APL-2022-00050

To Be Argued By: Charles R. Stinson
10 minutes assigned

Court of Appeals

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,

Petitioners/Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

Appellants' Reply Brief

Albany County Clerk's Index No. 904994-19

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PRELIMINARY STATEMENT

Can the government use warrantless, continuous GPS searches of individuals' locations, for the purpose of enforcing criminal laws, without restriction on the time and place of such searches, and without demonstrating that such searches advance its worthy policy goals? Proper application of the standards established by this Court to uphold individuals' right to privacy enshrined in Article I, Section 12 of the New York Constitution answers that question, "No." Petitioners[1] challenge the New York State Department of Transportation's (the "Department") electronic logging device ("ELD") Rule, which provides for continuous warrantless monitoring of commercial trucks and drivers by requiring the installation and use of GPS tracking and recording equipment at an estimated cost to the trucking industry of nearly $2 billion.[2] The Department maintains that the ELD Rule falls within the administrative search exception to Article I, Section 12's warrant requirement. The Department insists that its general policy goal of highway safety justifies its warrantless privacy intrusion and that it can use these

[1] Petitioners/Plaintiffs-Appellants Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Douglas J. Hasner, David D. Wynn, and Gary L. O'Brien.

[2] *See Electronic Logging Devices & Hours of Service Supporting Documents*, 80 Fed. Reg. 78,292, 78,294 (Dec. 16, 2015). And the overwhelming majority of carriers are not likely to realize any corresponding benefit in paperwork reduction, the primary driver of FMCSA's benefits analysis. *Comments of the Owner-Operator Independent Drivers Ass'n, Inc.* at 67-68, No. FMCSA-2010-0167-0374 (May 23, 2011), *available at* https://www.regulations.gov/comment/FMCSA-2010-0167-0374 (noting that 93% of carriers operate 20 or fewer trucks who are least likely to recognize administrative costs reductions).

warrantless administrative searches to enforce the penal code. Supreme Court, Albany County and Supreme Court Appellate Division, Third Department agreed, granting the Department's motion to dismiss Petitioners' claims, deciding as a matter of law that the ELD Rule does not violate Article I, Section 12.

But the ELD Rule fails to respect the restraints on government action established by the New York Constitution in several ways. First, it does not account for the significant privacy interests implicated by its warrantless searches. A commercial truck is not only a driver's workplace, but it frequently serves as a home away from home for conducting all manner of personal activity. Whether drivers sleep in their trucks, they also frequently use them as a means of personal conveyance to travel to locations that are not the government's business. The Department ignores these interests because not all truckers sleep in their trucks and because truckers knew what they were getting into when they joined the industry. But this Court's state search and seizure precedent does not allow the government to invade individuals' privacy so casually.

Moreover, the ELD Rule violates Article I, Section 12 because it does not satisfy long-established requirements for procedural certainty and regularity that would serve as a substitute for the missing warrant. The purported limitations cited by the Department do not adequately protect truckers. Finally, and perhaps most damning, the Department has provided no adequate policy justification for the

ELD Rule's significant privacy intrusions. The rule authorizes invasive GPS tracking, without a warrant, of commercial truckers, yet the Department offers no evidence that these intrusions will advance its stated policy goal of reducing accidents and deaths on the highway. As the Department highlights, ELDs have been in use in other states for years, yet the Department relied only on the federal government's pre-promulgation theories as to the benefits of ELDs. But these hoped-for benefits have been proven illusory; indeed, ELDs have *contributed* to unsafe driving concerns. Petitioners, therefore, challenge a rule that has not been shown to provide any measurable improvement in highway safety despite years of use throughout the country.

ARGUMENT

I. Because the ELD Rule authorizes searches to enforce substantive criminal violations, the search scheme violates truckers' privacy rights enshrined in Article I, Section 12.

The Department asserts that the administrative search exception to Article I, Section 12 does not prohibit the state from designing searches to enforce criminal laws and that the flaw fatal to the search in *People v. Scott (Keta)*, 79 N.Y.2d 474 (1992), was its pretextual nature. They cite *People v. Quackenbush*, 88 N.Y.2d 534 (1996), and its holding that officers can legally uncover evidence through administrative searches. But *Keta*'s holding is not so limited, and, as in *Quackenbush*, officials *may* uncover evidence of crimes during an administrative

search without converting an otherwise proper administrative search scheme into an improper scheme that is designed to uncover evidence of crimes as is the case here (and in *Keta*).

