To be argued
By: Jeffrey W. Lang
10 minutes requested

Supreme Court of the State of New York
Appellate Division – Third Department

No. 531495

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

v.

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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Dated: October 4, 2021

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PRELIMINARY STATEMENT

Petitioners-appellants, three commercial truck drivers and a not-for-profit association of owners and operators of commercial motor vehicles (collectively, "OOIDA") appeal the dismissal of their hybrid article 78 and declaratory judgment action challenging New York's adoption of a federal driver safety standard that requires commercial truckers to record their hours of service via an electronic logging device, known as an "ELD," installed in their trucks (the "ELD Rule"). The ELD allows for GPS tracking of the trucks to ensure compliance with hours of service requirements. OOIDA argues that Supreme Court should have found that the ELD Rule violated the New York State Constitution's right to privacy and due process, and that the Department of Transportation ("the Department") failed to meet its obligations under the State Administrative Procedure Act to summarize and respond to OOIDA's comments and review proposed alternatives to the ELD Rule.

Supreme Court's order and judgment dismissing OOIDA's petition should be affirmed. The ELD Rule does not violate the New York State Constitution's guarantees of a right to privacy because the ELD Rule authorizes only a constitutionally permissible 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 is a reasonable method of ensuring 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, and these limitations make their use more reasonable than those instances where the Court of Appeals has struck down the use of warrantless GPS tracking.

Finally, the Department met its obligations under the State Administrative Procedure Act by detailing and responding to OOIDA's objections when it adopted the ELD Rule into New York Law. The administrative record is clear that the Department considered, but disagreed with, OOIDA's objections, and that OOIDA did not offer any significant alternatives to the ELD Rule in its comments.

QUESTIONS PRESENTED

1. Is the ELD Rule facially constitutional under the New York State Constitution?

Supreme Court answered this question "yes."

2. Did the Department meet its obligations under the State Administrative Procedure Act when it summarized and responded to OOIDA's objections during the rulemaking adopting the ELD Rule into New York Law?

Supreme Court answered this question "yes."

STATEMENT OF THE CASE

A. State Enforcement of 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.[1] To encourage state cooperation in the enforcement of these federal safety standards, the FMCSA provides grant funding to states which adopt 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

[1] For a more general history of the federal rulemaking regarding the ELD Rule, *see Owner Operator Independent Drivers Ass'n v. United States DOT*, 840 F.3d 879, 884-887 (7th Cir. 2016).

(*continued on the next page*)

receives millions of dollars annually in grant funding.[2] Program rules require that the states that receive funding adopt the relevant FMCSA regulations, like those at issue in this case, into state law, and for states to certify that they have done so. 49 C.F.R. §§ 350.209, 350.211.

New York complied with this requirement by incorporating the federal requirements into the Department's regulations. *See* 17 N.Y.C.R.R. 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. These agencies enforce these rules through the State's Commercial Vehicle Safety Plan, which includes a roadside safety inspection program for commercial vehicles and 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

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[2] For example, FMCSA estimates total payments to New York for fiscal year 2019 to be $14,775,210. *See Estimated Fiscal Year (FY) 2019 Motor Carrier Safety Assistance Program (MCSAP) Funding Distribution Table*, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, https://www.fmcsa.dot.gov/sites/fmcsa.dot.gov/files/docs/mission/grants/404851/estimated-funding-table-fy19.pdf.

HEALTH, AND HIGHWAY SAFETY (2016), *available at* https://www.ncbi.nlm.nih.gov/books/NBK384966/pdf/Bookshelf_NBK384966.pdf. In order to promote highway safety, FMCSA promulgated caps on the hours of service for commercial drivers and requirements that commercial drivers keep track of their hours of service to demonstrate their compliance with the hours of service limitations.

