APL-2022-00050 **To Be Argued By: Charles R. Stinson**
20 minutes requested

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' Brief

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RULE 500.1(F) DISCLOSURE STATEMENT

Petitioner-Plaintiff-Appellant Owner-Operator Independent Drivers Association, Inc. states that it has no parent companies or affiliates and has two subsidiaries, Owner-Operator Independent Drivers Association Foundation, Inc. and Owner-Operator Services, Inc.

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Petitioners/Plaintiffs-Appellants Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Douglas J. Hasner, David D. Wynn, and Gary L. O'Brien (collectively, "Petitioners") appeal the Decision & Order of Supreme Court, Albany County, New York, dated May 6, 2020, granting Defendants' motion to dismiss (R5-16, "Sup. Ct. Dec.") and the Opinion & Order of the Appellate Division, Third Department, entered March 31, 2022 (R214-26, "App. Div. Op."). Petitioners contend that the New York State Department of Transportation's (the "Department" or "NYSDOT") warrantless and pervasive GPS monitoring of truck drivers as required by New York's electronic logging device ("ELD") Rule violates Article I, Section 12 of the New York Constitution.

QUESTIONS PRESENTED

1. Whether the administrative search exception to Article I, Section 12's warrant requirement extends to searches designed to uncover evidence of criminal violations.

2. Whether New York's warrantless GPS searches of commercial truck drivers through mandating the installation and use of GPS/electronic logging devices meets the requirements of New York's administrative search exception to Article I, Section 12's warrant requirement.

3. Whether the Appellate Division erred by applying a "reasonable doubt" standard on a motion to dismiss a facial constitutional challenge to a search scheme.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal and to review the questions raised herein pursuant to CPLR § 5601(b)(1), as the appeal involves a substantial constitutional question: whether New York's truck driver inspection scheme violates Article I, Section 12 of the New York Constitution. Petitioners asserted this claim in their Verified Petition and Class Action Complaint (R31-38, R44)[1] and argued it in opposing Defendants' motion to dismiss (R238-53) and on appeal before the Appellate Division, Third Department (R269-70, R282-313; R336-55). Both Supreme Court, Albany County (R8-13) and the Appellate Division, Third Department (R217-24) finally decided this issue. Petitioners raised this issue in their Preliminary Appeal Statement and in their May 23, 2022 Jurisdictional Response Letter. From its inception, this case has centered around a significant constitutional issue: the privacy rights of tens of thousands of commercial truck drivers.

[1] Petitioners brought a combined action both under CPLR article 78 and for declaratory and injunctive relief. For the sake of convenience and to remain consistent with the terminology used in the Appellate Division and Supreme Court, this brief refers to OOIDA and the individual truckers as "Petitioners."

STATEMENT OF THE CASE

I. Introduction

Commercial truck drivers spend much of their lives in their trucks. For those truckers who haul goods in interstate commerce over long distances, often for weeks or months without going back to their residences, their truck is their home. These truckers eat, sleep, get dressed, and conduct all manner of personal business, including spending downtime, in their trucks. Long haul, regional, and local truckers also use their trucks as a mode of transportation for other personal business including getting to doctors' appointments, medical appointments, religious services, and other personal matters.

Petitioners challenge the Electronic Logging Device ("ELD") Rule as a warrantless search that violates their right to privacy under Article I, Section 12 of the New York Constitution. The ELD Rule was promulgated to aid enforcement of driver compliance with the "Hours-of-Service" ("HOS") rules, rules intended to regulate trucker alertness/fatigue by imposing limits on truckers' driving time. ELDs were intended to provide an electronic, and therefore more accurate, record of a driver's compliance with the HOS rules than the paper logbooks that truckers have used for decades to manually record their activities. The ELD Rule requires the installation of a device that conducts a 24-hours-a-day electronic search of truck drivers, recording drivers' work and non-work schedule and utilizing GPS

technology to record truck drivers' locations. State enforcement officials routinely demand access to ELD data during roadside inspections of trucks and driver without probable cause or reasonable suspicion of a violation of the law, and violations of the HOS rules are criminal offenses in New York.

But because ELDs still require drivers to manually input the information necessary to calculate a driver's compliance with the HOS rules, they offer scant improvement over the paper logs they replaced with respect to advancing the Department's claimed policy goals of improving HOS compliance and combating driver fatigue. This interest cannot justify the state's very real increased intrusion into truckers' privacy through the ELD Rule.

The Department asserts, and the courts below held, that these searches fit within the administrative search exception to Article I, Section 12's warrant requirement. That exception has only been held to permit *proper* administrative searches (unrelated to criminal enforcement) of *commercial* premises (places bearing a minimal expectation of privacy) where the authorizing statute adequately limits officer discretion in lieu of a warrant.

Fundamentally, commercial trucks are not mere business premises and bear little resemblance to a traditional storefront, warehouse, or office space. The ELD Rule allows the government to, without a warrant, search a truck driver's home away from home and location—privacy interests that far exceed the "minimal"

interest found in those commercial premises that are subject to administrative searches. Additionally, the ELD Rule does not provide the procedural protections required of administrative searches that would limit officer discretion as a substitute for a warrant. Furthermore, ELD searches are designed to enforce the hours-of-service rules, which carry criminal penalties under New York law. This Court has previously rejected application of the administrative search exception to warrantless searches designed to investigate criminal violations. For these reasons, Supreme Court and the Appellate Division erred in holding that ELD searches fall within the administrative search exception to Article I, Section 12's warrant requirement.

II. Background

A. ELDs provide minimal improvement over paper logs with respect to hours-of-service compliance or highway safety.

1. ELDs, like their paper predecessors, still require truckers to enter data manually to record their hours of service.

ELDs are intended to improve truckers' compliance with, and states' enforcement of, the hours-of-service rules governing how long a truck driver can work in a given time period. *See* Compl. ¶¶ 58, 76-88, 108 (R27, R29-31, R34); 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)). Because ELDs automatically record when a truck is moving, they were meant to improve upon the accuracy of paper logs, which truck drivers have used for decades to manually record all of their

work and rest time, and that enforcement officials believed to be frequently, intentionally or unintentionally, inaccurate. *See, e.g.*, App. Div. Op. at 8 (R221) (citing Federal Motor Carrier Safety Administration rulemakings).

But because ELDs continue to rely upon the driver to manually record certain data (*see* Compl. ¶¶ 71-72 (R29)), just as paper logs do, the actual improvement in accuracy of an ELDs calculation of a trucker's hours of service over paper logbooks is minimal. The data points needed to calculate a driver's hours of service include the time the truck is moving (which ELDs record automatically), time performing non-driving work (which the driver must manually input into the ELD), and time spent off duty (which the driver must also manually input into the ELD). 49 C.F.R. § 395.3(a). The maximum amount of time a trucker can drive a truck under the hours-of-service rules depends on both when and how much time the trucker spent off duty (*id.* § 395.3(a)(1)) and spent on duty working but not driving (*id.* § 395.3(a)(2)).