A. This Court in *Keta* recognized the important individual rights at issue when the government attempts to enforce penal sanctions.

On two occasions this Court has recognized that the government cannot use administrative searches *designed* to uncover evidence to support criminal enforcement because they do not adequately protect the significant privacy rights at stake. *See People v. Burger*, 67 N.Y.2d 338, 344 (1986) (holding that the Fourth Amendment prohibits administrative search schemes designed "solely to uncover evidence of criminality"); *Keta,* 79 N.Y.2d at 495 (holding that Article I, Section 12 prohibits using administrative searches "conducted for the purpose of exposing violations of the State's penal laws"). This principle finds solid footing in reason and logic: Criminal enforcement presents a greater degree of government intrusion and potential punishment and therefore must be accompanied by the protections served by warrants (or other, non-administrative exceptions). *See Keta*, 79 N.Y.2d at 502-03 ("[Administrative] inspection provisions must be part of a comprehensive administrative program that is *unrelated* to the enforcement of the criminal laws." (Emphasis added)).

In short, Article I, Section 12's administrative search exception differentiates between a government's trying to advance policy goals through civil

administrative rules[3]—which fit within the exception—and through criminal sanctions—which do not. *See id.* That distinction does not matter for the Fourth Amendment, *see Burger*, 482 U.S. at 712, but Article I, Section 12 offers more robust protections of individuals' privacy.

B. *Keta* did not rely solely on pretext.

The parties here agree that this Court's *Keta* decision provides the framework for analyzing the Department's ELD searches. *See, e.g.*, Appellants' Brief at 22-26; Respondents' Brief at 28. The parties disagree, however, as to the rationale underlying *Keta*'s holding. That is, the Department argues that this Court rejected the chop shop search scheme at issue in *Keta* solely because the administrative searches were merely pretext for searching for evidence of criminal violations. *See* Respondents' Brief at 28. But this Court's *Keta* holding and rationale are not limited to only pretextual searches.

Instead, *Keta* instructs that the government overreach in need of restraint is not merely using administrative searches as pretext, but using administrative searches without the judicial protection of a warrant to find evidence of criminality, "where their protections are most needed." 79 N.Y.2d at 499. Article I, Section 12, therefore, prohibits the state government from designing administrative

[3] The Department has failed to show, either during its rulemaking or in this litigation, that ELDs advance highway safety. *See, e.g., infra* at 9-14.

searches to uncover evidence of crimes. In *Keta*, the government's tactics required this Court to read between the lines to discern the search's true purpose, but here the intent appears on the face of the law: ELD searches are designed, at least in part, to search for evidence of crimes. *See, e.g.*, 17 N.Y.C.C.R.R. § 820.10.

People v. Quackenbush, 88 N.Y.2d 534 (1996), does not command a different result. *See* Respondents' Brief at 31-32. The warrantless search scheme at issue in *Quackenbush* did not authorize police to search for evidence of crimes. Rather, the police, in the process of carrying out a proper administrative search—one authorizing officials to inspect vehicles involved in crashes to determine the causes of accidents and remove unsafe vehicles from the road—incidentally uncovered evidence of criminal violations. 88 N.Y.2d at 539-40. This discovery did not invalidate the otherwise proper administrative search a transform it into one *designed* to enforce crimes from the outset.

C. Individuals do not waive—or consent to violation of—their constitutional rights by participating in a pervasively-regulated industry.