States incorporated these limitations on hours of service into state law in exchange for Motor Carrier Safety Assistance Program funding, and they have been in place and enforced for decades. Accordingly, state and federal law have long required commercial drivers to keep records of their duty status—including when and where that status changed and when they were resting in their vehicle's sleeper birth—and to produce such records for inspection upon demand by state law enforcement. 49 U.S.C. § 31142(d); N.Y. Transp. Law § 140(2)(b); N.Y. Transp. Law § 212; 17 NYCRR §§ 820.12(a), 820.6. New York has historically ensured compliance by conducting stops and roadside safety inspections of the records of a driver's hours of service. Violation of hours of service rules and falsifying records related to hours of service are crimes under New York law. N.Y. Transp. Law § 212.

B. Congress Updates the Law to Keep Track of Driver Hours of Service Electronically and the Department Incorporates those Rules into 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 those drivers who are already obligated to record hours of service information to install electronic logging devices (ELDs). Prior to the Act, state and federal regulations had permitted commercial truck drivers to record their hours of service via the use of an automatic on-board recording device or by keeping a paper record. *See* former 49 C.F.R. § 395.8 (2015).

In 2015, FMCSA updated its federal regulations to incorporate the statutory ELD Rule, 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). 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 U.S.C. § 395.24(d); 31137(b)(1)(B). 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). Drivers are required to input identifying information and any changes in duty status. Standard statuses are "off duty," "sleeper berth," "driving," "on-duty," "authorized personal use," and "yard moves." 49 C.F.R. § 395.26; 395.28. 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; *See* 49 C.F.R. Part 395, Appendix A, § 4.7.3.

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 are designed to be narrow. As the Seventh Circuit has explained, "the data recorded by ELDs are intentionally limited, restricting the scope of the information available to law enforcement." *Owner Operator Independent Drivers Association v. U.S. Dep't of Transp.*, 840 F.3d 879, 895 (7th Cir. 2016) (citing C.F.R. § 395.22(j); 395.24(d)). When a driver "indicates authorized personal use" of their truck, engine hours and vehicle miles "will be left blank" by the ELD. 49 C.F.R. § 395.26(d).

Similarly, the ELD Rule only requires that GPS tracking of a vehicle be accurate to within an approximately ten-mile radius when a driver's status is "authorized personal use," equivalent to a circle with an area of 314 square miles. 49 C.F.R. § 395.26(d), (i). For context, New York City is approximately 303 square miles. The ELD Rule would thus allow a reviewing officer to be able to tell that an off-duty driver was operating their truck somewhere within or close to the New York metropolitan area, but would not contain data granular enough to determine where within the City the driver went or what the driver did in their off time. Even when a driver's status is entered as "on duty," the ELD Rule only requires that the GPS tracking be accurate to within a half-mile radius of the truck's location—that is, accurate to within approximately ten city blocks. *See* 49 C.F.R. Part 395, Appendix A, § 4.3.1.6(c).

The ELD rule also "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 Association v. U.S. Dep't of Transp.*, 840 F.3d at 895, and the authorizing statute requires that there be "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 38th state to adopt the ELD Rule into its own law. (Supplemental Record on Appeal ("R") at 149.) New York did so via an emergency rulemaking under the State Administrative Procedure Act (SAPA). (R74-78.) OOIDA submitted public comment opposing New York's adoption of the ELD Rule arguing, among other things, that the ELD Rule violated the constitutional rights of commercial truck drivers. (R81-109.) OOIDA's comments did not suggest any specific additional measures to ensure driver privacy or improve driver safety. It merely pointed out alleged deficits in the ELD Rule. (*See, e.g.,* R100-101 (complaining that the Department did not add additional privacy protection measures to the federal regulation without identifying any proposed measures.)) The emergency rules were permanently incorporated into New York law via a final notice of adoption on April 9, 2019, and made effective April 24, 2019. 17 N.Y.C.R.R. § 820.6. Most of the Department's Notice of Adoption was devoted to addressing OOIDA's comments. (R149-150.)

