No. _____

In The Supreme Court of the United States

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., MARK ELROD, and RICHARD PINGEL,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, AND THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Electronic Logging Device (ELD) Rule subjects 3.5 million commercial motor vehicle drivers to warrantless inspections intended to enforce driver compliance with federal hours of service (HOS) regulations. ELDs continuously monitor and record the activities of drivers while operating their vehicles. Enforcement officers are authorized to extract ELD data during roadside inspections without a warrant. Criminal citations for HOS violations are issued routinely by inspecting officers at the roadside. Ninety-five percent of HOS enforcement activities are undertaken by state enforcement officers operating under federal grants. The ELD Rule fails to establish regulations at the federal level to serve as a constitutionally adequate substitute for a warrant as required under *New York v. Burger*, 482 U.S. 691, 703 (1987) and imposes no requirement on enforcing states to include such regulations at the state level.

1. Whether the Seventh Circuit erred by extending the pervasively regulated industry exception to the Fourth Amendment's warrant requirement beyond the administrative search of business *premises* to include the search of drivers in support of the ordinary needs of law enforcement?

2. Whether the ELD rule violates the Fourth Amendment by failing to establish a regulatory structure at both the federal and state levels to serve as a constitutionally adequate substitute for a warrant?

LIST OF PARTIES TO THE PROCEEDING BELOW

Petitioners:

Owner-Operator Independent Drivers Association, Inc.

Mark Elrod

Richard Pingel

Respondents:

United States Department of Transportation

Federal Motor Carrier Safety Administration

United States of America

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Owner-Operator Independent Drivers Association, Inc. states that it has no parent corporations, subsidiaries (including wholly-owned subsidiaries), or affiliates that have issued shares to the public. Petitioners Mark Elrod and Richard Pingel are unincorporated drivers.

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OPINIONS BELOW

The October 31, 2016 opinion of the United States Court of Appeals for the Seventh Circuit denying the Petition for Review is reported at 840 F.3d 879 and is reproduced at pages 1-32 of the appendix to this Petition. The Petition for Review challenged the lawfulness of a regulation promulgated by the Federal Motor Carrier Safety Administration requiring electronic logging devices (ELDs) to be installed on commercial motor vehicles operating within the United States and establishing requirements concerning the technical aspects and the use of ELDs. The notice of FMCSA's Final Rule is reported at 80 Fed. Reg. 78292, and the relevant portions thereof are reproduced at pages 52-60 of the appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit had subject matter jurisdiction of the Petition for Review under 28 U.S.C. §§ 1331 & 2342(3)(A). The causes of action alleged in the Petition for Review that are relevant to the instant Petition for a Writ of Certiorari arise under 49 U.S.C. § 31137 and the Fourth Amendment to the United States Constitution. This Court's jurisdiction arises under 28 U.S.C. § 1254(1).

The United States Court of Appeals for the Seventh Circuit issued its Opinion on October 31, 2016. Petitioners timely filed a petition for rehearing

en banc. The Seventh denied Petitioners' petition for rehearing *en banc* in an Order dated January 12, 2017. App. 33-34.

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. §§ 31102 & 31137, 49 C.F.R. § 350.215, and 80 Fed. Reg. 78292, the relevant portions of which are reproduced at App. 35-60. This case also involves the Fourth Amendment to the United States Constitution; 49 U.S.C. §§ 113, 521, & 31102; 49 C.F.R. §§ 350.101, 350.201, & 390.37; and Ala. Code § 32-9A-4, Ariz. Rev. Stat. § 28-5240, 21 Del. C. § 4709, 625 Ill. Comp. Stat. 5/18b-108, Iowa Code § 321.482, Me. Rev. Stat. tit. 29-A § 558-A, N.M. Stat. § 65-3-5, N.Y. Transp. Law § 213, Tenn. Code § 65-15-106, Tex. Transp. Code § 644.151, & W.Va. Code § 24A-7-4, the relevant portions of which are reproduced below.

U.S. Const. amend. IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

49 U.S.C. § 113. Federal Motor Carrier Safety Administration

* * *

(f) Powers and duties. – The Administrator shall carry out –

(1) duties and powers related to motor carriers or motor carrier safety vested in the Secretary by chapters 5, 51, 55, 57, 59, 133 through 149, 311, 313, 315, and 317 and by section 18 of the Noise Control Act of 1972 (42 U.S.C. 4917; 86 Stat. 1249-1250); except as otherwise delegated by the Secretary to any agency of the Department of Transportation other than the Federal Highway Administration, as of October 8, 1999; and

(2) Additional duties and powers prescribed by the Secretary.

49 U.S.C. § 521. Civil penalties

* * *

(b) Violations relating to commercial motor vehicle safety regulation and operators. –

* * *

(6) Criminal penalties. –

(A) In general. – Any person who knowingly and willfully violates any provision of subchapter III of

chapter 311 (except sections 31138 and 31139) or section 31502 of this title, or a regulation issued under any of those provisions shall, upon conviction, be subject for each offense to a fine not to exceed $25,000 or imprisonment for a term not to exceed one year, or both, except that, if such violator is an employee, the violator shall only be subject to penalty if, while operating a commercial motor vehicle, the violator's activities have led or could have led to death or serious injury, in which case the violator shall be subject, upon conviction, to a fine not to exceed $2,500.

49 C.F.R. § 350.101

(a) What is the MCSAP? The MCSAP is a Federal grant program that provides financial assistance to States to reduce the number and severity of accidents and hazardous materials incidents involving commercial motor vehicles (CMVs). The goal of the MCSAP is to reduce CMV-involved accidents, fatalities, and injuries through consistent, uniform, and effective CMV safety programs. Investing grant monies in appropriate safety programs will increase the likelihood that safety defects, driver deficiencies, and unsafe motor carrier practices will be detected and corrected before they become contributing factors to accidents. The MCSAP

also sets forth the conditions for participation by States and local jurisdictions and promotes the adoption and uniform enforcement of state safety rules, regulations, and standards compatible with the Federal Motor Carrier Safety Regulations (FMCSRs) and Federal Hazardous Material Regulations (HMRs) for both interstate and intrastate motor carriers and drivers.

49 C.F.R. § 350.201

To qualify for MCSAP Funds, each state must:

(a) assume responsibility for improving motor carrier safety by adopting and enforcing State safety laws and regulations, standards, and orders that are compatible with Federal regulations, the FMCSRs . . . , and standards, and orders of the Federal Government, except as may be determined by the Administrator to be inapplicable to a State enforcement program.

(b) Implement performance-based activities, including deployment and maintenance of technology to enhance the efficiency and effectiveness of CMV safety programs.

(c) Designate a Lead State Agency responsible for administering the CVSP throughout the State.

(d) Give satisfactory assurances that the Lead State Agency has or will have the legal authority, resources, and qualified personnel necessary to enforce the FMCSRs and HMRs or compatible State laws or regulations, standards and orders in the CVSP.

(e) Give satisfactory assurances that the State will devote adequate resources to the administration of the CVSP including the enforcement of the FMCSRs, HMRs, or compatible State laws, regulations, standards, and orders throughout the State.

(f) Provide that the total expenditure of amounts of the Lead State Agency responsible for administering the Plan will be maintained at a level of effort each fiscal year in accordance with 49 C.F.R. 350.301.

(g) Provide a right of entry (or other method a State may use that is adequate to obtain necessary information) and inspection to carry out the CVSP.

(h) Provide that all reports required in the CVSP under this section be available to FMCSA upon request.

(i) Provide that the Lead State Agency adopt the reporting standards and use the forms for recordkeeping, inspections, and investigations that FMCSA prescribes.

(j) Require all registrants of CMVs to demonstrate their knowledge of applicable FMCSRs, HMRs, or compatible State laws or regulations, standards, and orders.

(k) Grant maximum reciprocity for inspections conducted under the North American Inspection Standards through the use of a nationally accepted system that allows ready identification of previously inspected CMVs.

(l) Ensure that activities described in 49 C.F.R. 350.309, if financed through MCSAP funds, will not diminish the effectiveness of the development and implementation of the programs to improve motor carrier, CMV, and driver safety.

(m) Ensure that the Lead State Agency will coordinate the CVSP, data collection and information systems, with the State highway safety improvement program under 23 U.S.C. 148(c).

(n) Ensure participation in appropriate FMCSA information technology and data systems and other information systems by all appropriate jurisdictions receiving funding under this section.

(o) Ensure information is exchanged with other States in a timely manner.

(p) Provide satisfactory assurances that the State will undertake efforts that will emphasize and improve enforcement of

State and local traffic laws and regulations related to CMV safety.

(q) Provide satisfactory assurances that the State will address activities in support of the national program elements listed in § 350.109, including the following three activities:

(1) Activities aimed at removing impaired CMV drivers from the highways through adequate enforcement of regulations on the use of alcohol and controlled substances and by ensuring ready roadside access to alcohol detection and measuring equipment.

(2) Activities aimed at providing training to MCSAP personnel to recognize drivers impaired by alcohol or controlled substances.

(3) Activities related to criminal interdiction, including human trafficking, when conducted with an appropriate CMV inspection, and appropriate strategies for carrying out those interdiction activities, including interdiction activities that affect the transportation of controlled substances . . . by any occupant of a CMV.

(r) Establish and dedicate sufficient resources to a program to ensure that accurate, complete, and timely motor

carrier safety data are collected and reported, and to ensure the State's participation in a national motor carrier safety data correction system prescribed by FMCSA.

(s) (1) Provide that the State will enforce registration (i.e., operating authority) requirements under 49 U.S.C. 13902 and 31134, and 49 C.F.R. 392.9a by prohibiting the operation of (i.e., placing out of service) any vehicle discovered to be operating without the required operating authority or beyond the scope of the motor carrier's operating authority.

(2) Ensure that the State will cooperate in the enforcement of financial responsibility requirements under 49 U.S.C. 13906, 31138, 31139, and 49 C.F.R. part 387.

(t) Ensure consistent, effective, and reasonable sanctions.

(u) Ensure that roadside inspections will be conducted at locations that are adequate to protect the safety of drivers and enforcement personnel.

(v) Provide that the State will include in the training manual for the licensing examination to drive a CMV and the training manual for the licensing examination to drive a non-CMV information on best

practices for driving safely in the vicinity of non-CMVs and CMVs.

(w) Provide that the State will conduct comprehensive and highly visible traffic enforcement and CMV safety inspection programs in high-risk locations and corridors.

(x) Except in the case of an imminent or obvious safety hazard, ensure that an inspection of a vehicle transporting passengers for a motor carrier of passengers is conducted at a bus station, terminal, border crossing, maintenance facility, destination, or other location where a motor carrier may make a planned stop (excluding a weigh station).

(y) Ensure that it transmits to roadside inspectors the notice of each Federal exemption under 49 U.S.C. 31315(b) and 49 C.F.R. 390.23 and 390.25 provided to the State by FMCSA, including the name of the person granted the exemption and any terms and conditions that apply to the exemption.

(z) Except for a territory of the United States, conduct new entrant safety audits of interstate and, at the State's discretion, intrastate new entrant motor carriers under 49 U.S.C. 31144(g). The State must verify the quality of the work conducted by a third party authorized to conduct new entrant safety audits under 49 U.S.C. 31144(g) on its behalf and the

State remains solely responsible for the management and oversight of the activities.

(aa) Agree to fully participate in performance and registration information systems management under 49 U.S.C. 31106(b) not later than October 1, 2020, by complying with the conditions for participation under paragraph (3) of that section, or demonstrate to the FMCSA an alternative approach for identifying and immobilizing a motor carrier with serious safety deficiencies in a manner that provides an equivalent level of safety.

(bb) In the case of a State that shares a land border with another country, conduct a border CMV safety program focusing on international commerce that includes enforcement and related projects or forfeit all funds based on border-related activities.

(cc) Comply with the requirements of the innovative technology deployment program in 49 U.S.C. 31102(l)(3) if the State funds operation and maintenance costs associated with innovative technology deployment with its MCSAP funding.