The Department also argues that commercial truckers, by participating in their chosen profession, consented to ELD searches and the corresponding unconstitutional invasion of their privacy rights. Respondents' Brief at 36-37. But the lawfulness of administrative searches does not depend on the "consent" of the searched—indeed, if it did, there would be no need for administrative search

standards, as any such search would be consented to. Instead, an administrative search abides by—or violates—Article I, Section 12 based solely on the terms of its authorizing laws. *See, e.g.*, *United States v. Biswell*, 406 U.S. 311, 315 (1972) ("[T]he legality of the [carefully limited administrative] search depends not on consent but on the authority of a valid statute."); *see also United States v. Aukai*, 497 F.3d 955, 959 (9th Cir. 2007) (*en banc*) (noting that constitutionality of administrative searches does not depend on consent); *United States v. Burch*, 153 F.3d 1140, 1143 (10th Cir. 1998) (consent to an administrative search of a tractor/semi-trailer was "irrelevant" to authority to conduct the search).

The Department's version of the administrative search exception—that participating in a pervasively-regulated industry constitutes consent to whatever search the government wishes to execute—renders this Court's and others' administrative search cases meaningless. Instead, laws authorizing administrative searches must meet the strict procedural guidelines that ensure the same protection of individuals' rights provided by a warrant. Commercial truckers have not "consented" to ELD searches or "waived" their right to privacy under Article I, Section 12. *Cf. Sokolov v. Village of Freeport*, 52 N.Y.2d 341, 346-47 (1981) (noting that state cannot condition right to exercise privilege on acceptance of constitutional violation); *see also id.* at 346 (noting that consent to a search is not voluntary if given as condition to earn income).

II. The Department failed to demonstrate that the ELD Rule's substantial privacy intrusions were justified and within Article I, Section 12's procedural requirements.

A. Article I, Section 12 protects individuals' right to privacy in their location.

The Department argues that *Weaver* and *Cunningham* do not apply here because the precision of the government's tracking in those cases exceeded the precision of the tracking accomplished by ELDs. *See* Respondents' Brief at 34-35 (discussing *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)). But those cases instruct that an individual's GPS location is information worth protecting—"of constitutional dimension and consequence." *Weaver*, 12 N.Y.3d at 446. Warrantless GPS tracking is not "compatible with any reasonable notion of personal privacy or ordered liberty." *Id.* at 441. The government need not collect as much, or as precise, location data as it did in *Weaver* and *Cunningham* for the search to delve significantly into Petitioners' constitutionally protected privacy interests. Respondents' Brief at 38-39. Much can be revealed about a person's life by their location within a half-mile or ten-mile radius over the course of an interstate trip. *See* Cmpl. ¶¶ 93-95 (R32) (explaining that truckers conduct all manner of personal business in and with their trucks). The upshot of *Weaver* and *Cunningham* is straightforward: Location matters, and the government must either get a warrant or

make sure it has provided an adequate substitute for one before tracking individuals' locations using GPS.

And, perhaps more importantly, the Department has offered no showing why it needs *any* information about a driver's whereabouts, particularly while the driver is between duty status changes or using the vehicle as a personal conveyance. The Department's ELD Rule collects driver location at changes of duty status and every hour between changes of duty status. *See* 49 C.F.R. § 395.26(b)(3), (c)-(d); 17 N.Y.C.C.R.R. § 820.6 (adopting, with exceptions, federal regulations found at 49 C.F.R. §§ 395.1-395.38, 395.8(a)(1)(i)). ELDs, therefore, collect significantly more location data than do paper logs (which collect location data only when the driver changes duty status). *See id.* § 395.8(h)(5). But the Department has not shown why it needs this location information.

Indeed, under the ELD Rule, the truck's location plays no role in calculating a driver's compliance with the HOS rules. *See, e.g.*, Appellants' Brief at 6. How does a truck's *location* one, two, or even five hours after the truck started moving help determine how long the operator has been driving? Even more tenuous is the connection between location and off-duty time: How does a truck's location one, two, or even five hours after the driver changed his or her status to "Off-Duty" help determine HOS compliance? *Cf. Electronic Logging Devices & Hours of Service Supporting Documents*, 80 Fed. Reg. 78,292, 78,306 (Dec. 16, 2015)

(theorizing that continuous GPS monitoring "will help both employers and safety officials with HOS oversight" and that "FMCSA believes that ELD use will lead to increased compliance and beneficial behavior changes in commercial driving"). The Department seemingly hopes that a worthy policy goal and the public's trust in technology will paper over the ELD Rule's practical inadequacies.