C. OOIDA Sues to Invalidate the ELD Rule

OOIDA filed a petition for review in federal court to 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, *inter alia*, that the "ELD mandate is a 'reasonable' administrative inspection within the meaning of the Fourth Amendment." *See Owner Operator Independent Drivers Ass'n v. United States DOT*, 840 F.3d 879, 893 (7th Cir. 2016), *cert. denied,* 137 S.Ct. 2246 (2017).

OOIDA then commenced an action in New York Supreme Court, Albany County, prior to the Department's adoption of the ELD Rule, seeking to enjoin state officials from enforcing the ELD Rule prior to its incorporation into New York law. Supreme Court rejected that challenge, concluding that the State's preadoption actions related to the ELD Rule were "reasonable and wholly consistent with article I, § 12 of the State Constitution" and did not violate article I, § 6's due process guarantees because "a commercial vehicle operator of ordinary intelligence plainly is on notice that roadside inspectors will require proof of compliance with" hours of service "requirements, whether in the form of paper logs, ELDs

or other type of automated recording device." *Owner Operator Indep. Drivers Ass'n v. Calhoun*, 62 Misc. 3d 909, 923-924 (Sup. Ct. Albany County 2018).

The Department incorporated the ELD Rule into its regulations during the pendency of that proceeding, rendering the proceeding moot on appeal. *See Owner Operator Indep. Drivers Ass'n v. Karas*, 188 A.D.3d 1313 (3d Dep't 2020).

D. Proceedings Below

In response, OOIDA commenced this hybrid article 78 proceeding and declaratory judgment action challenging New York's adoption of the ELD Rule on three principal grounds. (R20-22.) OOIDA alleged (1) that the ELD Rule is facially unconstitutional because it violates the right to privacy of truck drivers guaranteed by Article I, Section 12 of the New York State Constitution; (2) that the ELD Rule is facially unconstitutional because it violates the due process rights of truck drivers guaranteed by Article 1, Section 6 of the New York State Constitution; and (3) the adoption of the ELD Rule violated the State Administrative Procedure Act ("SAPA") by failing to adequately consider OOIDA's comments submitted during the rulemaking or alternatives to

the rule; OOIDA included the New York State register notices constituting the Department's rulemaking and its own public comments as exhibits to the petition/complaint ("petition"). (R111-150.)

Respondents moved to dismiss the petition (1) on the merits for failure to state a claim on the basis that the ELD Rule was constitutional and the exhibits to the petition showed that the Department had met its SAPA obligations and (2) for failure to properly serve and assert any basis for liability on the part of respondents other than the Department. (R169-171; Addendum to Brief for Plaintiff's Appellants ("A") 2-36; 71-86.) OOIDA responded (A37-69), and respondents replied (R205-206; A37-69.) As part of their reply, respondents attached the affidavit of Raymond Weiss, a Technical Sergeant with the New York State Police's Division of Traffic Services. (R205-206.) Weiss explained that the New York State Police inspect ELD data "only to enforce compliance with hours of service rules" and do so in accordance with federal guidance on roadside inspections for hours of service. (R206.)

Supreme Court, Albany County (Cholakis, Acting J.), granted the motion to dismiss in a thoughtful decision. (R5-15.) First, in a finding OOIDA does not challenge on appeal, the court dismissed the petition as

to all respondents except the Department for lack of jurisdiction. (R5-6.) Second, the court rejected OOIDA's Article I, § 12 challenge, concluding that the ELD Rule only authorizes a constitutionally permissible administrative search. (R8-13.) Third, the court rejected OOIDA's Article I, § 6 due process challenge, holding that the mere possibility of the ELD Rule being abused by law enforcement is not sufficient to support a facial challenge to the constitutionality of the ELD Rule. (R10-11.) Finally, the court found that the Department had "addressed each of petitioners' concerns" during the rulemaking. (R8.) This appeal followed.