49 C.F.R. § 390.37

Any person who violates the rules set forth in this subchapter or part 325 of subchapter A may be subject to civil or criminal penalties.

Ala. Code § 32-9A-4

(a) Any person violating Section 32-9A-2(a)(1) shall be guilty of a misdemeanor and punished by a fine of not less than twenty-five dollars ($25) nor more than two thousand dollars ($2,000) for each offense. In addition, the court may impose a sentence of imprisonment in the county jail, not to exceed 30 days, for each offense.

Ariz. Rev. Stat. § 28-5240

A. In addition to civil penalties imposed under this chapter, a motor carrier, shipper or manufacturer who operates or causes to be operated a commercial motor vehicle in violation of this chapter or who knowingly violates or knowingly fails to comply with any provision of this chapter or with any rule adopted pursuant to this chapter is guilty of:

1. A class 2 misdemeanor for a first offense.

2. A class 1 misdemeanor for a second offense.

3. A class 6 felony for any subsequent offense.

21 Del. C. § 4709

(a) Any person, driver or motor carrier who violates any subpart of this chapter, or fails to do any act required by any subpart in this chapter or does any act forbidden in this chapter or subpart of the Code of Federal Regulations hereby adopted, upon conviction thereof, shall be sentenced to pay a fine for each violation of not less than $28.75 nor more than $115, or imprisonment for not more than 30 days or both. Any such person, driver or motor carrier committing a second or subsequent offense within 2 years upon conviction thereof shall be sentenced to pay a fine of not less than $115 nor more than $575 or imprisonment for not less than 60 days nor more than 1 year, or both.

625 Ill. Comp. Stat. 5/18b-108

* * *

(b) Except as provided in subsection (d), any driver who willfully violates any provision of this Chapter or any rule or regulation issued under this Chapter is guilty of a Class 4 felony. In addition to any other penalties prescribed by law, the maximum fine for each offense is $10,000.

Such violation shall be prosecuted by the State's Attorney or the Attorney General.

* * *

(d) Any driver who willfully violates Parts 392, 395, Sections 391.11, 391.15, 391.41, or 391.45 of Part 391, or any other Part of Title 49 of the Code of Federal Regulations, as adopted by reference in Section 18b-105 of this Code, which would place the driver or vehicle out of service, when the violation results in a motor vehicle accident that causes great bodily harm, permanent disability or disfigurement, or death to another person, is guilty of a Class 3 felony. Any person other than the driver who willfully violates Parts 392, 395, Sections 391.11, 391.15, 391.41, or 391.45 of Part 391 or any other Part of Title 49 of the Code of Federal Regulations, as adopted by reference in Section 18b-105 of this Code, which would place the driver or vehicle out of service, when the violation results in a motor vehicle accident that causes great bodily harm, permanent disability or disfigurement, or death to another person, is guilty of a Class 2 felony.

Iowa Code § 321.482

It is a simple misdemeanor for a person to do an act forbidden or to fail to perform an act required by this chapter unless the violation is by this chapter or other law of this state

declared to be a serious or aggravated misdemeanor or a felony. Chapter 232 has no application in the prosecution of offenses committed in violation of this chapter which are simple misdemeanors.

Me. Rev. Stat. tit. 29-A § 558-A

1. Crimes; penalties. Except as provided in subsections 2 to 4, a person commits a crime if that person:

> **A.** In fact violates this subchapter or a rule adopted pursuant to this subchapter. Violation of this paragraph is a Class E crime that is a strict liability crime as defined in Title 17-A, section 34, subsection 4-A;
>
> **B.** Intentionally or knowingly permits a violation of this subchapter or a rule adopted pursuant to this subchapter. Violation of this paragraph is a Class E crime. . . .

N.M. Stat. § 65-3-5

A. Any person who violates the provisions of the Motor Carrier Safety Act is guilty of a misdemeanor and shall be punished by a fine not exceeding five hundred dollars ($500) or thirty days in jail, or both.

N.Y. Transp. Law § 213

Any person violating the provisions of this article or failing to keep or falsifying any records to be kept in compliance therewith, or any corporation, company, association, joint-stock association, partnership, person or any officer or agent thereof, who shall require or permit any person to violate the provisions of this article or to falsify any record to be kept in compliance therewith shall be guilty of a misdemeanor and punishable by a fine of two hundred dollars, or by imprisonment not exceeding six months, or both. It shall be the duty of the commissioner, all peace officers, acting pursuant to their special duties, and all police officers, and they are hereby authorized, empowered, and required to enforce the provisions of this article.

Tenn. Code § 65-15-106

* * *

(b)(1) The department of safety shall designate enforcement officers charged with the duty of policing and enforcing this part, and such enforcement officers have authority to make arrests for violation of this part, orders, decisions, rules and regulations of the department of safety, or any part or portion thereof, and to serve any notice, order or subpoena issued by any court, the department of safety, its commissioner or any employee authorized to issue same, and to this end shall have full authority throughout the state.

* * *

(6) In a case in which a penalty is not otherwise provided for in this part, such person commits a Class B misdemeanor and, upon conviction, shall be punished as provided for in § 65-15-113.

Tex. Transp. Code § 644.151

(a) A person commits an offense if the person:

(1) violates a rule adopted under this chapter; or

(2) does not permit an inspection authorized under Section 644.104.

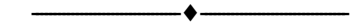
(b) An offense under this section is a Class C misdemeanor.

(c) Each day a violation continues under Subsection (a)(1) or each day a person refuses to allow an inspection described under Subsection (a)(2) is a separate offense.

W.Va. Code § 24A-7-4

Every officer, agent, employee, or stockholder of any motor carrier, or any motor carrier, and every person who violates, procures, aids, or abets in the violation of any of the provisions of this chapter, or who fails to obey any order, decision, requirement, rule, or regulation of the commission or procures, aids, or abets any person in his failure to obey such order,

> decision, requirement, rule, or regulation, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not exceeding one thousand dollars or confined in jail for not less than thirty days nor more than one year, or both, in the discretion of the court. Justices of the peace shall have concurrent jurisdiction with the circuit, criminal and intermediate courts of proceedings to enforce the penalties prescribed by this section.



STATEMENT OF THE CASE

I. Statutory & Regulatory Background

The Federal Motor Carrier Safety Administration (FMCSA) is responsible for promulgating and implementing commercial motor vehicle (CMV) safety standards. In order to discharge this responsibility, FMCSA has entered into a partnership with individual states which, in exchange for federal grants, have agreed to adopt federal safety standards into state law and to enforce those standards against motor carriers and CMV drivers. The federal-state partnership in CMV safety enforcement creates an additional layer of complexity that compounds the currently confused and muddled state of the law in both federal and state courts regarding the application of the pervasively regulated industry exception to the Fourth Amendment's warrant requirement.

FMCSA's electronic logging device (ELD) Rule subjects 3.5 million CMV drivers[1] to warrantless inspections designed specifically to enforce federal hours-of-service (HOS) regulations against such drivers. The federal government has "long limited the number of hours during which commercial truck drivers may operate their vehicles in a given day and over the course of a week." *Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA (OOIDA I)*, 656 F.3d 580, 582 (7th Cir. 2011). A violation of the HOS regulations may result in criminal penalties at both the federal[2] and state levels.[3]

Prior to the Final Rule at issue here, drivers were required to "record[] their hours in paper logbooks . . . to demonstrate compliance with the HOS regulations." *OOIDA I*, 656 F.3d at 582 (quoting 49 C.F.R. § 395.8(k)) (internal citation omitted). In 2012, Congress enacted

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[1] *See Owner-Operator Indep. Drivers Ass'n, Inc. v. FMCSA (OOIDA II)*, 840 F.3d 879, 887 (7th Cir. 2016); App. 10.

[2] *See* 49 U.S.C. § 521(b)(6); 49 C.F.R. § 390.37.

[3] Criminal sanctions are imposed for federal HOS violations by numerous states across the federal judicial circuits. By way of example, these states include: (1st Circuit) Me. Rev. Stat. tit. 29-A § 558-A(1)(A) ("Class E crime"); (2d Circuit) N.Y. Transp. Law § 213 ("misdemeanor"); (3d Circuit) 21 Del. C. § 4709 ("pay a fine . . . or imprisonment . . . or both"); (4th Circuit) W.Va. Code § 24A-7-4 ("misdemeanor"); (5th Circuit) Tex. Transp. Code § 644.151 ("Class C misdemeanor"); (6th Circuit) Tenn. Code § 65-15-106(b)(6) ("Class B misdemeanor"); (7th Circuit) 625 Ill. Comp. Stat. 5/18b-108(d) ("Class 4 felony"); (8th Circuit) Iowa Code § 321.482 ("simple misdemeanor"); (9th Circuit) Ariz. Rev. Stat. § 28-5240(A) ("class 2 misdemeanor for a first offense"); (10th Circuit) N.M. Stat. § 65-3-5 ("misdemeanor"); (11th Circuit) Ala. Code § 32-9A-4(a) ("misdemeanor").

a statute requiring the Secretary of Transportation[4] to prescribe regulations requiring commercial motor vehicles (CMVs) involved in interstate commerce to be equipped with ELDs. 49 U.S.C. § 31137. The statute requires that the ELDs "improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary. . . ." *Id.* § 31137(a)(1)-(2), App. 35. The statute further requires that ELDs accurately and automatically record hours of service, as well as record the location of a CMV. *Id.* §§ 31137(b)(1)(A)(i)-(ii), (f)(1)(A), App. 35, 39. The ELD device must be designed to aid "law enforcement review." *Id.* § 31137(b)(2)(A), App. 36. The information recorded by ELDs is made available to law enforcement personnel during roadside inspections. *Id.* § 31137(b)(1)(B), App. 36. The Secretary may use ELD data "only to enforce the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations." *Id.* § 31137(e)(1); App. 38.

In 2015, FMCSA issued a final rule that purported to comply with the requirements of Section 31137. Electronic Logging Devices and Hours of Service Supporting Documents [hereinafter "ELD Rule"], 80 Fed. Reg. 78292 (Dec. 16, 2015); App. 52. The ELD Rule mandates that drivers currently using paper logbooks instead use ELDs. *Id.* at 78293, App. 53. An ELD

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[4] Responsibility for exercising this statutory authority has been assigned to the Federal Motor Carrier Safety Administration (FMCSA), an agency within the Department of Transportation. 49 U.S.C. § 113(f). Unless the context requires otherwise, references to the "Secretary" refer to each of the Respondents.

integrates with a vehicle's engine and uses GPS technology to automatically record the date, the time, the vehicle's geographic location, the number of engine hours, the number of vehicle miles, and identifying information about the driver and the vehicle. *Id.* at 78386, App. 57-59. Rather than recording changes in duty status automatically, as required by Section 31137, the ELD Rule mandates that a driver manually input his or her duty status before the ELD begins to record. *See id.* at 78386, App. 56. Drivers are required to input other information into their ELD, including changes in duty status, time spent eating and resting in the CMV's sleeper berth, as well as time spent away from the vehicle. *See id.* at 78386, App. 56. During a roadside inspection, an "authorized safety official" is empowered to download these data from an ELD. *Id.* at 78296-97, 78404, App. 54-55, 60. Although the ELD Rule contains numerous references to "authorized safety officials," the Rule fails to define this term—nor is the term defined anywhere else in the Federal Register, the Code of Federal Regulations, or the United States Code.

The ELD enforcement responsibilities are shared between federal and state authorities. The federal motor carrier safety regulations promulgated by FMCSA are enforced primarily by individual states, which, in exchange for federal grants under the Motor Carrier Safety Assistance Program (MCSAP), 49 U.S.C. § 31102, App. 40; 49 C.F.R. Part 350, incorporate the federal standards into state law. *Nat'l Tank Truck Carriers, Inc. v. FHA*, 170 F.3d 203, 205 (D.C. Cir. 1999).