But like paper logs, ELDs can only accurately calculate drivers' compliance with the rules if the drivers' manual entries are accurate. Thus, while ELDs record, without driver input, how long the truck has been moving and whether that time exceeds 11 hours, the maximum daily driving limit (§ 395.3(a)(3)(i)), because ELDs rely upon manual entries by the driver, they provide no more accuracy over

paper logs in calculating whether *any* of that driving time, from the first minute to the eleventh hour, was lawful.

If a driver inaccurately enters the activities that must be provided manually, then the ELD can show an enforcement official that the trucker is driving within the rules when he or she is not. If the driver has not operated the truck for 10 consecutive hours and manually told the ELD he or she was off duty that entire time, then the ELD will show the driver eligible to drive a full 11 hours for the day. 49 CFR § 395.3(a)(1). But if the driver in fact worked during those 10 consecutive non-driving hours and did not manually enter that work time into the ELD, then the ELD will inaccurately show the driver as eligible to drive for 11 hours that day, even though the rules would not allow the trucker to operate the truck for any amount of time. None of those 11 hours of driving—that the ELD would calculate as lawful—would in fact *be* lawful. At best, the ELD has an 11-hour margin of error, allowing 11 hours of unlawful driving before the ELD shows, for the first time, that the driver is violating the rules (for the driving time beyond that first unlawful 11 hours).

2. The hours-of-service rules require the recording of a trucker's location but do not provide for the use of that location.

The ELD Rule also requires ELDs to automatically record the driver's location via GPS. 49 CFR § 395.26(b)(3). The paper logbook rules required drivers

to record their location ("city, town, or village") at each change of duty status. 49 C.F.R. § 395.8(h)(5). The ELD rules, however, require ELDs to record the driver's location at each change of duty status and every hour between changes in duty status, even when the driver is off duty. *Id.* § 395.26(b)(3), (c)-(d). ELDs record location data to within half a mile for on-duty time and within 10 miles for off-duty time. ELDs, therefore, automatically record the driver's location more accurately and more frequently than drivers' manual entries on paper logs. But what is the state's interest in recording a driver's location? The calculation of a driver's compliance with the hours-of-service rules does not make use of this location information,[2] *see id.* § 395.3(a), and the other rules describe only how location data is to be collected, not how it is used by the government.

3. ELDs do not advance their intended policy goals.

Given the minimal improvement by ELDs over paper logbooks in the recording of truckers' hours of service and the rule's silence on the use of the location data ELDs must record, the Department seemingly imposed this invasion of trucker privacy without consideration of whether it was necessary, or even useful, to improve highway safety, or whether the federal ELD Rule comports with the New York Constitution's robust privacy protections.

[2] Despite this disconnect, the federal government has asked for public comment on whether it should change the rules to require ELDs to record even more location data, including decreasing the collection interval from 60 minutes to 15 minutes. *See Advance Notice of Proposed Rulemaking; Request for Comments*, 87 Fed. Reg. 56,921, 56,924 (Sept. 16, 2022).

When publishing the final ELD rule, even the Federal Motor Carrier Safety Administration ("FMCSA") was vague about the use of location information:

> Automatic recording of all times when the CMV is moving and regular recording of geolocation data and other data elements will help both employers and authorized safety officials with HOS oversight, as those elements cannot be easily manipulated. FMCSA believes that ELD use will lead to increased compliance and beneficial behavior changes in commercial driving.

Electronic Logging Devices & Hours of Service Supporting Documents, 80 Fed. Reg. 78,292, 78,306 (Dec. 16, 2015).

B. ELD data collection invades truckers' privacy interests.

ELDs collect far more data than is necessary to calculate hours of service and determine compliance with the HOS rules. ELDs integrate with the vehicle's engine to automatically record the date, time, GPS location, engine hours, and vehicle miles along with the identification of the driver and motor carrier—24 hours a day, 365 days a year—regardless of whether the driver is, for example, on or off duty, driving in a professional or personal capacity, or resting in his or her truck's sleeper berth. *See* Compl. ¶¶ 10-11, 70-72, 94-99 (R20-21, R29, R32-33); 17 N.Y.C.C.R.R. §§ 820.6, 820.13 (adopting 49 C.F.R. Part 395). Given the interstate nature of the commercial trucking industry and that ELDs constantly record information, ELDs track drivers' activity over extended geographic distances, including far beyond New York's borders, and when their trucks are being used for purely personal purposes. Compl. ¶¶ 33, 42 (R24-25).

C. The government uses ELD searches for criminal law enforcement.

The information recorded by ELDs is designed to aid law enforcement review, *see* Compl. ¶¶ 64, 99-100 (R28, R32-33), and truck drivers are required to grant access to ELD data to law enforcement officials upon demand. *See* Compl. ¶¶ 13, 65 (R22, R28). Law enforcement officials may demand to review ELD data on the ELD's digital display screen or to download it. *See* Compl. ¶¶ 73-74, 99-100 (R29, R32-33). A driver is required to have at least seven days of ELD data available for inspection upon demand by enforcement officials. 17 N.Y.C.C.R.R. § 820.7 (adopting 49 C.F.R. § 395.24(d)). This data is also provided to the motor carrier for which the drivers work. Motor carriers must make at least six months of data available for inspection upon demand by enforcement officials. *Id.* (adopting 49 C.F.R. § 395.22(i), (j)).

D. New York adopted the ELD Rule as a condition of receiving federal grant money.

The Department adopted the ELD Rule (and other trucking regulations) pursuant to a voluntary contractual agreement with the U.S. Department of Transportation, Federal Motor Carrier Safety Administration ("FMCSA"), which is the federal agency responsible for establishing and enforcing federal trucking regulations. *Id.* ¶ 54 (R27); *see* 49 C.F.R., Parts 350-99. FMCSA's contracts with states require the states to adopt the federal trucking rules, including hours-of-service rules, into state law and then enforce them. *See* Compl. ¶¶ 55-57 (R27)

(explaining that Congress has not authorized states to enforce federal trucking regulations directly). In exchange, states receive federal funds under FMCSA's Motor Carrier Safety Assistance Program ("MCSAP"). *See* Compl. ¶¶ 57-58 (R27); *see* 49 U.S.C. § 31102(b), (c); 49 C.F.R. § 350.101(a).

New York participates in MCSAP and receives annual federal grants under that program. *See* Compl. ¶ 58 (R27); Compl. Ex. A ("January 16, 2019 Emergency/Proposed Rulemaking") at 8, 10 (R56, R58); Compl. Ex. B ("March 20, 2019 Emergency Rulemaking") at 13-14 (R74-75); Sup. Ct. Dec. at 2 (R6). Because New York's participation in the MCSAP program is voluntary, the Department is not relieved of its obligation to promulgate rules that comply with the New York Constitution.