ARGUMENT

OOIDA'S PETITION WAS PROPERLY DISMISSED FOR FAILURE TO STATE A CLAIM

As an initial matter, OOIDA does not challenge on appeal the dismissal of all respondents other than the Department. Indeed, it did not defend the dismissal of those respondents below. Accordingly, any objection to that part of Supreme Court's order should be deemed forfeited. As explained below, the Court should also affirm the dismissal of the claims as against the Department for failure to state a claim.

A. The ELD Rule Allows a Permissible Administrative Search Under Article I, Section 12 of the New York State Constitution

OOIDA's facial constitutional challenges to the ELD Rule were properly dismissed by Supreme Court.[3] Contrary to OOIDA's claim, Supreme Court properly acknowledged that New York courts treat facial challenges as "generally disfavored." *People v. Stuart*, 100 N.Y.2d 412, 422 (2003). As OOIDA concedes (Br. at 52-53), 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*

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[3] On appeal, OOIDA continues its argument that the ELD Rule also violates Article I, § 6 of the New York Constitution only by way of a footnote, *see* Br. at 48, n.6, which is insufficient to properly place the issue before this Court. *See, e.g., People v. McDaniel*, 295 A.D.2d 371 (2002). The argument that the ELD Rule is unconstitutional because it is not rationally related to any legitimate public interest is patently without merit in any case. As Supreme Court explained, the retrospectively analyzed success of a policy in achieving a goal does not bear on whether the policy is rationally related to that goal. And the ELD Rule is plainly related to the legitimate public purpose of maintaining safe roadways and minimizing accidents by ensuring that commercial truck drivers are not overworked to the degree that they become a danger. *See People v. Quackenbush*, 88 N.Y.2d 534, 543 (1996) (observing there is a "compelling safety interest of the government in regulating the use of motor vehicles on the State's public highways.")

Nursing Home v. Davis, 21 N.Y.3d 570, 577 (2013) (quoting *Cohen v. State of New York*, 94 N.Y.2d 1, 8 (1999)). So long as there are circumstances under which the challenged provision "could be constitutionally applied," a facial challenge must fail. *Moran Towing Corp. v. Urbach*, 99 N.Y.2d 433, 445 (2003). Supreme Court properly held that OOIDA failed to state a claim that the ELD Rule could not be constitutionally applied under any circumstances.

1. The search permitted by the ELD Rule is a permissible administrative search under the New York State Constitution

"Both the Fourth Amendment[4] 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, 542 (1996) (internal quotation marks and citation omitted). Accordingly, the general requirement is that government actors "'obtain advance judicial approval of searches and seizures through the warrant procedure.'" *Id.*

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[4]OOIDA has disclaimed any challenge under the Fourth Amendment.

(quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). The warrant requirement is not absolute, however, and "warrantless 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*. As Supreme Court correctly held, the ELD Rule authorizes a search which falls into the administrative search exception to the warrant requirement.

Commercial trucking is a pervasively regulated industry that has been "regulated by detailed government standards" for decades. *Id*. Federal regulation of commercial trucking, including regulating "the maximum hours of service for commercial drivers" with the goal of promoting highway safety, extends back more than eighty years. *Owner Operator Independent Drivers Ass'n*, 840 F.3d at 885-887 (detailing the history of hours of service requirements, starting with the Federal Motor Carrier Act of 1935). State and federal 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 Supreme Court observed, "one would be hard-pressed to find an industry more pervasively regulated than the trucking industry." (R12.) Accordingly, while New York courts have never expressly passed on the question, numerous federal and state courts in other jurisdictions have held that commercial trucking is a pervasively regulated industry pursuant to which an administrative search may be justified. *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); *Owner Operator Independent Drivers Ass'n*, 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 (11th Cir. 2009); *State v. Jean*, 243 Ariz. 331, 337 (2018); *State v. Beaver*, 2016 MT 332 (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 (2010). OOIDA has not identified any court that has reached a contrary conclusion and, based on this office's research, no court has.

Under state 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, 498-99 (2014). Similarly, "there is generally only a diminished expectation of privacy in an automobile." *Quackenbush*, 88 N.Y.2d at 543 n.4.