To qualify for federal grants under MCSAP, a state must certify its compliance with numerous requirements imposed by both statute and regulation. 49 U.S.C. §§ 31102(c)(2)(A)-(BB), App. 41-47; 49 C.F.R. § 350.201. If a state does not comply with MCSAP requirements, the Secretary can make a finding of nonconformity and immediately "withhold[] all MCSAP funding." 49 C.F.R. § 350.215(e)(1), App. 50; 49 U.S.C. § 31102(k)(2)(B), App. 48. Ninety-five percent of the HOS enforcement activity is undertaken by state enforcement officers operating under MCSAP grants.[5]

II. Factual Background & Proceedings Below

Petitioners Mark Elrod and Richard Pingel are professional CMV drivers who operate as owner-operators in interstate commerce. The Owner-Operator Independent Drivers Association, Inc. (OOIDA) is a not-for-profit corporation and the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. The approximately 157,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA, Richard Pingel and Mark Elrod each filed written comments with FMCSA in connection with its consideration of

[5] FMCSA, *Pocket Guide to Large Truck and Bus Statistics* 18 (May 2016), http://ntl.bts.gov/lib/59000/59100/59189/2016_Pocket_Guide_to_Large_Truck_and_Bus_Statistics.pdf.

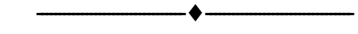
the ELD Rule. Petitioners Elrod and Pingel are members of OOIDA.

Petitioners sought review of the ELD Rule in the Seventh Circuit under 28 U.S.C. § 2342(3). Petitioners advanced several arguments for vacating the ELD Rule, including that the ELD Rule "fails to protect the confidentiality of personal data collected by ELDs" and that "the [R]ule violates the Fourth Amendment's prohibition against unreasonable searches and seizures." *See OOIDA II*, 840 F.3d at 887, App. 11.

The Secretary opposed Petitioners' Fourth Amendment argument by contending that CMV drivers participate in a pervasively regulated industry and therefore have a reduced expectation of privacy, citing *United States v. Burger*, 482 U.S. 691, 700 (1987). Br. for Resp'ts 54-55, No. 15-3756, ECF No. 30. The Secretary contended that warrantless searches are therefore reasonable under the circumstances presented in this case. *Id*. at 55-58. Petitioners did not dispute the fact that interstate trucking is a pervasively regulated industry, but argued that the *Burger* exception has never been extended beyond an administrative search of business *premises* and has never been used to support the ordinary needs of law enforcement. *See* Pet'rs' Opening Br. 50-56, No. 15-3756, ECF No. 21-1. Further, Petitioners argued that the *Burger* exception requires that warrantless searches in a pervasively regulated industry must be accompanied by regulations that act as a constitutionally adequate substitute for a warrant and that the

ELD rule does not provide for such regulations at either the federal or state levels. *Id*. at 57-58.

A three-judge Panel of the Seventh Circuit denied the Petition for Review. *See OOIDA II*, 840 F.3d at 896, App. 1, 32. The Panel held that interstate trucking is a pervasively regulated industry. *Id.* at 892-95, App. 23-29. The Panel declined to address the issues of whether the pervasively regulated industry exception extends beyond the administrative inspection of business premises or whether that exception covers warrantless searches in support of the ordinary needs of law enforcement. *See generally id.* Petitioners timely filed a petition for rehearing *en banc*. The Seventh Circuit denied Petitioners' petition for rehearing *en banc* in an Order dated January 11, 2017. App. 33-34.



REASONS FOR GRANTING THE PETITION

The Seventh Circuit's opinion abandons well-settled principles of Fourth Amendment jurisprudence in the context of administrative searches. Controlling authority establishes that the pervasively regulated industry exception to the Fourth Amendment's warrant requirement applies only to the administrative inspection of business premises—not persons. Further, administrative inspections should never be used to support the ordinary needs of law enforcement. By erroneously approving the ELD Rule, the Seventh Circuit has subjected 3.5 million drivers to warrantless searches designed specifically to uncover evidence of

criminal activity. Further, these searches are unconstrained in scope, time, duration, frequency, and location; indeed, the ELD Rule fails even to inform drivers of *who* is authorized to conduct these searches.

The Seventh Circuit erred in at least two respects, both of which establish a basis for *certiorari*. First, the Court allowed the pervasively regulated industry exception to the Fourth Amendment's warrant requirement to be extended beyond the administrative search of business premises to include the search of persons. The Seventh Circuit's holding here finds some support in decisions made by the Second and Third Circuits, but splits directly with holdings by the Fifth and Eleventh Circuits, all of which are discussed below. Further, this holding represents the first time that the pervasively regulated industry exception—a narrow carve-out from the Fourth Amendment's warrant requirement—has been applied directly to the search of individuals to serve the ordinary needs of criminal law enforcement. In this regard, the Seventh Circuit's determination to allow the warrantless use of ELDs to support the ordinary needs of law enforcement conflicts with longstanding precedent by this Court and specific holdings in the Third, Fifth, Eighth, and Tenth Circuits that each struck down administrative searches when used as a pretext to gather evidence of criminal activity.

Second, even if the Secretary were authorized to allow warrantless, suspicionless searches of individuals to serve the ordinary needs of criminal law enforcement, the ELD Rule would still run afoul of the

Fourth Amendment. The Seventh Circuit upheld, in conflict with this Court's precedent, an administrative search program, implemented at both the federal and state levels, that fails to provide a constitutionally adequate substitute for a warrant. Before the Seventh Circuit issued its opinion, confusion already reigned among the state and federal courts regarding how to apply *Burger* and how to reconcile warrantless administrative searches with the dictates of the Fourth Amendment. The Seventh Circuit's opinion has exacerbated this confusion by approving an administrative search program that contains none of the hallmarks of reasonableness articulated in *Burger* and similar cases. The Seventh Circuit's departure from the precedent established by this Court and its fellow Circuits has created confusion that requires definitive resolution.

Statutes and regulations authorizing warrantless administrative searches are "the 20th-century equivalent of the Act authorizing the writ of assistance." *Illinois v. Krull*, 480 U.S. 340, 364 (1987) (O'Connor, J., dissenting). The writ of assistance provided "general warrants authorizing officials to search any and all residential and commercial premises, without particularized suspicion, to enforce various trade regulations and restrictions," *People v. Scott*, 593 N.E.2d 1328, 1343 (N.Y. 1992). As the New York Court of Appeals has explained:

> Such writs were an important component of colonial resentment against the Crown and, in fact, "ignited the flame that led to American

> independence." 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.

Scott, 593 N.E.2d at 1343 (quoting John S. Morgan, Comment, *The Junking of the Fourth Amendment:* Illinois v. Krull *and* New York v. Burger, 63 Tulane L. Rev. 335, 337 (1988)). In an era of ever-increasing digitization of information, it is imperative to establish checks against the ability of the government to infringe on the privacy of its citizens. "GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . . Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse." *United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring). ELDs continually monitor the location and activity of individuals—information that could be misused by unscrupulous or untrained enforcement officers to conduct warrantless, suspicionless searches to be used in criminal prosecution, as well as to harass, intimidate, or otherwise mistreat drivers. This Court's guidance is necessary to curtail this discretion and to vindicate the Fourth Amendment rights of millions of

individuals who participate in pervasively regulated industries.

ARGUMENT

I. The Circuit Courts are Divided Respecting Whether the Pervasively Regulated Industry Exception to the Fourth Amendment's Warrant Requirement May be Applied Under the Circumstances Present Here

A. There is a Split Among the Circuit Courts Respecting Whether the Pervasively Regulated Industry Exception Extends Beyond the Search of Business Premises

"The [Supreme] Court long has recognized that the Fourth Amendment's prohibition on unreasonable searches and seizures is applicable to commercial premises, as well as to private homes." *New York v. Burger*, 482 U.S. 691, 699 (1987). However, commercial premises carry a lesser expectation of privacy than do private homes, "particularly . . . in commercial property employed in 'closely regulated' industries." *Id.* This Court, therefore, has sometimes authorized warrantless searches of commercial premises in what has come to be known as the pervasively regulated industry exception to the Fourth Amendment's warrant requirement.[6] *See id.* at 700-01.

[6] Before a court may authorize such a search, it must determine, first, whether there is a "'substantial' government

This Court has never authorized the application of the pervasively regulated industry exception beyond the search of business premises. In establishing this exception, this Court has specifically noted that a statute authorizing a warrantless search "must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his *property* will be subject to periodic inspections undertaken for specific purposes.'" *Burger*, 482 U.S. at 703 (quoting *Donovan*, 452 U.S. at 600 (emphasis added)). The foundation for the Court's holding in *Burger* rests on a long series of cases dealing exclusively with administrative inspections of commercial premises. *Donovan*, 452 U.S. at 606 (approving warrantless inspection of stone-quarry); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 322-25 (1978) (disapproving warrantless inspection of factory); *United States v. Biswell*, 406 U.S. 311, 315 (1972) (approving warrantless inspection of premises on which firearms were sold); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (disapproving warrantless inspection of premises on which liquor was sold). At least four judges of the Seventh Circuit have noted that "*Burger* does not deal with searches of persons and living quarters located on business premises" and that only this Court may broaden the exception to the Fourth Amendment's warrant requirement established in *Burger*. *Serpas v.*

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interest that informs the regulatory scheme pursuant to which the inspection is made," and second, whether "the warrantless inspections . . . [are] 'necessary to further [the] regulatory scheme.'" *Burger*, 482 U.S. at 702 (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)).

Schmidt, 827 F.2d 23, 34-35 (7th Cir. 1986) (Easterbrook, Posner, Coffee, & Manion, JJ., dissenting from denial of rehearing *en banc*).

The ELD Rule does far more than authorize administrative inspections of business premises. HOS regulations are directed toward the personal conduct of drivers. *See OOIDA I*, 656 F.3d at 582. ELDs monitor and record driver conduct, including driver activity and location, twenty-four hours per day, seven days per week, more expansively and invasively than paper logbooks currently do. Commercial motor vehicles used for truck-load freight transportation are typically equipped with a sleeping berth, a microwave oven for preparing driver meals, a television set and other amenities for the driver's personal comfort. ELDs record a driver's off-duty time while occupying the sleeper berth of the vehicle and using these amenities. The warrantless, suspicionless intrusion into this deeply personal information cannot be justified under the administrative search rationale that has been used to uphold impersonal record-keeping requirements and accompanying inspections. *Cf. Anobile v. Pelligrino*, 303 F.3d 107, 121 (2d Cir. 2001) (barring warrantless searches of racetrack dormitories); *Serpas*, 827 F.2d at 28-29 (same). Indeed, the only case relied upon by the Seventh Circuit involved neither an administrative search nor the pervasively regulated industry exception for a warrantless search. *OOIDA II*, 840 F.3d at 895, App. 28 (citing *Krieg v. Seybold*, 481 F.3d 512, 518 (7th Cir. 2007)). In *Krieg*, the Seventh Circuit upheld the random drug testing of

city-employed heavy equipment operators, finding that the drug testing served a "'special governmental need'" for persons in safety sensitive positions. *Krieg*, 481 F.3d at 517-20 (quoting *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665 (1989)). Nothing in the *Krieg* ruling can be interpreted to extend to "persons" the constitutionality of an administrative search based upon the pervasively regulated industry exception to the requirement for a warrant.

In *Whren v. United States*, Justice Scalia, writing for a unanimous Court, observed that *Burger* upheld the constitutionality of a warrantless administrative inspection "of *business premises* conducted by authorities responsible for enforcing a pervasive regulatory scheme. . . ." 517 U.S. 806, 811 n.2 (1996) (emphasis added). Here, the Seventh Circuit held that individuals working in a pervasively regulated industry may be personally subjected to continuous recording of their whereabouts, and work and rest activities, by sophisticated monitoring devices over long periods of time.