III. Procedural History

During the Department's rulemaking process, OOIDA submitted comments explaining (among other problems) that the proposed ELD requirement violated Article I, Section 12 of the New York Constitution. Compl. ¶¶ 76, 80-81, 83-84 (R29-30); *see generally* Compl. Ex. C ("Public Comment of OOIDA in Response to an Emergency/Proposed Rulemaking") at R80-109. In addressing OOIDA's Article I, Section 12 concerns, the Department cited a decision from the United States Court of Appeals for the Seventh Circuit applying Fourth Amendment jurisprudence to a similar ELD search regime adopted by the federal government.

Compl. Ex. D ("April 24, 2019 Notice of Adoption") at R149-50. The Department adopted the ELD requirement into New York law on April 9, 2019 after previously adopting the ELD requirement on an emergency basis. *See* Compl. ¶¶ 77-87 (R30-31). The Department ignored OOIDA's comments regarding Article I, Section 12 and did not alter its proposed language for the final rule. Compl. ¶ 86 (R31).

On August 8, 2019, Appellants filed a class action complaint in Supreme Court, Albany County alleging that Defendants had adopted and were enforcing the ELD mandate in violation of Article I, Section 12 (Search and Seizure) and Section 6 (Due Process) of the New York Constitution, and Article 78 of New York's Civil Practice Law and Rules. *See* Compl. ¶¶ 184-99 (R43-45). Defendants moved to dismiss, and Supreme Court, on May 6, 2020, granted Defendants' motion and upheld the constitutionality of the ELD Rule. Sup. Ct. Dec. (R5-16). The court held that the ELD Rule authorized valid administrative searches within the exception to Article I, Section 12's warrant requirement. *Id.* at 7-9 (R11-13). The court also held that the Department's adoption of the ELD Rule was not arbitrary and capricious and satisfied its obligations under Section 202 of New York's State Administrative Procedures Act. *Id.* at 4 (R8).

Petitioners filed a timely notice of appeal to the Appellate Division, Third Department, on June 5, 2020. *See* Notice of Appeal (R2). The Appellate Division affirmed, agreeing with Supreme Court that Defendants' ELD searches fall within

the administrative search exception to the constitutional warrant requirement. App. Div. Op. at 7-11 (R220-24). The court applied a "beyond a reasonable doubt" standard to Petitioners' facial challenge at the motion to dismiss stage. App. Div. Op. at 4 (R217). The Appellate Division rejected the application of *People v. Scott (Keta)*, 79 N.Y.2d 474 (1992), to this case, holding that warrantless administrative searches can be used to uncover evidence of crimes. *Id.* at 9-10 (R222-23). The court further held that the ELD Rule sufficiently limits officer discretion so as to fit within the exception. *Id.* at 10 (R223). The Appellate Division also affirmed Supreme Court's dismissal of Petitioners' due process and administrative procedure act claims. *Id.* at 11 (R224).

STANDARD OF REVIEW

This Court has jurisdiction to hear this appeal and to review the questions raised herein pursuant to CPLR § 5601(b)(1), as the appeal involves a substantial constitutional question: whether New York's truck driver inspection scheme violates Article I, Section 12 of the New York Constitution.

In reviewing Supreme Court's dismissal, this Court must determine "whether, accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable view of the facts stated." *People v. N.Y.C. Transit Auth.*, 59 N.Y.2d 343, 348 (1983); *see also Aristy-Farer v. State*, 29 N.Y.3d 501, 509 (2017). Plaintiffs are "entitled to all favorable inferences that can be drawn

from their pleadings," and if this Court determines "that plaintiffs are entitled to relief on any reasonable view of the facts stated, our inquiry is complete and we must declare the complaint legally sufficient." *Id.*; *see also Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) ("We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."). Plaintiffs have a "right to seek redress, and not have the courthouse doors closed at the very inception of an action, where the pleading meets a minimal standard necessary to resist dismissal of a complaint." *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 379 (1995).

Finally, the presumption of constitutionality owed to state rules does not obviate the motion to dismiss standard, and this Court declares state search schemes to be facially unconstitutional where they authorize searches that violate Article I, Section 12. *See, e.g.*, *Keta*, 79 N.Y.2d at 499-500, 517.

SUMMARY OF ARGUMENT

New Yorkers value their privacy. This Court has recognized that this right holds so much significance that the Court must depart from the privacy standards applicable under the federal Constitution to ensure that the state Constitution adequately protects New Yorkers from unreasonable government intrusions into that privacy: "[W]e have not hesitated in the past to interpret article I, § 12 of the

State Constitution independently of its Federal counterpart when necessary to assure that our State's citizens are adequately protected from unreasonable governmental intrusions." *Keta*, 79 N.Y.2d at 496-97.

This right to privacy once again faces significant intrusion in the form of warrantless GPS monitoring of tens of thousands of commercial truck drivers ostensibly to enforce hours-of-service rules that attempt to monitor drivers' level of fatigue. When the Department enacted its requirement that operators use electronic logging devices ("ELDs"), it sanctioned warrantless searches that upped the privacy intrusion ante without providing any legitimate justification or demonstrated improvement in highway safety. Instead, the Department incorporated the federal ELD mandate because it wanted to ensure its continued access to federal grants for the enforcement of state motor carrier regulations.

But the desire to comply with the conditions of a federal grant does not trump New York's constitutional protections, including its stringent version of the administrative search exception to Article I, Section 12's warrant requirement. This Court has demonstrated "firm and continuing commitment to protecting the privacy rights embodied within article I, § 12." *Keta*, 79 N.Y.2d at 497. Those privacy rights include a narrower exception to the warrant requirement where the government codifies a search scheme to enforce a regulatory regime. Thus, for example, while the Fourth Amendment may not prevent a government from

designing a regulatory search regime to enforce criminal laws, Article I, Section 12 does. *See, e.g.*, *Keta*, 79 N.Y.2d at 498. Indeed, the government's enforcement of the criminal laws is where "traditional probable cause and warrant requirements . . . protections are most needed." *Id.* at 499.

Yet the Department employs GPS monitoring to conduct warrantless searches to enforce a regulatory regime that carries with it criminal sanctions, government activity prohibited under *Keta*. Moreover, the ELD Rule lacks many of the basic procedural protections that *Keta* and other cases have recognized as crucial to the constitutionality of administrative searches. These procedures are not mere technicalities. They serve as a substitute for the absent warrant, ensuring that the search subject's privacy and other rights remain protected without court approval of the search via a warrant.

The ELD Rule therefore falls outside the administrative search exception for two essential and independent reasons: (1) The rule is not a proper administrative search because it is designed to enforce criminal laws; and (2) The rule does not contain the procedural limitations that ensure warrantless administrative searches provide the same protection of individuals' privacy as a warrant.