Accordingly, as part of a pervasively regulated industry and further involving the operation of motor vehicles, commercial truck drivers have a diminished expectation of privacy in the whereabouts of their vehicles. *See, e.g., United States v. Navas*, 597 F.3d 492, 501 (2d Cir. 2010) (reduced expectation of privacy because of pervasive regulation of

commercial trucking informed the application of the automobile exception). Nor does OOIDA's argument that some truck drivers live in their trucks establish a greater expectation of privacy for purposes of the facial constitutional challenge raised here. Because OOIDA's burden is to show that the ELD regulation is unconstitutional in all its applications, it must show the statute is unconstitutional even 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); *People v. Stuart*, 100 N.Y.2d at 422-423 (same).

In any case, it is difficult to see why truck drivers may reasonably expect a greater degree of privacy because they choose to live in a space that would otherwise be subject to a lower expectation of privacy. *See Navas*, 597 F.3d at 501; *United States v. Lee*, 2016 U.S. Dist. LEXIS 98663 (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."). One would not expect, for example, a commercial premise to be

exempt from otherwise applicable and pervasive regulation simply because the owner chooses to live on-site.

The ELD Rule is a reasonable means of serving a compelling government interest. The ELD Rule serves the compelling, and long recognized, government interest in ensuring highway safety by reducing the number of accidents. *Quackenbush*, 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."). It cannot reasonably be argued that "the public safety concerns inherent in commercial trucking" do not "give the government a substantial interest" in regulating the industry generally and enforcing hours of service requirements in particular. *Owner Operator Independent Drivers Ass'n*, 840 F.3d at 895.

The factual findings of the FMCA rulemaking showed that maintaining the prior system of paper recordkeeping to document hours of service was inadequate because of the "widespread" and longstanding problem of "falsification and errors" of the paper records. *Id*. Drivers reported that carriers would pressure them to alter paper records in a way that would not be possible if recording were performed automatically by an ELD. *Id*. at 883. As the Department observed in the Notice of

Adoption of the ELD Rule, the use of ELD devices "makes it more difficult for carriers to evade responsibility" for hours of service violations. (R150.) And as the Seventh Circuit explained, "ELDs should not only help discover hours of service violations but also deter such violations." *Owner Operator Independent Drivers Ass'n*, 840 F.3d at 895.

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 541-42 (quoting *People v. Scott (Keta)*, 79 N.Y.2d 474, 499, 500, 502 (1994) (hereinafter "*Keta*")). The express limitations on the scope and manner of the search authorized by the ELD Rule meet this requirement.

The ELD Rule contains the necessary limitations on the scope of the permitted search to pass constitutional muster under Article I, § 12. The ELD Rule unambiguously 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, the search permitted by the ELD Rule is limited in scope and the ELD Rule confines a searching officer's discretion. *Owner Operator Independent Drivers Ass'n*, 840 F.3d at 896. ELDs record only limited data related 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. Even that data is not required to be so granular as to allow an inspecting officer to tell where the truck is, or has been, to within more 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. *Owner Operator Independent Drivers Ass'n*, 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.") For example, the ELD Rule

does not authorize an inspecting official to search either the cab of the truck or the driver for contraband.

Accordingly, the ELD Rule is a permissible administrative search under Article I, § 12 of the New York State Constitution.

2. An Administrative Search Is Not Rendered Unconstitutional Simply Because the Regulatory Scheme Being Enforced Carries Criminal Penalties for Violations

OOIDA is wrong when it argues that the Court of Appeals has held that that a regulatory scheme permitting an administrative search is facially unconstitutional under Article I, § 12 simply because the results of that search may reveal a violation of the penal law. OOIDA's reading of *Keta* and *People v. Burger*, 67 N.Y.2d 338 (1996), misstates the principles underlying those cases and the resulting rule of law.

Keta readopted *Burger* under state constitutional principles after the Supreme Court of the United States rejected the Court of Appeals' interpretation of the administrative search requirement under the Fourth Amendment of the United States 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 345.

