating a motor vehicle with inadequate brakes, a misdemeanor under the version of VTL § 375 then in effect. *See* 88 N.Y.2d at 537; VTL § 375(32) (1995). The evidence of defective brakes was uncovered when police impounded the defendant's car and inspected its mechanical areas under the authority of VTL § 603 (1995). VTL § 603 required the police to investigate the cause of any automobile accident that resulted in an injury and provide a report to the Commissioner of the Department of Motor Vehicles detailing "the facts" of the crash. Mechanical inspections conducted after an accident under VTL § 603 will naturally result in the periodic discovery of evidence that the driver was operating the vehicle in violation of provisions of the VTL or the Penal Law. Nevertheless, this Court upheld the search as a proper exercise of the administrative search exception to the warrant requirement. *Quackenbush*, 88 N.Y.2d at 545. That result cannot be squared with petitioners' view of *Keta* and *Burger*. *See also Collateral Loanbrokers Assn. of N.Y., Inc. v. City of New York*, 178 A.D.3d 598 (1st Dep't 2019) (availability of criminal penalties did not invalidate administrative search regime).

Thus, contrary to petitioners' arguments, the ELD rule is not forbidden by Article I, § 12 merely because there are criminal penalties attached to violating the hours-of-service requirements. These penalties are directly tied to non-compliance with the regulatory scheme itself, the goal of which is highway safety and not the enforcement of other criminal laws. Indeed, no other criminal penalties can flow from the information captured by an ELD because the authorizing statute expressly limits the use of ELD data "to enforc[ing] the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations." 49 U.S.C. § 31137(e). Accordingly, administrative searches authorized by the ELD rule are not designed to be used pretextually to enforce unrelated Penal Law provisions in the manner that *Burger* and *Keta* found to be a violation of Article I, § 12.

C. The ELD Rule Does Not Authorize the Kind of Secret, Limitless GPS Tracking That This Court Has Held to be Unconstitutional.

Although this Court found particular uses of warrantless GPS tracking to be unconstitutional in two prior cases, the searches authorized by the ELD rule do not suffer from any of the same flaws that animated the holdings in those cases.

First, in *People v. Weaver*, 12 N.Y.3d 433, 445 (2009), this Court held that the installation of a GPS device was a search within the meaning of Article I, § 12. There, a GPS device was surreptitiously placed on the defendant's vehicle without a warrant, without any level of particularized suspicion, and without any asserted exception to the warrant requirement. *Id.* at 436, 445. The GPS monitoring device provided the location of the defendant's vehicle to within 30 feet and could be confidentially retrieved by the surveilling officer. *Id.* The Court was particularly concerned with the level of detail provided by the GPS monitoring device in that case and in other similar cases. "Disclosed in the data retrieved … will be trips the indisputably private nature of which it takes little imagination to conjure" and from which "by easy inference" a "highly detailed profile" of an individual's associations and "the pattern of our professional and avocational pursuits" could be discerned. *Id.* at 441-42.

This Court in *Weaver* went no further than invalidating the particular search at issue in that case, however, and did not issue a bright-line rule prohibiting the use of GPS tracking devices without a warrant. To the contrary, this Court acknowledged that there would be other sets of circumstances where the use of undisclosed, warrantless GPS tracking

"for the purpose of official criminal investigation will be excused." *Id.* at 444. But because the government had conceded that there were otherwise no exceptions to the warrant requirement that applied in that case, this Court concluded that the use of a warrantless GPS tracking device was improper. *Id.* at 444-45, 447.

Second, in *Matter of Cunningham v. N.Y. State Department of Labor*, 21 N.Y.3d 515, 520-23 (2013), this Court held that exceptions to the warrant requirement—in that case the workplace exception—could potentially justify GPS tracking that was reasonable in scope, but ultimately concluded that the particular use of the GPS there resulted in an unreasonable search.

The petitioner in *Cunningham* was a state employee on whose private vehicle a GPS tracker had been secretly installed as part of an investigation by the Office of the State Inspector General into the employee's falsification of time records. *Id.* at 518-19. The GPS tracking data supported several disciplinary charges that were challenged via an article 78 proceeding as being predicated on an unlawful search. *Id.* at 519. This Court held that the installation of the device was a search, but that the workplace exception to the warrant requirement applied because

the GPS was installed on a vehicle that the petitioner claimed to have been using to perform state business. *Id.* at 520-21. This Court further held that "[t]he Inspector General did not violate the State or Federal Constitution by failing to seek a warrant before attaching a GPS device to petitioner's car." *Id.* at 522.