This Court should reverse the decision of the Appellate Division, Third Department and Supreme Court, Albany County and hold that Petitioners have stated a claim that the Department's ELD Rule authorizes searches that violate

Article I, Section 12 and, therefore, have stated a claim for a facial violation of the New York Constitution.

ARGUMENT

I. New York's administrative search exception does not extend to searches—like those authorized by the ELD Rule—designed to uncover evidence of crimes.

New York law has recognized the importance of New Yorkers' privacy rights for decades. Starting in 1938, New York's Constitution—Article I, Section 12—has specifically addressed these rights, and this Court has repeatedly held that New York protects individual privacy more than does the Fourth Amendment in numerous situations. *See, e.g.*, *Keta*, 79 N.Y.2d at 496-97; *see also id.* at 486-87 (1992) (citing *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting), *Matter of Doe v. Coughlin,* 71 N.Y.2d 48, 52-53 (1987), and *People v. Onofre,* 51 N.Y.2d 476, 485-88 (1980)).

Furthermore, this Court has made clear that Article I, Section 12 requires government officials to secure a warrant to employ GPS technology to track individuals, even on public roads. *See People v. Weaver*, 12 N.Y.3d 433, 444-46 (2009) ("[W]e think it manifest that the continuous GPS surveillance and recording by law enforcement authorities of the defendant's every automotive movement cannot be described except as a search of constitutional dimension and consequence"). It is "obvious" that unsupervised, warrantless GPS monitoring is

not "compatible with any reasonable notion of personal privacy or ordered liberty." *Weaver*, 12 N.Y.3d at 441.

Indeed, this Court recognizes the awesome power of GPS tracking:

> The whole of a person's progress through the world, into both public and private spatial spheres, can be charted and recorded over lengthy periods possibly limited only by the need to change the transmitting unit's batteries. Disclosed in the data retrieved from the transmitting unit, nearly instantaneously with the press of a button on the highly portable receiving unit, will be trips the indisputably private nature of which takes little imagination to conjure: 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. What the technology yields and records with breathtaking quality and quantity is a highly detailed profile, not simply of where we go, but by easy inference, of our associations—political, religious, amicable and amorous, to name only a few—and of the pattern of our professional and avocational pursuits.

Id. at 441-42.

In short, the government generally cannot use GPS searches without a warrant. Thus, ELD searches, which use GPS technology to keep tabs on truck drivers, violate Article I, Section 12 unless they fall within an exception to that section's warrant requirement. The Department here claims the ELD Rule falls within the administrative search exception for pervasively regulated industries.

In short, ELD searches do not fit within New York's version of the administrative search exception, which, as this Court has recognized, permits a narrower scope of searches than does its Fourth Amendment analog: Article I,

Section 12 prevents the government from designing administrative searches to enforce criminal laws. But the ELD Rule can *only* be used to enforce commercial vehicle hours-of-service rules, and violations of these rules carry criminal penalties under New York Law.

A. Article I, Section 12 provides stronger protections for New Yorkers' privacy than does the Fourth Amendment in the context of administrative searches.

This Court previously held that whether an administrative search passes muster under the Fourth Amendment does not answer the question of whether the search runs afoul of Article I, Section 12. The *Keta* Court overturned a search scheme under Section 12 that the United States Supreme Court upheld under the Fourth Amendment. *See New York v. Burger*, 482 U.S. 691 (1987).

1. The United States Supreme Court reversed this Court's decision that the Fourth Amendment prohibits governments from using administrative searches designed to uncover evidence of crimes.

This Court in *People v. Burger*, 67 N.Y.2d 338 (1986), analyzed whether New York's warrantless searches of vehicle dismantling businesses (chop shops) violated the Fourth Amendment. At issue was whether these searches were valid administrative search schemes within the administrative search exception to the warrant requirement or whether they were used to "obtain evidence of crimes where traditional requirements of the Fourth Amendment apply." 67 N.Y.2d at

343. This Court concluded that the law violated the Fourth Amendment because it authorized searches designed to "uncover evidence of criminality." *Id.* at 344.

The U.S. Supreme Court reversed, holding that the Fourth Amendment does not prevent a state from using warrantless administrative searches designed to enforce a regulatory scheme *and* criminal laws. *See New York v. Burger*, 482 U.S. 691, 703-06, 712-13 (1987). A closely divided Court noted that, with respect to the Fourth Amendment, "a State can address a major social problem *both* by way of an administrative scheme *and* through penal sanctions." *Id.* at 712. The Court concluded that so long as the separate regulatory scheme was properly administrative, the discovery of evidence of crimes that were not the target of the otherwise lawful search did not render the search illegal. *Id.* at 716.

Whether searches designed to enforce criminal laws could be proper administrative searches under the New York Constitution remained undecided until *Keta* in 1992.

2. This Court expressly rejected the federal approach and confirmed that Article I, Section 12 does not allow for the two-prong scheme ratified in *Burger*.

Five years later, this Court again addressed warrantless administrative searches of chop shops, but this time under Article I, Section 12. *Keta,* 79 N.Y.2d at 491. Because the United States Constitution sets the floor, not the ceiling, for the protection of individual rights, *see People v. LaValle*, 3 N.Y.3d 88, 129 & n.20

(2004), and states and their constitutions "remain the primary guardian of the liberty of the people," *Keta*, 79 N.Y.2d at 496, 505 (Kaye, J., concurring) (noting that state courts have not only a right but also a "responsibility to interpret their own Constitutions"),[3] the question before this Court was whether New York's administrative search exception provided greater protection of individuals' privacy than its Fourth Amendment analog.

Noting New York's robust protection of individual privacy, the *Keta* Court unambiguously rejected the Supreme Court's Fourth Amendment approach expressed in *Burger*:

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

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

[3] The *Keta* Court adopted Judge Kaye's analysis in her concurrence regarding the role of the state Constitution. *See Keta*, 79 N.Y.2d at 495-96 ("The soundness and thoroughness of that concurrence renders a further extended discussion of the dissent's constitutional argument unnecessary. Accordingly, rather than engaging in what would necessarily be a redundant exposition of basic analytical principles, we simply adopt the views expressed in the concurrence . . . .").

Instead, this Court reverted to its approach outlined in the original *Burger* opinion, now under Article I, Section 12 rather than the Fourth Amendment:

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

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

Thus, "the administrative search exception cannot be used to validate warrantless searches conducted for the purpose of exposing violations of the State's penal laws." *Keta*, 79 N.Y.2d at 495 (characterizing the "primary premise" of this Court's *Burger* decision).

3. *Keta*'s rationale and analysis should not be limited to "pretext" situations.

Keta involved a pretextual search. The police used the chop shop bookkeeping searches to find evidence of stolen cars and parts, the crimes meant to be deterred by the regulatory scheme. *See Keta*, 79 N.Y.2d at 494-95. This case does not involve a pretextual search, but *Keta*'s analysis is not limited to pretext cases. This Court recognized that the wrong forestalled by its analysis in the initial *Burger* opinion was the ability of the government to search for *evidence of crimes*

without probable cause and neutral oversight, "where their protections are most needed." *Keta*, 79 N.Y.2d at 499.