Under *Keta* and *Burger*, "the fundamental defect in" VTL § 415-a(5)(a) was that it "authorize[d] searches solely to uncover evidence of criminality and not to enforce a comprehensive regulatory scheme." *Burger*, 67 N.Y.2d at 344. The Court of Appeals 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. The permitted searches could be, and were conceded in practice to be, conducted without checking the inventory to be inspected against the records that were required to be maintained by the regulatory scheme. *Id*. Rather, the administrative searches were merely pretext for searches "undertaken solely to discover whether defendant was storing stolen property on his premises." *Burger*, 67 N.Y.2d at 345.

Thus, the problem with the inspection regime in *Keta* and *Burger* concerned the mismatch between the inspections and the regulatory scheme allegedly being enforced. That scheme contained criminal

penalties for non-compliance that were directly related to violations of the record-keeping requirements. *See* VTL § 415-a(5)(a) (1991). 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(5)(1) (1991), and failing to produce the required records was a misdemeanor, VTL 415-a(5)(a) (1991). Yet the 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; in other words, the regulatory requirements were "'in reality, designed simply to give the police an expedient means of enforcing'" the general criminal prohibition on possessing stolen property. *Keta*, 79 N.Y.2d at 474 (quoting *Burger*, 67 N.Y.2d at 344).

Accordingly, *Keta* and *Burger* do not stand for the proposition OOIDA advances: 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 Supreme Court read them: that an administrative search is not constitutional if the administrative scheme the search is nominally designed to advance is merely a pretext for the enforcement of other criminal statutes.

Indeed, the Court of Appeals 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 OOIDA suggests and is not offended simply because the results of an administrative search may yield evidence of related 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(31-b) (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 an 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, the Court of Appeals upheld the search as a proper exercise of the administrative search exception to the warrant requirement. *Quackenbush*, 88 N.Y.2d at 545. The Court could not have done so consistent with OOIDA's reading of *Burger* and *Keta.*

The First Department's decision in *Collateral Loanbrokers Assn. of N.Y., Inc. v. City of New York*, 178 A.D.3d 598 (1st Dep't 2019), relied on by OOIDA, also applies a broader understanding of the administrative search exception than the one OOIDA advances. *Collateral Loanbrokers* upheld a host of provisions making up a "robust statutory and regulatory scheme . . . that governs, among other things, on-premises administrative inspections" of pawnbrokers as satisfying "the *Burger* standards." *Id.* at 602. The court singled out only one provision out of more than a dozen

challenged provisions, several of which permitted an administrative search, as constitutionally suspect. *Id.* at 601. That provision, N.Y. City Charter § 436, was facially unconstitutional because it contained no limitations whatsoever on the time, place, and scope of the permitted search of both persons and property, contained "no record keeping requirements," and authorized "immediate arrest for failure to comply." *Id.* at 600.

By contrast, one of the provisions upheld in *Collateral Loanbrokers* was N.Y.C. Administrative Code 20-273, which imposes detailed record keeping requirements on pawnbrokers and provides that the records "shall be open to the inspection of any police officer, the commissioner or any departmental inspector, judge of the criminal court, or person duly authorized in writing" as well as "any official or other person" authorized by "any applicable state and local law." N.Y.C. Administrative Code 20-273(e). The First Department explained that the upheld provision was "unlike the unconstitutional scheme in *People v. Scott (Keta).* The regulatory scheme here was not created solely to uncover evidence of criminality. Rather it serves to enforce the reporting requirements that provide consumer protection." *Collateral Loanbrokers*, 178 A.D.3d 601.

The court found no constitutional flaw in the authorized inspections notwithstanding that the scheme carried criminal penalties for violations of reporting requirements. For example, a violation of N.Y.C. Admin. Code §§ 20-267 and 20-273's record-keeping and reporting requirements is "a class A misdemeanor." NYC Admin. Code 20-275.