The Appellate Division's analysis of this issue fell woefully short of what is required to protect individual privacy rights. The court focused solely on the fact that ELDs collect less precise data than the trackers at issue in *Weaver* and *Cunningham*. App. Div. Op. at 8-9 (R221-22). Not only does this ignore that sensitive information can be revealed by even the less granular ELD data, but it ignores the other procedural limitations required by the administrative search exception. *See, e.g.*, Appellants' Brief at 35-37. This Court should take this opportunity to reaffirm Article I, Section 12's privacy protections safeguarded by the administrative search exception's procedural requirements.

B. The Department has failed to show that ever-increasing invasions of drivers' significant privacy rights will improve highway safety.

The Department offers one justification for requiring truckers to give the government access to their location: highway safety. Respondents' Brief at 20-21. Petitioners of course agree that highway safety is a worthy policy goal—truckers' lives, and livelihoods, depend on safe highways more so than almost any other profession. But the Department wholly failed to demonstrate during its adoption of

the ELD Rule that requiring ELDs would actually improve highway safety. Indeed, as it did here (Respondents' Brief at 21), the Department relied on the federal government's pre-promulgation analysis to justify the warrantless intrusion into drivers' whereabouts. *See* Compl. Ex. D ("April 24, 2019 Notice of Adoption") at R149-50.[4] The Department's reliance fails for two reasons. First, FMCSA did not consider whether its proposed rule would violate Article I, Section 12; the Department is obligated to ensure its actions comply with the New York Constitution. Second, the federal agency did not have the benefit of ELDs being required in 47 states (Respondents' Brief at 24) and the data associated with that ELD use during its rulemaking. *See* 80 Fed. Reg. at 78,306 (theorizing how GPS

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[4] Moreover, FMCSA, during its rulemaking, was aware of the tenuous connection between HOS compliance and fatigue. A 2016 report cited by the Department (Respondents' Brief at 4) noted the difficulties in addressing driver fatigue and fatigue-related crashes:

> [I]t is not straightforward to determine how additional modifications of the current HOS regulations would result in more or less fatigue in CMV drivers that might, respectively, raise or lower crash risk.
>
> . . .
>
> A further complication is that fatigue is very difficult to define and therefore to measure objectively. If fatigue is loosely defined as the inability to sustain performance over time, under such a vague definition, it is not directly measurable. Therefore, it is somewhat difficult to assess fatigue, and thus to regulate how to avoid driving while fatigued.

NATIONAL ACADEMIES OF SCIENCE, ENGINEERING, & MEDICINE, COMMERCIAL MOTOR VEHICLE DRIVER FATIGUE, LONG-TERM HEALTH, & HIGHWAY SAFETY RESEARCH NEEDS at 3 (2016), *available at* https://www.ncbi.nlm.nih.gov/books/NBK384966/pdf/Bookshelf_NBK384966.pdf. Petitioners agree that operator fatigue remains a serious issue, but both FMCSA and the Department continue to intrude more and more on drivers' privacy interests without demonstrating that such intrusions in reality combat fatigue and improve safety.

location data might help HOS compliance). But the Department did—it was much better positioned to evaluate ELD's actual efficacy.

The Department could, and should, have examined whether ELD use in fact improves highway safety. The Department could, and should, have reviewed the crash data from the 47 other states that had already required ELDs at the time of the Department's rulemaking. In fact, Petitioner OOIDA provided this data to the Department. *See* Public Comment of the Owner-Operator Independent Drivers Association, Inc. at 18 (R99) (quoting 2019 study that estimates accidents have increased by 2,000-3,000 accidents per year since ELDs have been required).[5] Consideration of this information would have revealed that ELDs do not improve highway safety.