While *Cunningham* did hold that the use of the GPS device in that instance was an unreasonable search, that was not due to the absence of a warrant. Rather, this Court held that the particular search at issue was "excessively intrusive" because no steps were taken to stop or limit the tracking of the petitioner outside of work hours—times that were not relevant to the State's investigation of the petitioner's real whereabouts when he claimed to be at work. *Id.* at 522-23. Thus, this Court explained that the search was invalid because the State had not made "a reasonable effort to avoid tracking" the petitioner outside of periods relevant to its investigation. *Id.* at 523. It did not establish any bright-line prohibition on the use of GPS tracking.

The GPS tracking permitted by the ELD rule is materially different from the searches in *Weaver* and *Cunningham* in multiple ways. First, the commercial truck drivers are aware of the tracking and consent to it

as a condition of participation in the industry. As explained *supra* at 16-20, commercial truck drivers consent to the regulations governing the business in which they have chosen to engage and lack the same, already lessened, expectation of privacy that non-commercial drivers have in the use of their personal vehicles. Indeed, other than the general location of the vehicle provided by the GPS at one-hour intervals when the vehicle is in motion, commercial truck drivers have been required to keep track of and disclose the other information recorded by the ELD—such as vehicle miles and the time and location of any changes in duty status—for decades.

Accordingly, under the ELD rule, drivers know that to avoid disclosure of even their general off duty whereabouts, they need only use some other mode of transportation than their commercial vehicles on the personal errand they wish to keep private. That is a very different situation from the secret tracking in *Weaver* and *Cunningham*. The individuals in those cases were not aware of the GPS device attached to their vehicles and could not have been expected to adjust their expectations of privacy when using their vehicles.

Second, the GPS tracking here is properly limited to the only moments in a day that are relevant to calculating a driver's compliance with the hours-of-service regulations. Contrary to petitioners' claim (Br. at 9), ELDs do not engage in continuous tracking "24 hours a day, 365 days a year." Instead, the "ELDs record only at specified times, such as when the vehicle is turned on, when the duty status changes, and once per hour when driving." *OOIDA I*, 840 F.3d at 887; *see supra* at 7. Since those specified times all relate to when a vehicle is actually in use, the GPS tracking is properly tailored to enforcement of the hours-of-service regulations.

Third, the GPS tracking here is not nearly as granular as the tracking in *Weaver* and *Cunningham*. In *Weaver*, the GPS tracking pinpointed a private vehicle's location to within 30 feet at all times, which potentially permitted inferences disclosing off duty "trips 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." *Weaver*, 12 N.Y.3d at 441-42.

By contrast, the ELD rule limits the specificity of the recording of the truck's location, whether the driver is on or off duty. Thus, the GPS tracker in *Weaver* was 88 times more precise than the GPS device required by the ELD rule even when a driver is on duty.[8] And unlike the continuous and precise off duty tracking in *Cunningham*, when a driver indicates "authorized personal use" of their truck, engine hours and vehicle miles are not recorded by the ELD, 49 C.F.R. § 395.26(d), and the specificity of the GPS tracking is reduced to indicating the location of the truck to within an approximately ten-mile radius (a 314 square mile area). 49 C.F.R. § 395.26(d), (i). That the GPS reports that a driver engaged in a personal errand has taken the truck somewhere within or in proximity to the same city is a far lesser intrusion on privacy than the GPS tracking involved in *Weaver* and *Cunningham*.

Petitioners' assertions (Br. 28-29) that the ELD rule breaks new ground and permits the GPS tracking of a *person* is simply false. The rule does not authorize the placement of a tracker on the person of an individ-

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[8] This is calculated by taking 2,640 feet (the half mile radius of the location tracking required by ELD rule when a driver is on duty) and dividing by 30 feet (the radius of the location tracking used by the device in *Weaver*).

ual driver nor on any of his personal items; it requires the installation of the ELD device in the *truck*. And while the ELD's GPS tracks the *truck's* general area, it does not record any information about the driver's location when not inside the truck beyond the bare fact that he is not there. Indeed, this Court has explicitly recognized that tracking a vehicle and tracking the driver of the vehicle are not the same. In *Cunningham*, this Court expressly rejected the very same conflation of vehicle and driver that petitioners advance here. The Court explained it was "unpersuaded by the suggestion in the concurring opinion that, on our reasoning, a GPS device could, without a warrant, be attached to an employee's shoe or purse" because "[p]eople have a greater expectation of privacy in the location of their bodies, and the clothing and accessories that accompany their bodies, than in the location of their cars." *Cunningham*, 21 N.Y.3d at 421.

Nor, as petitioners suggest (Br. at 30), does the fact that the ELD rule applies to a motor vehicle rather than a stationary business location make any difference to whether the administrative search exception applies. This Court has upheld the use of the administrative search exception to the warrant requirement to privately owned motor vehicles

that were not engaged in any commercial business. *See Quackenbush*, 88 N.Y.2d at 534. The Third Department therefore broke no new ground when it held the administrative search exception applied to the commercial trucks regulated by the ELD rule.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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