Thus, the government cannot use warrantless administrative searches *designed* to uncover evidence supporting penal sanctions. *See Keta*, 79 N.Y.2d at 498. This Court wisely adjudged the true intent behind the government's searches in *Keta*, preventing the government from using otherwise proper administrative inspections as pretext for criminal enforcement. Here, however, the government's intent is plain: Inspection officials use ELDs to enforce substantive HOS rules that carry criminal sanctions. *See, e.g.*, 17 N.Y.C.C.R.R. § 820.10; *see also infra* at 25-26.

This Court's *Keta* analysis comports with the dissenting opinion in the U.S Supreme Court's *Burger* decision, which addresses problems arising with regulatory programs that include both administrative inspections *and* criminal investigations. *Keta* recognizes that the New York Constitution protects persons in these situations; *Burger* held that the Fourth Amendment does not.

Thus, whether the government uses an administrative inspection scheme as pretext for criminal investigations or uses one expressly for criminal enforcement, judicial oversight and probable cause must apply to protect individuals' privacy rights. A proper program "must be part of a comprehensive administrative program that is *unrelated* to the enforcement of criminal laws." *Keta*, 79 N.Y.2d at 502-03

(emphasis added). The Court in *Keta* made it clear that "the administrative search exception should remain a narrow and carefully circumscribed one." *Id*. at 499.

This principle does not require inspection officials to close their eyes to evidence of criminality that may be revealed by *proper* administrative searches. Thus, the administrative searches this Court examined in *People v. Quackenbush*, 88 N.Y.2d 534 (1996), do not run afoul of Article I, Section 12. The laws at issue in *Quackenbush* authorized police to inspect vehicles involved in crashes to determine the cause of the crash and to remove defective vehicles from the road. 88 N.Y.2d at 539-40. This proper administrative scheme could also reveal evidence of other crimes related to vehicle defects. Merely because the search also revealed evidence of criminality did not convert the proper administrative search—*i.e.*, a search that is part of a proper administrative scheme not designed to enforce criminal laws—into an unconstitutional one.

But *Quackenbush*'s reasoning and application assumes a *proper* administrative search from the outset. The searches at issue in *Keta* lacked that foundation: searches intended, whether implicitly or expressly, to uncover evidence of crimes are not proper administrative searches. The ELD Rule authorizes searches designed to uncover evidence of crimes.

B. The ELD Rule authorizes searches designed to enforce the hours-of-service rules, which carry potential criminal sanctions.

Applying *Keta*'s rejection of the federal administrative search exception, the principal issue for the Court here is whether New York's ELD Rule authorizes a proper "administrative search" potentially within the exception to Article I, Section 12 or is one designed to uncover evidence of conduct punishable by criminal sanctions. The applicable regulations reveal that the ELD Rule falls into the latter category and suffers from the defect deemed dispositive by this Court in *Burger* and *Keta*: ELD searches are designed to enforce criminal laws.

As set forth in the Complaint, substantive violations of the hours-of-service rules are criminal offenses under New York law. Compl. ¶¶ 99, 100, 103-07 (R32-34). In addition to regulations promulgated pursuant to the Vehicle and Traffic Law, the Department's Transportation Law regulations in Part 820 apply "to motor carriers and drivers" operating in the State and authorize "all police officers" and other persons authorized by the Department to enforce Part 820. 17 N.Y.C.C.R.R. § 820.12. The rules authorize the "Commissioner of Transportation and the Commissioner of Motor Vehicles" to "examine or investigate the operation of motor carriers and their compliance with rules and regulations." *Id*. § 820.9.

Violation of Part 820 is a traffic infraction, misdemeanor, or felony that may result in fines, imprisonment, or a vehicle or driver being placed out of service—which prevents driving until the violation is remedied. *See* 17 N.Y.C.C.R.R.

§ 820.10. The ELD Rule was incorporated into Part 820, making it subject to Part 820's investigative search and seizure and criminal provisions. Moreover, violation of the hours-of-service rules is a misdemeanor under New York law. N.Y. Transp. Law § 213.

Thus, the ELD Rule authorizes searches designed to enforce the criminal law. Notably, ELD searches serve no other purpose—ELD data can *only* be used to enforce hours-of-service regulations. *See, e.g.*, 49 U.S.C. § 31137(e)(1), (3); *see also* App. Div. Opening Brief at 29-30 (R297-98).

New York's administrative search exception to Article I, Section 12 covers only *proper* administrative searches and does not extend to searches designed to help government officials enforce criminal laws. Only those search rules that are "part of a comprehensive administrative program that is unrelated to the enforcement of the criminal laws" fit within the exception. *Keta*, 79 N.Y.2d at 501-02. The ELD Rule, on its face, authorizes searches that are designed to enforce the hours-of-service rules. The ELD Rule's warrantless searches of commercial truck drivers for the sole purpose of finding evidence of violations of HOS rules that carry criminal sanctions constitutes a facial violation of Article I, Section 12.

II. Petitioners allege that the ELD Rule does not provide the procedural protections demanded by the administrative search exception that would serve as a substitute for a warrant.

The Department cannot use warrantless administrative searches, like those authorized by the ELD Rule, that are designed to uncover evidence of crimes. *See supra* Part I. But even if it could, the ELD Rule lacks the procedural protections that the administrative search exception requires to ensure that individuals' rights, normally protected by a warrant, remain protected without probable cause and judicial oversight. *See, e.g.*, *Keta*, 79 N.Y.2d at 498-99, 502.

Warrantless search regimes must satisfy three conditions to fall within the administrative search exception[4] to Article I, Section 12: (1) The target must have a minimal, at most, expectation of privacy (*People v. Davis*, 156 Misc.2d 926, 931 (Sup. Ct. Bronx Cnty. 1993)); (2) The search must be necessary to further the regulatory scheme (*see Keta*, 79 N.Y.2d at 500); and (3) The search regime must include rules that guarantee "certainty and regularity" of application to protect against the risk of arbitrary or abusive enforcement (*see id.* at 499-500; *see also*

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[4] That an industry faces regulation pervasive enough to open the door to application of the administrative search exception does not answer the question of whether a particular search fits within the exception. The exception's elements ensure that a search regime adequately replaces the absent warrant—the government does not have carte blanche to engage in unbounded warrantless searches in all aspects of trucking even if trucking constitutes a closely or pervasively regulated industry. *See, e.g.*, *People v. Reyes*, 154 Misc.2d 476, 478 (Crim. Ct. Bronx Cnty. 1993) (explaining that authorization to conduct a warrantless safety inspection of a commercial motor vehicle did not extend to a search of the driver's cab).

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

Petitioners allege that the ELD Rule meets none of the conditions required by *Keta*, and the failure to meet any one condition is fatal under Article I, Section 12.