Indeed, the unintended consequences flowing from mandated ELD use—*e.g.*, that drivers may be motivated to drive faster to reach their destination or face the prospect of stopping in unsafe and impractical areas—far outweigh the theoretical safety benefits predicted before the rule went into effect. *See id.* (referring to study demonstrating that accidents and unsafe driving infractions increased with ELD implementation). These fact demonstrate that ELDs likely

[5] To note, ELD use has not led to drastically different outcomes in the years since OOIDA presented this information to the Department. *See, e.g.*, Alex Scott, Andrew Balthrop, & Jason W. Miller, *Unintended responses to IT-enabled monitoring: The case of the electronic logging device mandate*, J. of Ops. Mgmt. at 6 (July 28, 2020) (determining that requiring ELDs causes more speeding and unsafe driving, resulting in increased crash rates).

make highways less safe. Moreover, Petitioners' explanation of ELDs' shortcomings (Appellants' Brief at 6-7)—far from a "highly strained attempt to devise a cheating scenario" (Respondents' Brief at 23)—instead demonstrates that ELDs are not perfect recorders of hours-of-service compliance as the Department and Appellate Division imply. ELDs were intended to cure the mistakes and potential tampering associated with manual driver recording on paper logbooks, but ELDs continue to rely on driver input to calculate HOS compliance.

HOS calculations depend on several variables, some of which are recorded automatically by ELDs (time when the truck is moving) and some which must be entered manually by the driver, including the driver's duty status when the vehicle is moving (whether on-duty or off-duty in personal conveyance mode) and when the vehicle is not moving (whether working on-duty not-driving or off-duty not working). *See* Appellants' Brief at 6. A driver's HOS records are only accurate if the manual entries are correct. Only the time moving (and location) are automatically recorded by ELDs. A driver, therefore, may appear to comply with the HOS rules, but actual compliance rests upon the driver's manual inputs, just as is the case for paper logbooks. The result is a substantial privacy intrusion through GPS searches with no guaranteed corresponding increase in actual HOS compliance—or any advancement of the actual end policy goal of improvement in highway safety as demonstrated by reduced crashes and deaths on the roads.

Furthermore, this year the federal government has sought public comment on a proposal to collect even more location (and other) data, including collecting a truck's location twice or four times more frequently than the current (unexplained) hourly collection, without any explanation of how current or even more ELD location data improves highway safety. *Advance Notice of Proposed Rulemaking; Request for Comments*, 87 Fed. Reg. 56,921, 56,924 (Sept. 16, 2022). Unless this Court upholds Article I, Section 12's restraints on the Department's warrantless searches, the Department likely would again believe it is compelled to incorporate this change—were FMCSA to adopt it—into New York law to continue receiving its federal grants.[6]

Yet the Department disregards this potential development, relying on the fact that such an increase has not yet been incorporated into law. Respondents' Brief at 7. But the proposal itself speaks volumes: neither the federal nor state governments seriously consider truckers' privacy rights when they promulgate their rules. Had they done so, they would at least attempt to explain why drivers must accede to the government's demands for more and more personal information.

[6] Petitioners are not aware of any instance of FMCSA withholding MCSAP funds for a state's failure to adopt rules that are substantially equivalent to the federal rules.

The explanation for the Department's promulgation of the ELD Rule despite its significant privacy intrusions with no demonstrated policy gains is simple: The Department has determined that it needs to adopt the ELD Rule to keep up its end of its bargain with the federal government. *E.g.*, Respondents' Brief at 2-3 & n.1. But even if incorporation of the ELD Rule is required by the Department's MCSAP[7] agreement, the contractual duty does not trump the New York Constitution. Neither the federal government nor other states that have incorporated the ELD Rule are obligated to protect the privacy rights enshrined in Article I, Section 12, but the Department is. *Pro forma* references to the federal government's unrealized expectations for ELDs fall woefully short of satisfying this burden.

C. The administrative search exception's limitations and procedural requirements protect important privacy rights.

1. The ELD Rule fails to meet the administrative search exception's procedural requirements.

This Court and others have outlined what governments must do to ensure their administrative search schemes comply with constitutional search and seizure and privacy protections. These procedural requirements are not mere suggestions. They serve as the primary protection against government overreach that is

[7] MCSAP is the "Motor Carrier Safety Assistance Program," the program by which the federal government outsources enforcement of its trucking regulations to state governments in exchange for enforcement money. *E.g.*, Respondents' Brief at 2-3.