Thus, contrary to OOIDA's 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. The criminal penalties related to the ELD Rule 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. The authorizing statute expressly limits the use of data recorded by an ELD "to enforce[ing] the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations." 49 U.S.C. § 31137(e). Simply put, the data gathered by the administrative search permitted under the ELD Rule may not be used pretextually to enforce unrelated penal law offences in the manner that *Burger* and *Keta* found to be a violation of Article I, § 12.

3. The ELD Rule Does Not Authorize the Kind of Limitless GPS Tracking That the Court of Appeals has Held to be Unconstitutional

That the ELDs required by the ELD Rule use GPS tracking to monitor the general location of a commercial truck does not render the ELD Rule unconstitutional. OOIDA is incorrect when it asserts (Br. at 15) that *People v. Weaver*, 12 N.Y.3d 433 (2009) and *Matter of Cunningham v. N.Y. State Dep't of Labor*, 21 N.Y.3d 515 (2013) hold that "the pervasive warrantless GPS tracking of an individual is per se unconstitutional" and prohibits all warrantless use of GPS devices. None of the cases cited by OOIDA stands for that proposition or otherwise supports OOIDA's argument that the ELD Rule is facially unconstitutional.

In *Weaver*, the Court of Appeals held that the installation of a GPS device was a search within the meaning of Article I, § 12. It did not hold that GPS tracking was constitutionally prohibited in all circumstances nor that the traditional exceptions to the warrant requirement could not apply in the context of GPS tracking. 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. 12 N.Y.3d 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 411-42.

The *Weaver* Court, however, went no further and did not issue a bright-line rule prohibiting the use of GPS tracking devices without a warrant as OOIDA suggests. To the contrary, the 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.

Similarly, *Cunningham* did not hold that warrantless GPS tracking was unconstitutional in all instances, including where an exception to the warrant requirement applies. Just the opposite; *Cunningham* found that

exceptions to the warrant requirement—in that case the workplace exception—could potentially justify GPS tracking that was reasonable in scope, but that the particular use of the GPS in that case was an unreasonable search. 21 N.Y.3d at 520-21. Indeed, this central holding of *Cunningham* was what sparked a three-judge concurrence written by Judge Abdus-Salaam. *Id.* at 524-29 (Abdus-Salaam, concurring). Judge Abdus-Salaam would have required a warrant, but her view was not the rule adopted by the majority.

The petitioner in *Cunningham* was a state employee who had a GPS tracker secretly installed in his private vehicle 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. The 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 had claimed to have been using to perform state business. *Id.* at 520-21. Far from concluding that the installation of the GPS device was per se unconstitutional, the

Court of Appeals held that "The 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, the 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, the 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*. Perhaps most importantly, the GPS monitoring required by the ELD Rule is not so granular as to reveal the kind of information that concerned the Court in *Weaver*. While GPS tracking that pinpoints a private vehicle's location to

within 30-feet at all times potentially permits 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, the ELD Rule explicitly 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. And unlike the constant 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 an off-duty driver has taken the truck somewhere within or in proximity to the same city is a far lesser intrusion on privacy that the GPS tracking involved in *Weaver* and *Cunningham*.

The GPS tracking within the ELD Rule is also materially different from the tracking in *Weaver* and *Cunningham* because commercial truck drivers are aware of the tracking of the vehicle and consent to it by choosing to participate in the closely regulated industry of commercial trucking. The GPS tracking that is part of the ELD Rule is by no means secret, but part and parcel of the public regulatory scheme for commercial truck driving. As explained *supra* at 18-20, truck drivers consent to the regulations around the business in which they have chosen to engage and lack the same, already lessened, expectation of privacy that drivers have in the use of their personal, non-commercial vehicles outside of work hours. Indeed, other than the general location of the vehicle provided by the GPS under the ELD Rule, drivers have been required to keep track of and disclose the other information recorded by the ELD—such as vehicle miles, shift changes, and 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 vehicle 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.