A. Truck drivers' expectation of privacy in their vehicles exceeds the "minimal" interest that can be invaded under the closely regulated business exception.

The closely regulated business exception to the warrant requirement applies only to searches that invade only a minimal expectation of privacy. *See Davis*, 156 Misc.2d at 931 (citing *Keta*, 79 N.Y.2d at 500). This means governments can use warrantless administrative searches to inspect commercial premises, not persons. *See, e.g.*, *Whren v. United States*, 517 U.S. 806, 819 n.2 (1996) ("An administrative inspection is the inspection of business premises conducted by authorities responsible for enforcing a pervasive regulatory scheme."); *see also Rethinking Closely Regulated Industries*, 129 Harv. L. Rev. 797, 797 (2016) ("The closely regulated industry exception applies to searches of *commercial* premises for *civil* purposes."). The ELD Rule and the HOS rules, on the other hand, constitute searches of the location of commercial vehicles and persons—invasions

of privacy interests that far exceed the minimal expectation of privacy that can be invaded with warrantless administrative searches.

First, even if drivers possess a diminished expectation of privacy on the open road, it cannot be said that they have the *minimal* expectation of privacy required for the exception. Compl. ¶¶ 33, 37 42, 93-94 (R24-25, R33); *cf. Quackenbush*, 88 N.Y.2d at 542-44 (explaining that a driver does not have a diminished expectation of privacy in a vehicle's private areas "where personal effects would be expected"). This Court in *Weaver* and *Cunningham* has also recognized the substantial privacy interests that drivers retain in their GPS-monitored locations, even when driving on public roads.

Furthermore, the hours-of-service rules are intended to regulate truck drivers' physical condition—*i.e.*, to combat driver fatigue. *See, e.g.*, Sup. Ct. Dec. at 9 (R13); App. Div. Op. at 8 (R221). Apart from whether ELDs advance this aim at all (the Department has not shown that they do), this feature of ELD searches means the government uses ELDs to monitor persons, not merely inspect premises. The Appellate Division erred when it determined that this ELD monitoring, because it uses GPS to track the location of a vehicle rather than a person, does not constitute a search of the person outside the scope of the exception. App. Div. Op. at 6 (R219).

And second, commercial trucks are not like the typical commercial premises that have been found to be subject to legal administrative searches, and Supreme Court below erred in equating the two. *See* Sup. Ct. Dec. at 8 (R12). Drivers use their trucks in both a commercial and personal capacity, distinguishing them from any other businesses that New York courts have addressed under the administrative search exception. For example, unlike taxi drivers, *see Carniol v. N.Y.C. Taxi & Limousine Comm'n*, 42 Misc.3d 199, 209 (Sup. Ct. N.Y. Cnty. 2013) (noting that the GPS technology is not designed "to collect personal information about the driver"), commercial trucks are, by nature, both vehicles of personal conveyance and the place where many drivers rest their heads at night. *See* Compl. ¶¶ 93-95 (R32). For some drivers, their truck is their only home. *See id.* at ¶ 93 (R32). Commercial trucks are not akin to a shop owner choosing to live above a business subject to an administrative search. The personal nature of commercial trucks is inherent to an industry that frequently requires its workers to spend long stretches on the road.

Petitioners have alleged a claim under Article I, Section 12 in light of drivers' constitutionally significant expectation of privacy and the government's using ELD searches to inspect more than mere commercial premises. A diminished expectation of privacy is not a nonexistent one. This Court recognized as much when it held warrantless GPS searches unconstitutional in *Weaver* and

Cunningham. Commercial truck drivers retain an expectation of privacy in their location that exceeds the limits of the administrative search exception.

B. The Department has not demonstrated that warrantless searches are necessary as required to fit within the administrative search exception.

For warrantless searches to pass constitutional muster under the administrative search exception, the government must demonstrate that *warrantless* searches are *necessary*. This requirement is not satisfied by a general, even substantial, policy interest. *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). No doubt the government would argue that it has a substantial interest in advancing most if not all its policy aims. And surely the government would argue that warrantless searches would advance those interests. *But see supra* at 5-9 (describing limited usefulness of ELD data relative to paper logs).

But a policy goal, even a worthy one like highway safety, does not alone satisfy the government's burden to demonstrate that it needs *warrantless* searches to advance that goal. The government's interest in furthering its objectives will always exist in administrative search cases, but, contrary to the ruling of Supreme Court below, this interest does not end the "necessary" inquiry. *See, e.g.*, Sup. Ct. Dec. at 9 (R13) (noting that ELD Rule is intended to "further a goal . . . to reduce

accidents attributable to driver fatigue" and determining that warrantless ELD searches are necessary). Moreover, merely because an industry faces sufficient regulation to be considered "pervasively regulated" does not mean warrantless searches are "necessary"; if it did, that requirement would be superfluous. *Cf.* App. Div. Op. at 5 (quoting *Quackenbush*'s discussion of accident inspections).

Thus, in dismissing Petitioners' claims, Supreme Court and the Appellate Division below determined, implicitly, that warrantless GPS tracking is necessary. But the Department presented no argument during its rulemaking explaining why warrantless searches were "necessary." *See* Sup. Ct. Dec. at 8-9 (R12-13); March 20, 2019 Emergency Rule Making at R75-76 (describing the needs and benefits of adopting the ELD mandate); April 24, 2019 Notice of Adoption at R150 (explaining the adoption of the ELD mandate without change in response to OOIDA's comments); *see also generally* App. Div. Op. at 8-11 (R221-24).

The primary thrust of the government's position on the "necessary" element is that incorporation of the ELD Rule was "necessary" under federal law and the Department's MCSAP contract with FMCSA. April 24, 2019 Notice of Adoption at R149-50 (explaining the adoption of the ELD mandate without change in response to OOIDA's comments). But neither premise is true.[5] The Department

[5] In any event, neither would satisfy the "necessary" element of the administrative search standard, which focuses on whether the government in fact needs warrantless searches to enforce its regulatory regime.

was not required under federal law to adopt the ELD Rule (or to adopt it without a warrant requirement or other procedural enhancements to protect New Yorkers' privacy). Likewise, the Department's desire for federal highway funds through voluntary participation in MCSAP cannot trump the New York Constitution.

The government's failure to provide a convincing justification for their warrantless searches can be easily explained: The government does not *need* warrantless GPS tracking to enforce the hours-of-service rules. *Cf. City of Los Angeles v. Patel*, 576 U.S. 409, 427 (2015) (rejecting the argument that requiring a warrant will undermine the enforcement regime when there are other mechanisms to achieve the requisite judicial oversight).

Thus, in addition to failing to explain ELDs' limited utility as explained above, *supra* at 5-9, the Department has not shown that warrantless searches are necessary to advance its goals; searches authorized by the ELD Rule do not fit within the administrative search exception to Article I, Section 12.