normally accomplished through judicial oversight and the warrant requirement. Without these guardrails, the administrative search exception ceases to be "narrowly and precisely tailored" so as to protect individuals' rights. *See Keta*, 79 N.Y.2d at 497-98. Where an administrative search scheme authorizes warrantless searches, "the law must provide for such certainty and regularity of application as to be a constitutionally adequate substitute for a warrant." *Keta*, 79 N.Y.2d at 502

The ELD Rule does not properly limit officer discretion and authority. It lacks restrictions in several important areas that would ensure the "certainty and regularity of application" this Court requires. The rule places no limits on officer discretion with respect to timing, frequency, or location of searches. *See* Appellants' Brief at 35-37; *cf. New York v. Burger*, 482 U.S. 691, 722-23 (1987) (Brennan, J., dissenting) (highlighting lack of rules regarding timing, frequency, or selection of targets of administrative search).

Furthermore, throughout the rulemaking process and this litigation, the Department has never explained why it needs *warrantless* searches to advance its policy goals. *See* Appellants' Brief at 31-33. In this Court, the Department advances the vague notion that ELDs are necessary to advance HOS compliance and, presumably, highway safety. *E.g.*, Respondents' Brief at 22. Apart from the fact that this is a mere conclusion (and one not supported by the record of real-world ELD use), it says nothing about why *warrantless* searches are necessary to

advance the Department's goals. *See Keta*, 79 N.Y.2d at 500 (holding that a warrantless search must also be necessary because a substantial government interest alone does not justify the privacy intrusion). The Department consistently adopted the apparent position that it need not explain this point (or that adoption was necessary under the Department's MCSAP agreement). But Article I, Section 12 requires the government to secure a warrant before invading individuals' privacy unless it can establish that its searches fall within an exception to that requirement. For the administrative search exception, part of that demonstration requires a "necessary" showing. But the Department has never demonstrated this critical element of a permissible administrative search, and the courts below did not address it. *See* Appellants' Brief at 31-32. This Court is the last line of defense to ensure that the government meets all the requirements for a constitutional warrantless administrative search.

2. ELDs invade privacy interests that fall outside the permissible scope of administrative searches.

Article I, Section 12 also protects targets of administrative searches by ensuring that only those interests with minimal expectations of privacy[8] will be

[8] *Navas* and *Lee*, cited by the Department, do not control on the question of whether truckers have a greater expectation of privacy in their trucks than exists in traditional commercial premises. *See* Respondents' Brief at 20 (citing *United States v. Navas*, 597 F.3d 492, 501 (2d Cir. 2010) & *United States v. Lee*, No. 15-CR-30134-NJR, 2016 WL 4046967, at *11 (S.D. Ill. July 28, 2016)). Apart from the fact that those case are applying the Fourth Amendment, they also deal with an exception to the warrant requirement premised on probable cause, not suspicionless administrative searches.

subject to search. Petitioners indeed cite a Supreme Court decision for this prospect (Respondents' Brief at 19), but that decision relies on this Court's *Keta* opinion, and the other administrative search cases imply this underlying principle. *See* Appellants' Brief at 28-29. Those cases involve searches of traditional commercial premises like chop shops and mines.

Even if a heavy truck does not face the same analysis as a personal vehicle, neither is it merely a traditional commercial premises. For many operators—due to the nature of their occupation—the truck is a hybrid of home, personal conveyance, and workplace. Many truckers do not "choose" (Respondents' Brief at 20) to live in their trucks or use them as a personal vehicle. For long hauls, due to the economics of the business, there is no alternative. Petitioners raise these points not to argue that ELDs affect a greater privacy intrusion where a driver sleeps in the truck. Rather, these facts demonstrate the very nature of the search target: Commercial vehicles represent a unique interest that must be evaluated with their particular characteristics in mind. Moreover, here, where the government intends to monitor individuals' conduct and fatigue level, the interest at stake again represents one greatly in excess of the character of interest that can be subjected to a warrantless administrative search. *See* Appellants' Brief at 29.

III. Petitioners have stated a facial constitutional violation by showing that the ELD Rule authorizes searches that violate Article I, Section 12.