The Seventh Circuit's opinion represents a split with the Fifth and Eleventh Circuits and the Virginia Court of Appeals. In *Bruce v. Beary*, 498 F.3d 1232 (11th Cir. 2007), the Eleventh Circuit held that the administrative search of an auto body repair shop could not be extended to justify the search and detention of employees of the shop. *Id.* at 1244-48. The court explained that the search and detention of employees "hardly seems to be what the Supreme Court had in mind in *Burger* when it held that the

Constitution is not offended by statutes authorizing the regular routine inspection of books and records required to be kept by auto salvagers." *Id.* at 1244. Thus, the court found that the search of "persons" exceeded the proper scope of an administrative inspection: "Not just vehicles were searched; everyone on the Premises was. Not just VIN plates were seized; driver's licenses were also. Not just records were seized; employees were detained for ten hours." *Id.* at 1247. The same can be found in the so-called administrative searches authorized by the ELD Rule. The devices do not record only the on-duty/off-duty time required by HOS regulations. ELDs record a driver's location and activity twenty-four hours a day, seven days a week, including personal sleep time and off-duty personal excursions taken in the truck unit.

Similarly, the Fifth Circuit in *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181 (5th Cir. 2009) found that the Fourth Amendment protects the owner of a commercial establishment, even a heavily regulated one, from *unreasonable* intrusions onto his property by agents of the government. *Id.* at 202-03. The Fifth Circuit observed:

> No reasonable deputy sheriff in defendants' positions could have concluded that such a raid—in which they, e.g., threatened individuals with weapons, threw employees to the ground, searched the attic and trashed the cash registers, broke down the door to a closed apartment, and blocked the exists [sic] to a

> club they believed to be overcrowded—was a lawful, warrantless administrative search to check for underage alcohol consumption or fire code violations.

Id. at 203. And the Virginia Court of Appeals held that, although mining was a "closely regulated industry" and Virginia law prohibited smoking and smokers' articles like matches and lighters in the mines, authorities illegally seized cigarettes and lighters from individual miners. *Commonwealth v. Burgan*, 450 S.E.2d 177, 178 (Va. App. 1994). The court held that the closely regulated industry exception to the Fourth Amendment "has been applied to the search of commercial premises, not searches of the person." *Id.* at 174.

The Second and Third Circuits agree with the Panel and are in conflict with the Fifth and Eleventh Circuits regarding the constitutionality of administrative searches of persons based upon the pervasively regulated industry exception. The Third Circuit allowed drug testing of employees under the administrative search exception in the closely regulated New Jersey horse-racing industry. *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir. 1986). The Court held:

> Consequently, while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for

> alcohol and drug use can be said to be constitutionally unreasonable. We therefore hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry.

Id.; *see also Policemen's Benev. Ass'n of N.J., Loc. 318 v. Washington Tp. (Gloucester Cnty.)*, 850 F.2d 133, 141 (3d Cir. 1988) (allowing random drug testing of police officers as an administrative search because "the police industry is probably the most highly regulated, with respect to performance of its employees, of any industry in New Jersey"). The Second Circuit, in *Anobile v. Pelligrino*, 303 F.3d 107 (2d Cir. 2001), ruled consistently with *Shoemaker*, allowing pat-downs of persons incident to administrative searches of racetrack grounds. The Court found that "[b]ecause these searches all occurred in areas of the racetrack where the highly regulated activities addressed by the regulations were taking place . . . we conclude that the regulations provided persons present in those areas with sufficient notice of the likelihood of a search to satisfy the Fourth Amendment." *Id.* at 123. Review is necessary to resolve the splits among the Circuits and to bring coherence and clarity to the question of whether persons who are part of pervasively regulated industries may be subjected to suspicionless and warrantless searches.

B. The Seventh Circuit's Decision Upholding the Use of Warrantless, Suspicionless Searches to Support the Ordinary Needs of Law Enforcement Conflicts with Holdings in the Third, Fifth, Eighth, and Tenth Circuits

"In the law of administrative searches, one principle emerges with unusual clarity and unanimous acceptance: the government may not use an administrative inspection scheme to search for criminal violations." *Burger*, 482 U.S. at 724 (Brennan, J., dissenting). This Court approved the administrative search scheme at issue in *Burger* with the express recognition that "the New York Legislature had proper regulatory purposes for enacting the administrative scheme and was not using it as a 'pretext' to enable law enforcement authorities to gather evidence of penal law violations." *Burger*, 482 U.S at 716 n.27. Moreover, in other cases, this Court has consistently affirmed the principle that administrative searches may not be used as a pretext for seeking evidence of criminal activity. *City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000), citing *Whren*, 517 U.S. at 811-12 ("[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are *not* made for those purposes."); *Abel v. United States*, 362 U.S. 217, 226 (1960) ("The deliberate use by the Government of an administrative warrant for the purpose of gathering evidence in a criminal case must meet stern resistance

by the courts."); *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) (holding that the issuance of an administrative warrant to search a building following a fire may be permissible, but "'[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.'") (quoting *People v. Tyler*, 250 N.W.2d 467, 477 (Mich. 1977)).

The administrative search regime at issue here violates these repeated admonitions. Section 31137 is designed to support direct criminal enforcement of FMCSA's HOS regulations at both the federal and state levels. At the federal level, 49 U.S.C. § 521(b)(6) and 49 C.F.R. § 390.37 identify criminal penalties for HOS violations. Furthermore, as demonstrated by the examples identified above, numerous states, including states in every federal Circuit, directly enforce federal HOS regulations with criminal penalties. *Supra* note 3. Additionally, although Section 31137 states that the Secretary may use ELD data "only to enforce the Secretary's motor carrier safety and related regulations," 49 U.S.C. § 31137(e)(1), App. 38, the ELD Rule fails entirely to curb the discretion of inspecting officials. Motor carriers are required to keep ELD records for at least six months, and they must transmit that data to an authorized safety official upon request. 80 Fed. Reg. 78292, 78385; App. 54-55, 60. As ELDs contain detailed records regarding driver activities and whereabouts, an authorized safety official—again, a term that the Secretary failed to define—may conduct a warrantless search of ELD records to further criminal

investigations ranging from alleged speed limit violations to more nefarious crimes. The ELD Rule fails to establish any safeguards to curtail the discretion of inspecting officials. Although FMCSA holds the purse strings under the MCSAP program and can insist that state enforcement personnel and regulatory bodies abide by statutory and constitutional requirements, FMCSA took no steps to implement at the state level the requirements of Sections 31137(e)(2) & (3) or to require that any warrantless, suspicionless searches comply with the Fourth Amendment. The ELD Rule, therefore, condones a search program that violates the elementary principle that officers investigating criminal offenses must obtain a warrant before conducting a search.

Several courts, including this Court in *Burger*, have dealt with the problem arising when inspecting officers under an administrative inspection plan are motivated by the prospect of eventually bringing criminal charges on the basis of evidence gathered during the administrative inspection. Such searches have been allowed, but only under a narrow set of circumstances not found here.

Burger involved efforts by the state of New York to deal with car thefts and the ability of car thieves to dispose of stolen cars at "chop shops" set up to dismantle stolen cars and sell the parts at a profit. *Burger*, 482 U.S. at 693-94, 708-09. New York enacted an administrative regime to regulate chop shops through licensing and record keeping regulations. *Id.* at 694 nn.1 & 3. Separate penal statutes addressed

dealing with stolen vehicles and parts. *Id.* at 695 n.6. The issue in *Burger* was whether law enforcement personnel could conduct warrantless inspections of chop shops under the administrative code where those inspections regularly uncovered evidence of criminal violations for prosecution. The majority upheld the warrantless search under the administrative regulations:

> So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

Id. at 717.

The majority and dissenting Justices were divided over whether warrantless enforcement of the specific administrative regulations before the Court was being used as a pretext for criminal enforcement. *Id.* at 724 (Brennan, J., dissenting). The majority opinion concluded that the administrative and penal programs were sufficiently separate to permit warrantless administrative inspections. *Id.* at 717 (majority opinion). Here, those functions are merged under § 31137.

United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987), is instructive. In *Nechy*, the Seventh Circuit addressed the question of whether the motives of inspecting officers to gather evidence of criminal acts during an otherwise proper administrative inspection violated the Fourth Amendment. The Seventh Circuit

said no, citing *Burger* and *United States v. Cerri*, 753 F.2d 61, 64 (7th Cir. 1985). *Nechy*, 827 F.2d at 1165. As in *Burger*, the foundation for the holding in *Nechy* was that there was a two-step process at work, with step one being a valid administrative inspection that was separate and distinct from step two, the criminal prosecution: "We are not happy with a mode of justification by which the government is allowed to do in two steps what if done in one would violate the Fourth Amendment. . . . Nevertheless we can see no escape from the conclusion that this two-step process is lawful." *Nechy*, 827 F.2d at 1166.

The facts before the Court today are very different. The ELD enabling statute does not create a separate, stand-alone administrative regime, but is designed specifically to support the ordinary needs of criminal law enforcement. 49 U.S.C. § 31137 requires that ELDs "accurately record commercial driver hours of service," 49 U.S.C. § 31137(b)(1)(A)(i), App. 35, and that the ELD Rule "allow law enforcement to access the data contained in the device during roadside inspections," *id.* at § 31137(b)(1)(B), App. 36. ELD devices must also permit "data transfer and transportability for law enforcement officials." *Id.* at §§ 31137(b)(2)(B)(v), App. 36. Although subsections (e)(1)-(3) state that ELD data is to be used by law enforcement officials to enforce "record-of-duty status regulations" and "hours of service requirements," *id.* at § 31137(e)(1), App. 38-39, the Secretary shirked his duty to "institute appropriate measures to ensure any information collected by [ELDs] is used by enforcement personnel only for the

purpose of determining compliance with hours of service requirements," *id.* § 31137(e)(3), App. 39—a duty that encompasses not only statutory, but constitutional significance.[7] Violations of HOS regulations are subject to criminal penalties at the federal level under 49 U.S.C. § 521(b)(6). Further, as noted above, state enforcement officers operating under federal grants gather ELD data from drivers, and those same officers typically have the authority to issue criminal citations during roadside inspections for violations of HOS regulations. *Supra* note 3. Moreover, the ELD Rule permits "authorized safety officials"—who, because the term is undefined, may include persons uninterested in or without authority to enforce HOS regulations—to access detailed data regarding the whereabouts and activities of every driver for the past six months. Inspectors' unfettered access to this data practically

[7] The Secretary made a halfhearted attempt to cure this error by submitting, following oral argument, an internal FMCSA policy memorandum, published following the close of the administrative record, that states: "FMCSA limits the use of ELD records . . . for enforcement of the HOS requirements in 49 C.F.R. Part 395. ELD records may also be used for certain additional evidentiary purposes consistent with the Agency's longstanding enforcement capabilities. . . ." App. 62. There is no evidence that this internal document has been shared with state or federal enforcement personnel outside FMCSA, let alone that it is binding on any such personnel. Moreover, the text of the memorandum is facially inadequate to curb the discretion of inspecting officials to the extent necessary to satisfy the Fourth Amendment, especially in light of Attachment D to the memorandum, which expressly anticipates using ELD data to support the ordinary needs of criminal law enforcement. App. 63-64.

invites abuse, with warrantless searches used to seek evidence to be used in criminal prosecutions.

The searches authorized by the ELD Rule are not "properly administrative" under *Burger*, because the evidence gathered from the searches is directly related to the enforcement of criminal statutes by the inspecting officers. Indeed, the ELD Rule is most accurately described not as an administrative search program at all, but as a criminal law enforcement scheme whereby officers may conduct warrantless searches to further criminal investigations. The single step process sanctioned here, where law enforcement officers collect ELD data directly from drivers to establish criminal violations, violates the Fourth Amendment.

The issue respecting the use of administrative inspections to support the ordinary needs of law enforcement arises most frequently in the context of the use of such administrative inspections as a pretext for criminal investigation. Here, of course, the language of Section 31137 leaves no doubt that the statute was intended to support the ordinary needs of law enforcement. No need here to look for a pretext. The result under the Fourth Amendment is, however, the same, and the Seventh Circuit's holding conflicts with the holdings in at least four separate Circuits. *See Showers v. Spangler*, 182 F.3d 165, 174 (3d Cir. 1999) (holding that boundaries of administrative inspection authority did not authorize search for evidence of crimes); *Club Retro, L.L.C.*, 568 F.3d at 202 (holding that a raid designed to uncover evidence of criminal

wrongdoing was not a proper administrative search); *United States v. Knight*, 306 F.3d 534, 537 (8th Cir. 2002) (holding that administrative searches may not be used as pretext for criminal investigation); *United States v. Johnson*, 994 F.2d 740, 743 (10th Cir. 1993) (invalidating an administrative search that was employed solely as an instrument of criminal law enforcement).