C. The ELD Rule procedures do not sufficiently limit officer discretion, which the administrative search exception standard requires to provide a constitutionally adequate warrant substitute.

Even if commercial truck drivers possessed only the minimal expectation of privacy that can be legally invaded during an administrative search, and even if the Department had demonstrated that it needed *warrantless* searches to enforce the HOS rules, the ELD Rule does not meet the (necessarily) full-bodied procedural

requirements of the administrative search exception. These standards ensure that warrantless administrative search regimes protect individuals' rights in lieu of the absent warrant and guarantee "certainty and regularity of application." *Keta*, 79 N.Y.2d at 502; *see* Compl. ¶¶ 7, 12-13, 130-34 (R21, R22, R36-37). Supreme Court below examined the "quantity and quality of information to be recorded by the ELD" when considering this requirement. Sup. Ct. Dec. at 8 (R12). Whether ELDs limit the "quantity and quality of information" they collect does not alone answer the question of whether the ELD Rule sufficiently protects individual rights.

The Appellate Division's analysis similarly fails to fully confront this requirement. The court concluded that "the type of information recorded by the ELD and the scope of a search permitted by the rule are narrow" such that ELD searches are reasonable. App. Div. Op. at 8-9 (R221-22). The court below focused on the (purported) lack of specificity in ELD geography data. *See id.* The court ignored the reams of unnecessary personal information that could be revealed by the government's tracking driver on-duty movements within half a mile (*id.* at 8) or why drivers must tell the government their *off-duty* location information to help combat driver fatigue. And, the ELD and HOS rules require the collection of driver location data but do not provide for its use. *See supra* at 5-8.

Moreover, administrative search cases make clear that warrantless search schemes do not fit within the exception unless the search rules "set forth a minimum or maximum number of times that a particular establishment may be searched within a given time period" and "furnish guidelines for determining which establishments may be targeted." *Keta*, 79 N.Y.2d at 499-500. And governments must establish "limits on the time, place, and scope of searches." *Collateral Loanbrokers Ass'n of New York, Inc. v. City of New York*, 178 A.D.3d 598, 600 (1st Dept. 2019) (holding the warrantless search regime of pawnbroker business facially unconstitutional); *see also Karakus v. N.Y.C. Dep't of Consumer Affairs*, 114 A.D.3d 422, 423 (1st Dept. 2014) ("Even assuming a compelling government interest in surprise inspections of pedicabs in the absence of particularized suspicion, such stops do not meet constitutional standards unless 'undertaken by some system or uniform procedure, and not gratuitously or by individually discriminatory selection.'" (quoting *Quackenbush*, 88 N.Y.2d at 544 n.5)); *Reyes*, 154 Misc.2d at 479-80 (citing *Patchogue-Medford Cong. of Teachers v. Board of Education*, 70 N.Y.2d 57, 70 (1987), and *People v. Ingle*, 36 N.Y.2d 413, 419 (1975)).

These requirements are not mere formalities. Procedural limitations ensure that officers do not possess unrestrained discretion and provide the protections typically guaranteed by constitutional probable cause and warrant requirements.

See Collateral Loanbrokers Ass'n, 178 A.D.3d at 600-01; *Matter of Casalino Interior Demolition Corp. v. Martinez*, 29 A.D.3d 691, 692 (2d Dept. 2006) (holding a search unconstitutional because it was not conducted "according to nonarbitrary, nondiscriminatory, uniform procedures for detecting violations").

But the ELD Rule lacks many of the constraints on the discretion of enforcement officials required by Article I, Section 12. The ELD Rule does not limit the time, location, or frequency of an enforcement official's request to inspect and/or download ELD-recorded information, information that consists of continuous collection of GPS and other data. *See* Compl. ¶¶ 133, 143-44, 155, 158-59, 167-69, 174 (R37, R38-39, R40, R41). The ELD Rule also does not incorporate, expressly or impliedly, other regulations that might limit the discretion of enforcement officials. *See id.* at ¶¶ 66, 132, 134-35, 159, 169 (R28, R37-38, R40-41); March 20, 2019 Emergency Rule Making at R75-76; April 24, 2019 Notice of Adoption at R149-50; *cf. Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600 ("Contrary to defendants' argument, [the law] is not merely a general authorizing statute that looks to other sources to articulate and refine specific legal standards for searches."). Here, contrary to the Appellate Division's conclusions, the ELD Rule's procedural limitations do not adequately protect drivers' rights. Limitations on officer discretion in one area do not alone satisfy the exception's requirements. Thus, even though the ELD Rule claims to limit the uses for which

officers can use ELD data, the rule does not limit, for instance, search frequency, timing, or location.

The courts below ignored Petitioners' allegations regarding the ELD Rule's procedural shortfalls which result in a search regime that does not adequately protect commercial truck drivers' privacy rights. *See* Sup. Ct. Dec. at 8-9 (R12-13); App. Div. Op. at 8-9 (R221-22). Instead, the courts have significantly expanded this narrow exception to Article I, Section 12's warrant requirement. This Court should reverse the decision of the Appellate Division affirming dismissal of a warrantless search regime that runs over the procedural guidelines that this Court and others have repeatedly and carefully recognized as crucial to protecting the privacy rights of individuals in this state.

Moreover, the Department has not shown that any significant policy advancement accompanies this significant privacy invasion. The Department has not shown that ELDs increase highway safety or driver fatigue. Indeed, they still rely on manual driver inputs, and thus provide a *de minimis* increase in hours-of-service accuracy in certain crucial ways. Drivers must, as they did with logbooks, manually record whether they are still working, off duty, or in the sleeper berth. This information ultimately determines whether a drivers' driving time is lawful: The amount of time a trucker can drive a truck depends on both when and how

much time the trucker spent off duty (49 C.F.R. § 395.3(a)(1)) and time spent on duty working but not driving (*id.* § 395.3(a)(2)).

Notably, the GPS tracking at issue here does not directly impact a drivers' hours of service. "Location" is not a part of the formula for calculating a trucker's driving time under the rules. *See* 49 C.F.R. § 395.3(a). Yet ELDs represent a significant increase in privacy intrusion over paper logs. Drivers had to record their location when they changed duty status under the paper log rules. *Id.* § 395.8(h)(5) ("city, town, or village"). ELDs record the driver's location not only at each change of duty status but also every hour between changes in duty status, even when the driver is off duty. *Id.* § 395.8(b)(3), (c)-(d). FMCSA recently proposed decreasing the recording interval to every 30 or 15 minutes. *See* 87 Fed. Reg. at 56,924. And ELDs record location data to within half a mile for on-duty time and 10 miles for off-duty time.

Given the questionable improvement in recording accuracy of driver duty status that ELDs provide compared to paper logs, and the tenuous, at best, connection between a driver's location and the calculation of the driver's hours of service, ELDs provide at most a *de minimis* advancement of the Department's interest in improving hours-of-service compliance. And such an insignificant advancement cannot justify the increased (and ever-increasing) intrusion into truckers' privacy.