For much the same reason, OOIDA's assertions that the ELD Rule breaks new ground and permits the GPS tracking of a *person* is simply false. Br. at 33-38. The ELD Rule does not require the placement of a tracker on an individual driver or on any of their 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 they are not there. Indeed, the Court of Appeals has explicitly recognized that tracking a vehicle and tracking the driver of the vehicle are not the same. In *Cunningham*, the majority expressly rejected the very same conflation of vehicle and driver that OOIDA advances here. The majority 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 "People 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 OOIDA suggests, 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. The Court of Appeals 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. Supreme Court broke no new ground when it held the administrative search exception applied to the commercial trucks regulated by the ELD Rule.

B. The Department Met Its Obligations Under SAPA

Supreme Court properly rejected OOIDA's argument that the rulemaking adopting the ELD Rule violated SAPA. SAPA requires that, as part of the rulemaking process, an agency must 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). "The standard to be met in

determining the validity of an agency's rule making under the statute is 'substantial compliance.'" *Medical Society v. Serio*, 100 N.Y.2d 855, 869 (2003). Supreme Court correctly held that the Department's adoption of the ELD Rule substantially complied with these requirements.

OOIDA's arguments that the Department failed to articulate and respond to its objections and proposed alternatives is entirely without merit. The administrative record, which was appended to OOIDA's petition, demonstrates that the Department summarized and responded to OOIDA's constitutional challenges. (R149-150.) The Department explained that it was rejecting OOIDA's Fourth Amendment challenges based on the Seventh Circuit's decision rejecting those same challenges and incorporated by reference the analysis undertaken by FMCA at the federal level—an administrative proceeding in which OOIDA participated—which also answered OOIDA's federal constitutional and factual objections. (R150; *see* Final Rule: Electronic Logging Devices and Hours of Service Supporting Documents, 80 Fed. Reg. 78292 (2015).) The Department also explained that it had considered OOIDA's challenges taken "at the state level" and, after consulting with this office, concluded that "the arguments lack merit under the controlling legal authority"

before going on to explain that the Department lacked flexibility to deviate from the federal regulations in any case. (R150.) This explanation was more than sufficient to demonstrate substantial compliance with SAPA's requirements, particularly in light of the fact that OOIDA had raised its state constitutional challenges in Supreme Court in *Cahloun,* and the Department had responded to them there. *See Owner Operator Indep. Driver's Ass'n v. N.Y.S. Comm'r of Transp.*, Docket No. 900445-18, NYSCEF Docket Nos. 12, 33, 85.

Similarly lacking in merit is OOIDA's argument that it failed to address substantial alternatives to the ELD Rule. OOIDA proposed no such substantial alternatives. Rather, OOIDA only offered objections to the adoption of the rule on various grounds to which, as noted, the Department responded. SAPA does not require an agency to independently devise and discuss alternatives to a proposed rule based on objections that it has rejected.

Finally, OOIDA's argument that SAPA was violated because the Department ignored controlling law misunderstands the nature of the Department's obligations under SAPA § 202(5)(i) and (ii). Even if the Department's analysis was wrong (it was not, as the foregoing portions

of this brief demonstrate), SAPA § 202(5)(i) and (ii) impose procedural requirements that are met when the agency summarizes the arguments put forth and responds to them. Once an agency fully describes the issues and responds, it has satisfied its obligations under those provisions. If the agency's reasoning is incorrect, the final rules may fail on that account, but not because the agency has violated SAPA § 202(5)(i) and (ii) in promulgating them.

CONCLUSION

For the foregoing reasons, Supreme Court's order dismissing the petition should be affirmed.

Dated: Albany, New York
October 4, 2021

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to the Uniform Practice Rules of the Appellate Division (22 N.Y.C.R.R.) § 1250.8(j), the foregoing brief was prepared on a computer (on a word processor). A proportionally spaced, serif typeface was used, as follows:

Typeface: Century Schoolbook
Point size: 14
Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is **7,767.**