II. The Seventh Circuit Has Exacerbated a Circuit Split Regarding the Criteria That Must Be Met for an Administrative Search Regime to Provide a Constitutionally Adequate Substitute for a Warrant

A. The Prevailing Law Regarding Warrantless Administrative Searches

Even when warrantless administrative inspections are allowed under the pervasively regulated industry exception, they must be "appropriately limited," *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000), with "reasonable legislative or administrative standards for conducting an . . . inspection," *Camara v. Mun. Court*, 387 U.S. 523, 538 (1967). "Where a statute authorizes the inspection but makes no rules governing the procedures that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Colonnade*, 397 U.S. at 77.

In order for a warrantless inspection program of the commercial premises of a closely regulated business to be lawful, it must, "in terms of the certainty

and regularity of its application, provide[] a constitutionally adequate substitute for a warrant." *Donovan v. Dewey*, 452 U.S. 594, 603 (1981). To satisfy this requirement, the regulatory scheme "must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703. To put the owner on adequate notice, the regulatory scheme "must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.'" *Id.* (quoting *Donovan*, 452 U.S. at 600). The discretion of inspecting officers "must be 'carefully limited in time, place, and scope.'" *Id.* (quoting *United States v. Biswell*, 406 U.S. 311, 316 (1972)). Warrantless searches may not be executed if they are "so random, infrequent, or unpredictable that the owner, for all practical purposes, has no real expectation that his property will from time to time be inspected by government officials." *Donovan*, 452 U.S. at 599. In addition, this Court has suggested that the statute authorizing the search must "notif[y] the [business] operator as to who is authorized to conduct an inspection." *Burger*, 482 U.S. at 711. The "number of searches that may be conducted of a particular business during any given period" is also relevant to an analysis of whether the discretion of inspecting officers is sufficiently limited. *Id.* at 711 n.21.

Beyond these admonitions, this Court has provided little guidance by which the lower courts are to apply the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. As a result, the pervasively regulated industry exception has become muddled, with different Circuits applying different standards, and several Circuits unsure as to what standards to apply at all. State court decisions applying the Fourth Amendment are equally divided and confused.

B. Special Problems Created By the Joint Federal-State Enforcement Structure

The fact that CMV drivers haul freight cross country and that ninety-five percent of inspections are conducted by state enforcement officers present unique constitutional concerns that the ELD rule completely fails to address. For example, a truck hauling freight from Virginia to Massachusetts can pass through nine jurisdictions (Virginia, the District of Columbia, Maryland, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts) during a single 14-hour work day. CMVs commonly cross state lines throughout the lower 48 states. Even within a single state, drivers often confront multiple enforcement authorities (State DOT, State Troopers, County Sheriffs, and local police) with overlapping authority to inspect. Given this unique enforcement environment, it is imperative that the ELD Rule provide explicit, coherent guidance to ensure that searches undertaken to enforce HOS compliance comport with

the Fourth Amendment requirements. The ELD Rule falls short of satisfying this obligation.

The ELD Rule fails to inform a driver of his or her exposure to multiple inspections in multiple states by multiple inspection authorities, and does not place any limitations upon either state or federal enforcement officers who may conduct such inspections at any frequency and at any time of day or night. Indeed, no limitation is even placed on *who* may conduct inspections; the ELD Rule states that "authorized safety officials" may conduct searches, but this term is not defined anywhere in the ELD Rule, the Federal Register, the Code of Federal Regulations, or the United States Code. These deficiencies render the ELD Rule and the Seventh Circuit's opinion approving the Rule at odds with the dictates of this Court and of the remaining Circuits. Moreover, confusion already abounds among state courts as to how to apply *Burger* and related Supreme Court precedent—confusion that will only deepen following the Seventh Circuit's decision in this case. In light of this confusion, it is evident that without additional guidance from this Court, 3.5 million drivers will be subjected to different, and potentially unconstitutional, standards for warrantless searches in every individual state and federal jurisdiction.

C. Decisions by Federal and State Courts Addressing Warrantless Administrative Searches Are Muddled and Confused

"Formulating the boundaries and requirements of administrative search doctrine is . . . a matter of great importance, and yet the rules governing administrative searches are notoriously unclear. In fact, scholars and courts find it difficult to even define what an administrative search is, let alone to explain what test governs the validity of such a search." Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum. L. Rev. 254, 257 (2011). The Eleventh Circuit has narrowly interpreted—and, in part, cast aside—this Court's precedent, holding that an administrative search program is constitutional if it provides adequate notice and adequately limits the discretion of inspecting officers in the *scope* of the search, but ignoring the requirements that the search be "carefully limited in time . . . [and] place," *Biswell*, 406 U.S. at 316. *See United States v. Ponce-Aldona*, 579 F.3d 1218, 1225 (11th Cir. 2009). The Third, Fourth, Fifth, Sixth, and Ninth Circuits have similarly disregarded the mandate to limit the time of the search, though these decisions have purported to enforce the requirement that the search be limited in place. *Heffner v. Murphy*, 745 F.3d 56, 69-70 (3d Cir. 2014); *LeSueur-Richmond Slate Corp. v. Fehrer*, 666 F.3d 261, 266 (4th Cir. 2012); *United States v. Castelo*, 415 F.3d 407, 411 (5th Cir. 2005); *United States v. Dominguez-Prieto*, 923 F.2d 464, 469-70 (6th Cir. 1991); *United States v. Delgado*, 545

F.3d 1195, 1203 n.6 (9th Cir. 2008).[8] In many instances, "the mere existence of a statutory or regulatory regime is deemed sufficient regardless of the degree to which it limits discretion." Primus, *supra*, at 285; *see*, *e.g.*, *United States v. 4,432 Mastercases of Cigarettes, More or Less*, 448 F.3d 1168, 1180 (9th Cir. 2006) (upholding an administrative search program even though it "place[d] few limits on the discretion of searching officers"); *Tart v. Massachusetts*, 949 F.2d 490, 498 (1st Cir. 1991) (opining that "[t]he lack of explicit constraints on the officers' discretion is not determinative").

In some instances, the Circuit Courts have followed this Court's guidance—to the extent that it has been provided—requiring that administrative searches be carefully limited in time, place, and scope, and that the discretion of inspecting officers be adequately limited. *See*, *e.g.*, *United States v. Branson*, 21 F.3d 113, 117-18 (6th Cir. 1994); *United States v. V-1 Oil Co.*, 63 F.3d 909, 912-13 (9th Cir. 1995). However, these courts generally engage in superficial analyses, in the absence of any directive from this Court as to what limits are considered "careful" or "adequate."

Several other Circuits, in attempting to navigate the ambiguity of the phrase "constitutionally adequate

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[8] In an intracircuit split, the Ninth Circuit has, in a different case, strictly enforced the requirements that the search be limited in both time and place. *See Rush v. Obledo*, 756 F.2d 713, 721 (9th Cir. 1985) (invalidating an administrative search program because, *inter alia*, the authorizing statute allowed "searches . . . at any time of the day or night").

substitute for a warrant," have established stricter safeguards than their fellow Circuits. For example, the Tenth Circuit has explicitly held that, in order to be lawful, a regulation establishing an administrative search "must notify owners as to who is authorized to conduct an inspection." *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1211 (10th Cir. 2001). Prior to the Panel's opinion in the instant case, the Seventh Circuit vigorously enforced the Fourth Amendment's warrant requirement, holding that, "[t]o satisfy the 'certainty and regularity' requirement, the inspection program must define clearly what is to be searched, who can be searched, and the frequency of such searches." *Bionic Auto Parts, Inc. v. Fahner*, 721 F.2d 1072, 1078 (7th Cir. 1983).

As a result of this disarray, federal trial courts have been left without clear guidance as to what standards to apply to a warrantless administrative search. For example, one federal case in Texas involved a search program in which police officers arbitrarily placed roadblocks throughout a predominantly African-American neighborhood. *Shankle v. Texas City*, 885 F. Supp. 996, 999 (S.D. Tex. 1995). Police officers used these roadblocks to "summarily den[y] residents access to their homes." *Id.* "No standardized procedures governed the operation of the roadblocks: Police officers had complete discretion regarding whom to stop, what questions to ask, and whom to allow through the checkpoints." Primus, *supra*, at 285; *Shankle*, 885 F. Supp. at 999-1001. The court concluded that "[s]etting up roadblocks to deter young gang members and

then denying home access to people clearly beyond any relevant age group is not only arbitrary and capricious, it is insulting and downright silly." *Shankle*, 885 F. Supp. at 1004. Nevertheless, the court granted qualified immunity to the officers because "the law was not clearly established as to" whether purported "administrative searches" of the type at issue violated the Constitution. *See id.* at 1006. The court's tacit approval of such an outrageous search program demonstrates a sobering fact: "Fourth Amendment doctrine is sufficiently tolerant of executive discretion . . . so as to make it unclear whether officers may barricade an entire neighborhood and capriciously deny many people—who are not even suspected of wrongdoing—access to their own homes." Primus, *supra*, at 286. Such unconscionable results will continue to occur in the absence of clear instructions from this Court as to how to analyze the constitutionality of warrantless administrative searches.

State courts have also fallen victim to this lack of clarity, culminating in a split similar to that which exists among the federal Circuit Courts. For example, at least one state court has explicitly held that "*Burger* did not purport to provide the exclusive criteria by which the constitutional reasonableness of a specific administrative search is determined," *State v. Melvin*, 955 A.2d 245, 249 (Me. 2008), and several other state courts similarly focus on factors beyond those espoused in *Burger*, *see*, *e.g.*, *State v. McClure*, 74 S.W.3d 362, 374 (Tenn. Crim. App. 2001) (invalidating, pursuant to *Donovan* and *Marshall*, an administrative search

program for CMVs because "the regulations allow[ed] safety inspections to be conducted totally at the discretion of the officer in the field"). Contrariwise, some state courts base their holdings solely on the language and criteria in *Burger*, to the exclusion of other Supreme Court precedent, *see generally State v. Klager*, 797 N.W.2d 47 (S.D. 2011); *Horner v. State*, 836 P.2d 679 (Okla. Crim. App. 1992), and some state courts fail to cite *Burger* at all when conducting an analysis of an administrative search of a closely regulated business, *see generally People v. Castillo*, 9 Cal. Rptr. 2d 696 (Cal. Ct. App. 1992).

In another example of confusion, some courts have held that "the time, place, and scope limitations are only *factors* to consider in evaluating the constitutionality of" an administrative search program, *State v. Nobles*, 422 S.E.2d 78, 85 (N.C. App. 1992), *cited with approval in United States v. Steed*, 548 F.3d 961, 973 (11th Cir. 2008); *see also McDonald v. State*, 778 S.W.2d 88, 90-91 (Tex. Crim. App. 1989) (*en banc*) (approving a warrantless search under an administrative search program that allowed warrantless searches at any time), whereas other state courts diligently obey the Supreme Court's command that such programs "'*must* be carefully limited in time, place, and scope,'" *e.g.*, *De La Cruz v. Quackenbush*, 96 Cal. Rptr. 92, 103 (Cal. Ct. App. 2000) (quoting *Burger*, 482 U.S. at 703) (emphasis added) (internal quotation marks and citation omitted); *accord Commonwealth v. Leboeuf*, 934 N.E.2d 1285, 1289 (Mass. App. Ct. 2010); *Burgan*, 450 S.E.2d at 175; *Scott*, 593 N.E.2d at 1344.