If ELDs have not been shown to markedly increase highway safety, why does the Department require them? Indeed, the Department adopted the ELD Rule because its federal highway money could be in jeopardy if it did not. But a state agency's (even reasonable) desire to abide by an agreement with the federal government does not trump New York's Constitution and its protection of individuals' privacy in New York.

Truck drivers hauling goods into, out of, and through the state of New York face a litany of challenges standing in the way of their delivering their loads safely and promptly. Many of these obstacles are inherent to the work, but many are imposed without due consideration of the effects on drivers. This Court should recognize the important rights at stake and require the state government to respect the rights of those it regulates, including when the state acts as a condition of securing funds from the federal government.

III. Petitioners alleged that the ELD Rule authorizes searches that violate Article I, Section 12, which satisfies the burden required to state a facial challenge to a New York search law.

The Appellate Division, consistent with Defendants' arguments, referred to and apparently applied a "reasonable doubt" standard to Defendants' motion to dismiss Petitioners' facial challenge to ELD searches. App. Div. Op. at 4 (R217). But this Court's cases demonstrate that, even if plaintiffs must overcome a presumption of constitutionality, facial challenges need only demonstrate that the

law at issue authorizes searches that violate Article I, Section 12 and need not satisfy any additional burden of persuasion, particularly on a motion to dismiss.

A. New York law does not require parties to satisfy an enhanced burden of persuasion to state a claim for facial violations of Article I, Section 12.

Petitioners do not challenge a particular instance of an ELD search and instead have alleged that the ELD Rule violates the Constitution on its face because it authorizes searches that violate Article I, Section 12. Such facial challenges are not generally disfavored. *See Amazon.com, LLC v. N.Y. State Dep't of Taxation & Fin.*, 81 A.D.3d 183, 194 (1st Dept. 2010); *Patel*, 576 U.S. at 417-19. This and other New York courts have repeatedly entertained them, *see, e.g.*, *People v. Stuart*, 100 N.Y.2d 412, 429 (2003) (Kaye, J., concurring), including those brought under Article I, Section 12. *See, e.g., Patchogue-Medford Congress of Teachers*, 70 N.Y.2d at 62-63; *Collateral Loanbrokers*, 178 A.D.3d at 599-600. Thus, even though state statutes are presumed constitutional, this presumption can be rebutted, and New York courts strike down state laws that facially violate the Constitution. *See, e.g., People v. Viviani,* 36 N.Y.3d 564, 576 (2021) ("Despite that appropriately heavy burden, we conclude that the challenged portions of Executive Law § 552 … are facially unconstitutional."); *see also Owner Operator Indep. Drivers Ass'n v. N.Y.S. Dep't of Taxation & Fin.*, 52 Misc.3d 855, 857, 858-59

(Sup. Ct. Albany Cnty. 2016) (noting presumption but granting summary judgment to truckers upon finding that New York truck tax violated Commerce Clause).

Indeed, this Court in *Burger* accepted a facial challenge under Article I, Section 12: "Because New York City Charter § 436 and Vehicle and Traffic Law § 415-a(5)(a) permit such warrantless searches, they are facially unconstitutional." *Burger*, 67 N.Y.2d at 345; *see also Keta*, 79 N.Y.2d at 492.

The Appellate Division, First Department's *Collateral Loanbrokers* decision serves as a recent straightforward example for evaluating a facial challenge under Article I, Section 12. There, the First Department held a pawnbroker search regime facially unconstitutional as outside the limits of the closely regulated business exception. *See Collateral Loanbrokers Ass'n*, 178 A.D.3d at 599-600. The court analyzed the facial challenge based on "the words of the statute on a cold page and without reference to defendant's conduct." *Stuart*, 100 N.Y.2d at 421. The search statute violated Article I, Section 12 on its face because it did not adequately limit "time, place, and scope" of enforcement as required under the administrative search exception. *Collateral Loanbrokers Ass'n*, 178 A.D.3d at 600.

This Court can also look to the U.S. Supreme Court's recent facial challenge cases for guidance. *Cf. Stuart*, 100 N.Y.2d at 421 (relying on the Court's analysis in *United States v. Salerno*, 481 U.S. 739 (1987) and *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). *City of Los Angeles v. Patel*

involved a facial challenge to a city ordinance that required hotel guest records to be available for inspection upon request. 576 U.S. 409, 412-13 (2015). In overturning the search regime, the Court elucidated three important principles of facial challenges to warrantless search regimes. *See id.* at 419, 426-27.

First, facial challenges to warrantless search regimes "are not categorically barred or especially disfavored." *Id.* at 415. Indeed, the Supreme Court has repeatedly upheld facial challenges. *Id.* at 416-17 (collecting cases). Second, "when assessing whether a statute is [unconstitutional in all its applications], the [courts have] considered only applications of the statute in which it actually authorizes or prohibits conduct." *Id.* at 418. Whether other circumstances might render a search legal—such as local enforcement policy or exigent circumstances—does not impact the facial analysis. *See id.* at 417-18. Finally, facial challenges to administrative searches can be successful where the authorizing statute fails to ensure, at least under the federal standard, "certainty and regularity." *Id.* at 427-28.

Thus, whether statutes are presumed constitutional, plaintiffs state a claim for a facial violation of Article I, Section 12 when they demonstrate that a search regime authorizes searches that violate Article I, Section 12.

B. Petitioners allege the ELD Rule authorizes searches that violate Article I, Section 12.

The ELD Rule authorizes warrantless searches to uncover evidence of criminal violations in violation of Article I, Section 12, *supra* Part I. And, as described above, *supra* Part II, the ELD Rule's procedures do not sufficiently protect privacy interests to serve as the warrant substitute required by the administrative search exception. Thus, Petitioners have alleged that Defendants' ELD searches violate Article I, Section 12 and have therefore stated a claim for a facial constitutional violation.

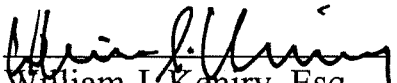
CONCLUSION

This Court consistently recognizes the importance of New York's Constitution and its role as foremost protector of individual rights in the state. But the Department's incorporation of the ELD Rule stands as yet another example of the state government ignoring the state Constitution and the rights it protects and paying attention instead only to policy goals (goals not advanced by the ELD Rule) and its access to federal funding. The Department, in its bid to safeguard the flow of federal highway dollars, rubber stamped the federal government's search regime without regard to whether it comported with the essential state constitutional obligations that protect individuals' privacy rights or whether the Department's substantial privacy intrusions yield any increase in highway safety.

This Court should reverse the rulings of the Appellate Division and Supreme Court and affirm the state government's role as protector of New Yorkers' rights rather than a mere enforcement arm of the federal government.

Dated: November 7, 2022
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 9,972 words.

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