The Department makes much of the standard applicable to facial constitutional challenges. *See* Respondents' Brief at 14-15. But whatever language is employed to describe this Court's task in evaluating Petitioners' facial claims, this Court and the Appellate Division have examined facial challenges to search regimes and demonstrated what is required to sustain a claim for violation: Where the law in question authorizes searches that violate Article I, Section 12, a facial claim lies. *E.g.*, *Burger*, 67 N.Y.2d at 345 ("Because New York City Charter § 436 and Vehicle and Traffic Law § 415-a(5)(a) permit such warrantless searches, they are facially unconstitutional."). In *Burger*, the law at issue surely authorized some searches that would satisfy Article I, Section 12. But it authorized some searches that did not, rendering it unconstitutional. *See Keta*, 79 N.Y.2d at 492; *see also Collateral Loanbrokers Ass'n of N.Y. v. City of New York*, 178 A.D.3d 598, 599-600 (2019); *Patchogue-Medford Cong. of Teachers v. Board of Education*, 70 N.Y.2d 57, 62-63 (1987).

Here, Petitioners have stated a claim that the ELD Rule authorizes searches that violate Article I, Section 12. *See supra* Parts I & II. Thus, Petitioners have stated a claim for a facial violation of Article I, Section 12. Moreover, that certain elements of interstate trucking—such as operators using their trucks as a home away from home and/or a personal conveyance—are not universally present does

not undercut Petitioners' facial claims. Rather, those facts are intrinsic to the interstate trucking industry and illuminate the nature of the privacy interest at stake. Many operators sleep in their trucks or use them as personal conveyance because they are hundreds of miles away from their homes and families. They do not "choose" (Respondents' Brief at 20) to live in their trucks like a shop owner with an upstairs apartment, nor do they "choose" to use their trucks to visit an urgent care clinic on the road like a corporate employee who uses a work vehicle to run an errand. Interstate trucking is a unique industry that warrants its own examination under Article I, Section 12.

CONCLUSION

The Department casts its ELD Rule as a balance between advancing highway safety and invading truckers' privacy rights. But throughout the Department's rulemaking and this litigation, the Department has never articulated how the ELD Rule's substantially-increased intrusion into drivers' privacy advances its claimed goal of highway safety. The Department has never provided any reason why it needs to know the GPS location of commercial vehicles to calculate hours of service. Instead, the Department has relied on the fact that advancing highway safety is a worthy goal and hoping that no court will too closely examine the details of the Department's actions to see if they actually advance that policy. But if the Department requires individuals to track their

location and hand that information over to the government upon request, it ought to at least be able to explain why it needs that information.

Moreover, the Department must ensure that its actions conform to the New York Constitution, especially where it provides more robust protections of individual rights than does the United States Constitution, as is the case of privacy. But here, the Department relied on FMCSA's pre-promulgation estimates and aspirations even though it could have examined real-world ELD use in other states. A cursory review of that data would have informed the Department that increased ELD use does not equate to safer highways. If this Court or Supreme Court upon remand overturns the ELD Rule, the Department will have to consider these factual inquiries if it attempts to re-promulgate an ELD mandate.

The ELD Rule not only fails to protect individuals' privacy rights enshrined in Article I, Section 12, but it also fails to advance the Department's stated policy goal. Indeed, the ELD Rule works against the claimed justification of improving highway safety. This Court, therefore, must decide whether the government can:

> warrantlessly track truckers' location using GPS technology—
>
> for the purpose of enforcing criminal laws—
>
> while invading a privacy interest that exceeds the interests previously considered within Article I, Section 12, and—
>
> without ensuring its rules provide the procedural protections required to satisfy Article I, Section 12—

all for the purpose of securing federal funding for commercial vehicle enforcement.

This Court should reverse the decisions of Supreme Court, Albany County and of the Appellate Division, Third Department and hold that Petitioners have stated a claim for violation of Article I, Section 12 of the New York Constitution.

Dated: April 24, 2023
Albany, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned attorney, William J. Keniry, Esq., hereby certifies that this brief complies with the printing requirements and other specifications of Part 1250. This brief was prepared on a computer using Times New Roman typeface, 14-point size, and double line spacing. According to the word processing system used by this office, this brief, inclusive of point headings and footnotes and exclusive of signature blocks and pages including the table of contents, table of citations, and proof of service, contains 5,102 words.

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