In this case, the Seventh Circuit almost entirely ignored the precedent established by this Court, aggravating the lack of uniformity among the Circuits and further obscuring the already unclear instructions for federal and state trial courts to follow when evaluating administrative searches. Neither the authorizing statute nor the ELD Rule limit the discretion of inspecting officers as to the time and place of inspections, nor do the statute or ELD Rule define the frequency at which drivers may be subject to searches. Further, the ELD Rule fails to apprise drivers of who may conduct inspections. The failure to impose these limitations is particularly important here because the joint federal-state enforcement scheme exposes drivers to multiple inspections, in multiple states, at the unconstrained discretion of enforcement officers in multiple jurisdictions. The Seventh Circuit held, however, that the ELD Rule does not offend the Fourth Amendment. *OOIDA II*, 840 F.3d at 895-96, App. 29-32.

The Seventh Circuit failed to address whether the administrative searches at issue are of such certainty and regularity and whether the discretion of inspecting officials is sufficiently constrained as to pass constitutional muster. The Seventh Circuit's opinion has established an intracircuit split—and deepened the existing intercircuit split—by holding, effectively, that an administrative search regime under the pervasively regulated industry exception need not contain any safeguards at all, let alone safeguards that serve as a constitutionally adequate substitute for a warrant. The opinion focuses only on what the

inspecting officers may inspect and what they may do with the ELD data, not how, when, or even who may conduct inspections. The Court's entire analysis regarding the discretion of inspecting officers comprises one paragraph:

> [T]he discretion of inspecting officers is limited in two important ways. First, the ELD mandate authorizes officers to inspect only ELD data; it does not provide discretion to search a vehicle more broadly. Second, § 31137(e)(3) requires the agency to take steps to ensure that law enforcement uses ELDs only to enforce compliance with the hours of service rules. The agency acknowledged this during rulemaking, and the agency issued a memorandum limiting the use of ELD records to enforcement of the hours of service requirements. Taken together, these protections create a constitutionally adequate substitute for a warrant in the commercial trucking industry.

OOIDA II, 849 F.3d at 896. This analysis ignores the Seventh Circuit's directive in *Bionic Auto Parts*, which requires that the inspection program "define clearly" how frequently searches may occur. *Bionic Auto Parts*, 721 F.2d at 1078. It further ignores this Court's mandate that the inspection program be "carefully limited in time, place, and scope," *Biswell*, 406 U.S. at 316, this Court's holding that certainty as to the identity of inspecting officials should be considered in determining the constitutionality of an administrative search regime, *Burger*, 482 U.S. at 711, and the holdings of

several of its fellow Circuits that have followed, at least to some extent, this Court's guidance in *Burger* and related cases, *see*, *e.g.*, *Vasquez-Castillo*, 258 F.3d at 1211. Moreover, the Seventh Circuit stands alone in authorizing an administrative search regime that fails to identify who may conduct searches.

"The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search." *Marshall*, 436 U.S. at 323. By failing to curtail that discretion, the ELD Rule constitutes a flagrant violation of the Fourth Amendment. The Seventh Circuit's opinion upholding the Rule has split with its fellow Circuits and has further unsettled the already nebulous standards by which both state and federal courts seek to apply the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. The Seventh Circuit has gone far beyond the holdings established by this Court and its fellow Circuits. The Seventh Circuit's opinion approving warrantless searches under circumstances that lie at the confluence of a deeply personal intrusion on driver privacy and the unfettered discretion of enforcement officers to use that intrusion to prosecute criminal offenses—is uniquely offensive to the Fourth Amendment.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

No. 15-3756

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., MARK ELROD, and RICHARD PINGEL,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,

Respondents.

On Petition for Review of the Final Rule of the Federal Motor Carrier Safety Administration. FMCSA-2010-0167.

ARGUED SEPTEMBER 13, 2016 –
DECIDED OCTOBER 31, 2016

Before BAUER, KANNE, and HAMILTON, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Since 1935, federal law has regulated the hours of service of truck drivers operating in interstate commerce. The regulations are intended to reduce fatigue-related accidents, and they require drivers to keep paper records showing their driving time and other on-duty time. Compliance has

long been an issue, though, because it is easy to insert an error in paper records, whether intentionally or not.

In 2012, Congress directed the Department of Transportation to issue regulations to require most interstate commercial motor vehicles to install electronic logging devices (ELDs). ELDs are linked to vehicle engines and automatically record data relevant to the hours of service regulations: whether the engine is running, the time, and the vehicle's approximate location. The devices are intended to improve drivers' compliance with the regulations, to decrease paperwork, and ultimately to reduce the number of fatigue-related accidents. Congress instructed the Department in promulgating the rule to consider other factors as well, such as driver privacy and preventing forms of harassment enabled by the ELDs. 49 U.S.C. § 31137. The Federal Motor Carrier Safety Administration, which is part of the Department of Transportation, promulgated the final rule requiring ELDs in 2015. Electronic Logging Devices and Hours of Service Supporting Documents, 80 Fed. Reg. 78,292 (Dec. 16, 2015) ("Final ELD Rule"), codified in 49 C.F.R. Pts. 385, 386, 390, and 395.

Petitioners Mark Elrod, Richard Pingel, and the Owner-Operator Independent Drivers Association (OOIDA) brought this action for judicial review of the final rule. Elrod and Pingel are professional truck drivers, and OOIDA is a trade organization. They argue that the agency's final rule should be vacated for five reasons. We uphold the final rule and deny their petition.

Petitioners claim first that the final rule is contrary to law because it permits ELDs that are not entirely automatic. We disagree. Petitioners' reading of the statute seeks to pit one statutory requirement against another rather than allow the agency to balance competing policy goals endorsed by Congress. Second, petitioners argue that the agency used too narrow a definition of "harassment" that will not sufficiently protect drivers. This claim also fails. When defining harassment, the agency sought input from drivers, motor carriers, and trade organizations; it considered administrative factors; and it ultimately provided a reasonable definition of the term. Third, petitioners argue that the agency's cost-benefit analysis was inadequate and fails to justify implementation of the ELD rule. However, the agency did not need to conduct a cost-benefit analysis for this rule, which was mandated by Congress. Even if such analysis were required, the studies were adequate. Fourth, petitioners argue that the agency did not sufficiently consider confidentiality protections for drivers. The agency, however, adopted a reasonable approach to protect drivers in this regard.

Fifth, petitioners argue that the ELD mandate imposes, in effect, an unconstitutional search and/or seizure on truck drivers. We find no Fourth Amendment violation. Whether or not the rule itself imposes a search or a seizure, inspection of data recorded on an ELD would fall within the "pervasively regulated industry" exception to the warrant requirement. The

agency's administrative inspection scheme for such information is reasonable.

I. *Factual and Regulatory Background*

The agency's road to the 2015 final rule was long and rocky. That history is relevant to several of petitioners' arguments, particularly the claims that ELDs must be entirely automatic, that ELD benefits do not outweigh their costs, and that the ELD mandate violates the Fourth Amendment.

A. *Federal Regulation of Commercial Motor Vehicles*

In the early twentieth century, commercial motor vehicles were largely regulated by individual states. See John J. George, *Federal Motor Carrier Act of 1935*, 21 Cornell L. Rev. 249, 249-51 (1936). This decentralized system ran into dormant commerce clause problems. In a series of cases, the Supreme Court struck down state regulations of commercial motor vehicles that interfered with interstate commerce. See, e.g., *Buck v. Kuykendall*, 267 U.S. 307 (1925) (striking down state's attempt to require certificate of "public convenience" to compete in commercial interstate transportation); *George W. Bush & Sons Co. v. Maloy*, 267 U.S. 317 (1925) (same); *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183 (1931) (striking down state tax on privilege of providing interstate bus transportation). In 1935, Congress responded by passing the Federal Motor Carrier Act of 1935, Pub. L. No. 255, § 201, 49 Stat. 543.

The Act delegated authority to the Interstate Commerce Commission to regulate many elements of interstate freight and passenger motor vehicle traffic. Most relevant for this case, the Act directed the Commission to regulate the maximum hours of service for commercial drivers. *Id.*, § 204(a)(1). Regulating hours of service was intended to promote highway safety by reducing accidents related to driver fatigue. 79 Cong. Rec. 12209-37 (1935). This remains the goal of the hours of service regulations today. Final ELD Rule, 80 Fed. Reg. at 78,303. Jurisdiction over the regulations moved to the Federal Highway Administration in 1995 and then to the new Federal Motor Carrier Safety Administration in 2000. See Interstate Commerce Commission Termination Act, Pub. L. 104-88, 109 Stat. 803 (1995); *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188, 193 (D.C. Cir. 2007) (discussing regulatory history).

The regulations require drivers to document four possible statuses: (1) driving; (2) on duty, not driving; (3) in the sleeper berth; and (4) off duty. 49 C.F.R. § 395.8(b). They set out maximum times for driving and require a minimum number of hours off duty each day. They also establish the maximum permissible on-duty time for each week.

Driver status has been traditionally documented through paper logs called the "Record of Duty Status." Drivers are required to keep copies of these records for seven days before submitting them to their motor carrier. 49 C.F.R. § 395.8(k)(2). The carrier must retain copies for six months. § 395.22(i)(1). Both drivers and

carriers must provide these records to authorized safety officials during roadside inspections or audits. If a driver violates the hours of service or fails to maintain her records accurately, she may be placed out of service. § 395.13.

These paper records have been ongoing sources of concern because they are easy to falsify. For example, a driver could exceed the cap on continuous driving (11 hours), but fail to record the excess hours. § 395.3(a)(3)(i). There is evidence that falsification of paper records occurs on a regular basis. 65 Fed. Reg. 25,540, 25,558 (May 2, 2000) (agency noting that hours of service violations are widespread). The paper records are also vulnerable to human error. Final ELD Rule, 80 Fed. Reg. at 78,303. These concerns were part of the impetus to update the hours of service regulations.

B. *Efforts to Update the Hours of Service Regulations*

In 1995, Congress directed the agency to revise the hours of service regulations for commercial motor vehicles. Pub. L. 104-88 § 408, set out as note under 49 U.S.C. § 31136 (1996 Supp.). The Agency then tried to modernize the regulations. The agency's proposed new rules have been struck down three times, twice by the Court of Appeals for the District of Columbia Circuit and once by this court.

In 2003 the agency issued a new final rule that overhauled the hours of service rules. 68 Fed. Reg.

22,456 (Apr. 28, 2003). The rule altered various requirements, including the length of the daily driving limit, the daily off-duty requirement, and the weekly on-duty maximum. See *id.* at 22,457, 22,501-02. The D.C. Circuit vacated the rule because the "agency failed to consider the impact of the rules on the health of drivers, a factor the agency must consider under its organic statute." *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

The agency then issued a revised final rule in 2005. 70 Fed. Reg. 49,978 (Aug. 25, 2005). The D.C. Circuit again held that the agency erred. *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 494 F.3d 188 (D.C. Cir. 2007). This time, the agency violated the Administrative Procedure Act by failing to provide sufficient opportunity for interested parties to comment on the method that justified the change in the hours of service rules. The agency also failed to explain sufficiently certain elements of that method. *Id*. at 193.

Within the agency's broader efforts to update the hours of service rule was a narrower issue of electronic monitoring. Before promulgating the 2003 rule, the agency considered requiring electronic on-board recorders (EOBRs), which are the technical and regulatory predecessors of ELDs. See 65 Fed. Reg. 25,540, 25,598 (May 2, 2000). The agency considered requiring EOBRs in response to Congress's 1995 directive to issue an advance notice of proposed rulemaking "dealing with a variety of fatigue-related issues pertaining to

commercial motor vehicle safety . . . including . . . automated and tamperproof recording devices." Pub. L. 104-88 § 408, set out as note under 49 U.S.C. § 31136 (1996 Supp.).[1]

While the proposed rule would have required EOBRs, the agency decided not to require them at that time. 68 Fed. Reg. 22,456, 22,488 (Apr. 28, 2003). The D.C. Circuit vacated the 2003 rule on other grounds but also admonished the agency for failing to respond adequately to the statutory directive to "deal [] with . . . automated and tamperproof recording devices," noting that the agency's decision on that point was "probably flawed." *Public Citizen*, 374 F.3d at 1220-22.

In response, the agency further investigated EOBRs. In 2004, the agency issued an optional advanced notice of proposed rulemaking, which indicated that it was still considering EOBR implementation. 69 Fed. Reg. 53,386 (Sept. 1, 2004). Then, in 2007 the agency issued a formal notice of proposed rulemaking that considered three issues: (1) EOBR performance standards; (2) mandatory use of EOBRs for motor carriers that regularly violated hours of service rules; and (3) incentives to promote voluntary use of EOBRs. 72 Fed. Reg. 2,340, 2,343 (Jan. 18, 2007). The final rule issued in 2010 required, among other things, that motor carriers "that have demonstrated serious noncompliance with the HOS [hours of service] rules will be

[1] This statute was first directed to the Federal Highway Administration in 1995, but that agency never took any action. The responsibility then fell to the Federal Motor Carrier Safety Administration.

subject to mandatory installation of EOBRs." 75 Fed. Reg. 17,208, 17,208 (Apr. 5, 2010). This rule led to the agency's third rebuke by the courts.

In 2011, this court vacated the final rule regarding EOBRs. *Owner-Operator Independent Drivers Ass'n v. Federal Motor Carrier Safety Admin.*, 656 F.3d 580 (7th Cir. 2011) ("*OOIDA I*"). As in the D.C. Circuit's 2003 decision, we found that the agency had failed to consider a statutory requirement: to ensure that electronic monitoring would not be used to harass drivers. 49 U.S.C. § 31137(a) (2011). Instead of building in safeguards to prevent EOBRs from being used to harass drivers, the agency had provided "a single conclusory sentence in the final rulemaking to the effect that the Agency 'has taken the [] statutory requirement[] into account throughout the final rule.' " *OOIDA I*, 656 F.3d at 588. This shortcoming rendered the final rule arbitrary and capricious. See 5 U.S.C. § 706.

C. *The Current Challenge to ELDs*

In 2012, Congress stepped in again and passed the Commercial Motor Vehicle Safety Enhancement Act of 2012. This time Congress was more direct. It ordered the Secretary of Transportation to issue regulations requiring most commercial vehicles to "be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations." 49 U.S.C. § 31137(a)(1). The Act specified several factors for the Secretary to consider in implementing the ELD mandate, including the potential for

harassment, § 31137(a)(2); the potential to reduce paper documents, § 31137(d)(1); driver privacy, § 31137(d)(2); and the confidentiality of personal data, § 31137(e).

To comply with this statutory mandate, the agency issued its final rule in 2015. Final ELD Rule, 80 Fed. Reg. 78,292 (Dec. 16, 2015). The rule (1) mandates ELDs for all vehicles that are currently required to maintain hours of service records; (2) provides technical specifications for ELDs; (3) clarifies the extent to which supporting paperwork is required; and (4) adopts provisions to ensure that ELDs are not used to harass drivers. *Id.* at 78,293. The compliance date for the ELD mandate is set for December 18, 2017, *id.* at 78,292, and it will affect an estimated 3.5 million drivers.

The rule prescribes requirements for ELDs. They must automatically link to vehicle engines when the engines turn on, and they must record the date, time, location, engine hours, vehicle miles, driver identification, vehicle identification, and motor carrier identification. 49 C.F.R. § 395.26. The collection of this data is intentionally limited in scope. Instead of continuously tracking this information, ELDs record only at specified times, such as when the vehicle is turned on, when the duty status changes, and once per hour while driving. *Id*. In addition, ELDs do not pinpoint a vehicle's exact location. They provide location only within a one-mile radius. Final ELD Rule, 80 Fed. Reg. at 78,296. As with the paper records, authorized safety officials may

review ELD data without a warrant at roadside inspections and during audits of motor carriers. 49 C.F.R. § 395.24(d); § 395.22(j).

II. *Analysis*

We now turn to petitioners' five arguments for vacating the 2015 final rule: (a) ELDs will not record enough information automatically; (b) the rule fails to protect drivers sufficiently from harassment; (c) the rule's benefits will not outweigh its costs; (d) the rule fails to protect the confidentiality of personal data collected by ELDs; and (e) the rule violates the Fourth Amendment's prohibition against unreasonable searches and seizures.

A. *"Automatically"*

Petitioners first argue that ELDs must be entirely automatic to comply with Congress's mandate. The statute directs the agency to issue regulations requiring an electronic monitoring device that "is capable of recording a driver's hours of service and duty status accurately and automatically." 49 U.S.C. § 31137(f)(1)(A). Petitioners argue that "automatically" means *entirely* automatic; no human involvement is permitted. They contend the device must be capable of automatically recording when a driver changes between the four statuses: driving; on duty, not driving; sleeper berth; and off duty. Petitioners also argue that if drivers must manually enter any information into the ELDs, this will enable falsification and

defeat the purpose of the statute. For instance, the ELDs prescribed in the rule cannot automatically capture on-duty, non-driving work, such as loading a truck. If a driver must manually input this status, she could falsify the record.

It is unclear what devices petitioners envision, and they do not say. Such a device would need to monitor quite a few variations in human activity. If the device must function *entirely automatically*, how should it record a driver's change from "off duty" to "on-duty, not driving"? According to petitioners, a driver may not clock-in manually; that would not be automatic. Or what if a driver is in the sleeper berth, but performing on-duty, non-driving work, such as reviewing a bill of lading? What type of device could tell the difference without any manual input?

Two possibilities are constant video surveillance or perhaps some form of bio-monitoring device.[2] But naming these possibilities shows why petitioners did not mention them: they would be breathtakingly invasive. Whether we review the agency's interpretation of "automatically" under *Chevron* or *Skidmore*, we are confident that Congress did not intend to require such invasive devices when it used the word "automatically." See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (deferring to

[2] By way of illustration, NASA has experimented with devices to monitor astronauts' sleep patterns. See, e.g., NASA, *Wearable System for Sleep Monitoring in Microgravity (Wearable Monitoring)*, July 14, 2016, http://www.nasa.gov/mission_pages/station/research/experments/1279.html.

agency's reasonable interpretation of ambiguous statute); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (deferring to agency's statutory interpretation to extent it is persuasive).

First, petitioners read the single word "automatically" in isolation, ignoring the rest of the statute. This runs contrary to the Supreme Court's repeated instruction to "construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. ___, ___, 135 S. Ct. 2480, 2489 (2015), citing *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010). We interpret statutes "as a symmetrical and coherent regulatory scheme," *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), and "fit, if possible, all parts into an harmonious whole," *Federal Trade Comm'n v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959). Here, other parts of the statute provide important context for the "automatic" requirement. For instance, the statute also directs the agency to ensure that ELDs will not be used to harass drivers, 49 U.S.C. § 31137(a)(2), and to consider drivers' privacy, § 31137(d)(2). These provisions show that Congress meant for the agency to balance competing goals. The agency understood this and balanced the competing directives in a reasonable manner.

Second, petitioners' interpretation of "automatically" is belied by prior use of the word in precisely this context. When Congress was drafting the 2012 Act, it was aware of the EOBR rule this court vacated in 2011. See S. Rep. No. 112-238 at 4 (2012) (discussing EOBRs). The 2012 statutory mandate for ELDs in 49

U.S.C. § 31137 used the same language that described EOBRs in the previous agency rule: devices "capable of recording a driver's hours of service and duty status accurately and automatically." 49 C.F.R. § 395.2 (2010). If Congress had intended a very different sort of device – such as a bio-monitor – it would have given some indication. Instead, Congress used the same phrase, strongly implying that it intended a device with similar capabilities and limitations.

Third, under petitioners' reading of the statute, Congress hid a sweeping change – all-encompassing surveillance of commercial drivers – in the interpretation of the word "automatically." We are confident that Congress did not intend that. In construing arguably ambiguous statutory terms, it is usually prudent to assume that Congress does not "alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001). More colloquially, Congress does not "hide elephants in mouseholes." *Id.* We do not interpret "automatically" to require constant video surveillance or bio-monitors. The ELDs prescribed by the agency function "automatically" within the meaning of § 31137.

B. *Driver "Harassment"*

Petitioners' second argument takes the tack opposite from the first: the final rule should be vacated because it does not protect drivers sufficiently from harassment. As noted, we vacated the 2011 rule

because the agency failed to consider the statutory mandate to "ensure that the devices are not used to harass vehicle operators." *OOIDA I*, 656 F.3d at 582, citing 49 U.S.C. § 31137(a).

After our earlier decision, the agency sought input to determine how ELDs might be used to harass drivers. 76 Fed. Reg. 20,611 (Apr. 13, 2011). In 2012, the agency conducted two public listening sessions, with options for online participation. See Final ELD Rule, 80 Fed. Reg. at 78,320. It also conducted a survey of drivers and motor carriers regarding the potential for ELD-related harassment. *Id*. at 78,298. The agency received substantial feedback from drivers, motor carriers, and trade associations. It incorporated some of these suggestions into its final rule, including several suggestions from petitioner OOIDA. *Id.* at 78,321.

For purposes of this rule, the agency ultimately defined harassment as "an action by a motor carrier toward a driver . . . involving the use of information available to the motor carrier through an ELD . . . that the motor carrier knew, or should have known, would result in the driver violating § 392.3 [prohibiting driving when abilities may be impaired by fatigue, illness, or "any other cause"] or part 395 [hours of service rules]." 49 C.F.R. § 390.36(a). In other words, ELD-related harassment can take two forms: when a motor carrier uses an ELD to encourage a driver to drive (1) when the driver's ability is somehow impaired; or (2) in violation of the hours of service rules.

Petitioners contend this definition is too narrow. They argue that by linking harassment to driver impairment and hours of service, the rule protects drivers from only a "very limited subset" of possible harassment. Similar to their argument about "automatically," petitioners claim that since the term "harassment" is unqualified in the statute, it must include *every* possible form of harassment.

On this issue the agency's interpretation of "harassment" is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*'s two-part test, we first ask if, using the "traditional tools of statutory construction," Congress has "directly spoken to the precise question at issue." *Id*. at 842, 843 n.9. If not, we proceed to *Chevron*'s second step and ask whether the agency's interpretation was "based on a permissible construction of the statute." *Id*. at 843.

Here, Congress has not "directly spoken" to the precise meaning and scope of the "harassment" mandate. As we said in 2011, the term harassment is "undefined in the statute and thus require[s] some amplification." *OOIDA I*, 656 F.3d at 588. Since Congress did not fill in the precise content, we assume that the "statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *King v. Burwell*, 576 U.S. at ___, 135 S. Ct. at 2488, quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). At *Chevron*'s second step, the agency's interpretation is reasonable.

Like the statute itself, the agency linked the definition of harassment to the use of ELDs. The agency explained that it intentionally tied the definition of harassment to specific regulatory violations to provide "objective criteria" for managing harassment allegations. Final ELD Rule, 80 Fed. Reg. at 78,326. The agency claims this will help its administrators, who are located throughout the country, address harassment complaints in a consistent and timely manner. *Id*.

The agency also bolstered its harassment definition in response to specific concerns raised by drivers during the notice-and-comment process. For instance, a number of drivers expressed concern that motor carriers would use ELDs to interrupt their sleep. *Id*. at 78,323, 78,326. In response, the agency required ELDs to include a mute function or volume control. 49 C.F.R. Pt. 395, Subpt. B, App. A 4.7.1(a). Drivers also expressed concern that carriers might pressure them to alter their ELD records. Final ELD Rule, 80 Fed. Reg. at 78,320, 78,323, 78,325. In response, the agency required that ELDs be made tamper-resistant, and the devices must retain a copy of their original records even if edited. *Id*. at 78,303. In addition, the agency adopted two specific proposals from petitioner OOIDA: it is expressly unlawful for motor carriers to use ELDs to harass drivers, and the agency established a process for drivers to file harassment complaints. *Id.* at 78,321.

The rule complies with the statutory mandate to protect drivers from harassment. The agency sought input from various stakeholders, considered logistical

and administrability factors, and addressed specific concerns raised during outreach sessions. In *OOIDA I*, we said that the definition of harassment needed elaboration. The agency has provided it in a reasonable way.

Moreover, petitioners have not identified an instance of harassment that the agency's definition will leave unprotected. The one example that petitioners offer is based on a mistake. They argue that a motor carrier might pressure a driver to continue driving during dangerous weather conditions. Since this does not violate the hours of service rules, petitioners reason, it would not be considered "harassment" under the rule's definition. That is incorrect. This situation would fall under the other portion of the agency's definition, which covers situations where a motor carrier pressures a driver to drive when her ability is impaired for any reason. 49 C.F.R. § 392.3 (noting that motor carrier may not require a driver to operate a commercial vehicle "while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness *or any other cause*, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle") (emphasis added). The agency's definition of harassment thus reaches petitioners' hypothetical. And even if some forms of potential harassment might fall outside the agency's definition, that would not render its definition unreasonable.

C. *Cost-Benefit Analysis*

Petitioners next challenge the agency's analysis of the costs and benefits of the ELD rule. They argue that the agency's calculation of the benefits is flawed because (1) ELDs will not improve hours of service compliance because they are not entirely automatic; and (2) the studies indicating otherwise are unreliable. We also reject this challenge. The agency was not required to conduct a cost-benefit analysis for this particular rule. Even if it had been required to do so, its studies were sufficient.

Requiring ELDs was not left to the discretion of the agency; Congress mandated it. In the 2012 legislation, Congress did not instruct the Agency to *consider* requiring electronic monitoring, as it had in the Interstate Commerce Commission Termination Act of 1995. See Pub. L. 104-88 § 408, set out as note under 49 U.S.C. § 31136 (1996 Supp.). In 2012, Congress simply ordered the agency to *require* ELDs. Section 31137(a) states that the Secretary "shall prescribe regulations . . . requiring" commercial motor vehicles to be "equipped with an electronic logging device." Congress instructed the agency to consider certain other factors such as the potential for harassment, § 31137(a)(2); the potential to reduce paper documents, § 31137(d)(1); driver privacy, § 31137(d)(2); and the confidentiality of personal data, § 31137(e). Congress did not condition issuance of the rule on a cost-benefit analysis.

Petitioners claim that consideration of the costs and benefits of the § 31137 ELD mandate is required

under § 31136. That is not correct. While § 31136 requires the agency to consider costs and benefits when promulgating minimum safety standards for commercial motor vehicles, § 31136(c)(2)(A), that requirement is expressly limited to regulations "under this section." § 31136(c)(2). It does not apply to § 31137, which contains the ELD mandate.

Section 31136 provides additional evidence that the agency was not required to perform a cost-benefit analysis or to ensure that benefits would exceed costs when implementing the ELD mandate. Congress knows how to require rule-makers to follow cost-benefit analyses when it wants, as § 31136 shows. See, e.g., *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 467 (2001) (EPA not permitted to consider costs when setting ambient air quality standards, in part because authority to consider cost had "elsewhere, and so often, been expressly granted" in Clean Air Act, but was not granted for standards in question). Even if the agency had done no cost-benefit analysis here, that would not invalidate the rule.

In any event, the agency's studies here were sufficient to justify the rule. In the Regulatory Impact Analysis, the agency relied on two studies. The first examined five motor carriers that had implemented electronic monitoring in their fleets for at least one year. This resulted in data on 8,545 roadside inspections of 5,792 commercial motor vehicles. Naturally, this sample size was relatively small because the ELD mandate had not yet been implemented at the national

level. The agency supplemented this study with its Roadside Intervention Model.

The Roadside Intervention Model estimated the reduction in crashes that would result from a decrease in regulatory violations. To do this, the agency correlated the type and length of driving violations to crash risk. See U.S. Dep't Trans., Regulatory Impact Analysis §§ 2.5.4; 4.2-4.2.4 (Nov. 2015). Using data from January 2005 to September 2009, which involved 9.7 million roadside interventions, the agency estimated that the ELD mandate would result each year in 26 lives saved, 562 injuries avoided, and 1,844 crashes avoided. *Id.* Executive Summary at vi, Table 4. While petitioners urge us to second-guess the agency's statistical judgment calls, we find that it exercised its expertise reasonably. See *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1221 (D.C. Cir. 2004) ("The agency's job is to exercise its expertise to make tough choices about which of the competing estimates is most plausible, and to hazard a guess as to which is correct, even if the lack of a 'significant market for such [electronic logging] devices' means that the estimate will be imprecise.").[3]

[3] Even if petitioners were correct that the agency needed to conduct a cost-benefit analysis and that the agency's studies were inadequate, the benefits of ELDs would still outweigh the costs. Petitioners do not challenge the accuracy of the agency's estimate of total paperwork savings from the ELD mandate, nor do they challenge the agency's estimate of total costs of the mandate. Even apart from the benefits of accidents prevented, the estimated paperwork savings alone outweigh the costs of the ELD

D. *Confidentiality of ELD Information*

Section 31137(e) requires the agency to provide safeguards to preserve the confidentiality of the data collected by ELDs. Petitioners argue that the agency has failed to do so. They claim that this situation parallels *OOIDA I*, where the agency simply failed to consider a factor mandated by statute (in that case, driver harassment) beyond "a single conclusory sentence in the final rulemaking." *OOIDA I*, 656 F.3d at 588. Here, however, the agency provided a sufficient response by considering confidentiality in several respects.

First, as a general matter, the agency will not maintain the ELD data itself. Instead, drivers and motor carriers are responsible for maintaining and storing the information. 49 C.F.R. § 395.24(d); § 395.22(i)(1). The final rule also requires motor carriers to "retain a driver's ELD records so as to protect a driver's privacy in a manner consistent with sound business practices." § 395.22(i)(2).

Second, the agency noted that existing regulations "govern the release of private information, including requests for purposes of civil litigation." Final ELD Rule, 80 Fed. Reg. at 78,322, citing 49 C.F.R. Pts. 7 and 9. The agency also highlighted broader federal privacy laws that will govern ELD data. *Id*.; see also Privacy Act, 5 U.S.C. § 552a (regulating the maintenance and use of agency records maintained on individuals). In this way, the agency showed that it considered the

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mandate. See U.S. Dep't Trans., Regulatory Impact Analysis, Executive Summary at v (Nov. 2015).

existing backdrop of confidentiality protections before issuing new rules.

Third, the agency said it will redact personal information before releasing confidential ELD-related data: "To protect data of a personal nature unrelated to business operations, the Agency would redact such information included as part of the administrative record before a document was made available in the public docket." Final ELD Rule, 80 Fed. Reg. at 78,322.

The agency's treatment of the confidentiality requirement is sufficient. It is a far cry from the prior lack of treatment of the harassment mandate in *OOIDA I*. While petitioners may have liked additional protections, the agency's treatment of the confidentiality requirement was not arbitrary or capricious.

E. *The Fourth Amendment*

Petitioners claim that the ELD mandate is an unconstitutional "search" and "seizure." They also argue that the rule does not fall within the Fourth Amendment's exception for "pervasively regulated industries." Petitioners' arguments are unpersuasive. We need not resolve whether the ELD mandate constitutes a search or a seizure. Even if it did, it would be reasonable under the Fourth Amendment exception for pervasively regulated industries.

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." As a general rule warrantless searches are "*per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009), citing *Katz v. United States*, 389 U.S. 347, 357 (1967). This protection applies to commercial property as well as to homes. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978).

One established exception is for administrative inspections of "pervasively regulated industries." In these industries, reasonable expectations of privacy are diminished because an individual who "embarks upon such a business . . . has voluntarily chosen to subject himself to a full arsenal of governmental regulation." *Id*. at 313. In such industries, Fourth Amendment protections do not disappear entirely. Administrative inspections must still be reasonable. See *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) ("[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness.' ").

To be eligible for the exception, administrative inspections in pervasively regulated industries must meet a three-part reasonableness test: (1) the regulatory scheme must be informed by a substantial government interest; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program must provide a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 702-03 (1987). Our Fourth Amendment

analysis of the ELD mandate requires two steps. First, we hold that commercial trucking is a pervasively regulated industry. We then explain why the ELD mandate is a "reasonable" administrative inspection within the meaning of the Fourth Amendment.

1. *Pervasively Regulated Industries*

At least six other circuits have concluded that the industry is pervasively regulated for purposes of the Fourth Amendment. See *United States v. Delgado*, 545 F.3d 1195, 1201-02 (9th Cir. 2008) (collecting cases). We agree.

The Supreme Court first examined the pervasively regulated industry exception in *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), and returned to it most recently in *City of Los Angeles v. Patel*, 576 U.S. ___, ___, 135 S. Ct. 2443, 2454-57 (2015). The Court has recognized four industries that fall within this exception: the sale of liquor, *Colonnade Catering Corp.*, 397 U.S. at 72; dealing in firearms, *United States v. Biswell*, 406 U.S. 311 (1972); mining, *Donovan v. Dewey*, 452 U.S. 594 (1981); and automobile junkyards, *New York v. Burger*, 482 U.S. 691 (1987). The Court has also held that two industries are *not* pervasively regulated. *Barlow's, Inc*., 436 U.S. at 313-14 (rejecting argument that "all businesses involved in interstate commerce" are pervasively regulated); *Patel*, 576 U.S. at ___, 135 S. Ct. at 2454-56 (hotels are not pervasively regulated).

The Court has relied on three primary factors to determine if a particular industry is pervasively regulated: (1) the history of regulation in that industry; (2) the comprehensiveness of the regulations; and most recently (3) any inherent danger in the industry. We consider these factors in turn.

"History is relevant when determining whether an industry is closely regulated." *Patel*, 576 U.S. at ___, 135 S. Ct. at 2455; see also *Barlow's, Inc.*, 436 U.S. at 313 (firearms industry had "such a history of government oversight that no reasonable expectation of privacy . . . could exist"). Regulation of commercial trucking has deep historical roots. See *supra*, Part I-A. The federal government has regulated the industry since 1935, and individual states imposed regulations even earlier.

In addition to the history of general regulation, hours of service rules have been in place since 1935. As the Supreme Court noted in *Patel*, a history of regulation that is unrelated to the administrative inspection would carry less force. See *Patel*, 576 U.S. at ___, 135 S. Ct. at 2455 (noting that historical regulations requiring inns to provide accommodations to all paying guests were unrelated to contemporary question of warrantless inspections of hotel guest registries). Commercial trucking has a long history of not only general regulation, but also rules governing the length of time drivers may stay on the road. See Federal Motor Carrier Act of 1935, Pub. L. No. 255, § 201, 49 Stat. 543. The ELD mandate updates those rule [sic] to capture

essentially the same information while reducing opportunities for falsification or human error. This factor weighs in favor of treating commercial trucking as pervasively regulated.

The Supreme Court also considers the comprehensiveness of regulation in an industry. See, e.g., *Burger*, 482 U.S. at 705 n.16 ("[T]he proper focus is on whether the 'regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' "), quoting *Dewey*, 452 U.S. at 600. The comprehensiveness of trucking regulation also helps to establish that industry participants have a diminished expectation of privacy.

The commercial trucking industry is regulated extensively. Federal regulations govern a host of issues ranging from driver qualifications, procedures for driver disqualification, inspection of vehicles, vehicle parts, reporting accidents, and repair and maintenance, to transportation of hazardous materials, minimum levels of financial responsibility for motor carriers, and more. See 49 C.F.R. §§ 100-399. States also impose significant regulations on commercial motor vehicles. See, e.g., 92 Ill. Adm. Code § 340-97; 140 Ind. Admin. Code § 7-3; Wis. Adm. Code Trans. § 177. This factor also weighs in favor of considering the commercial trucking industry to be pervasively regulated.

Finally, the Supreme Court signaled in *Patel* that courts should consider whether the industry is inherently dangerous. See *Patel*, 576 U.S. at ___, 135 S. Ct. at 2454 (distinguishing hotels from pervasively regulated industries because "nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare"). This factor also supports treating commercial trucking as pervasively regulated.

Congress has long recognized commercial trucking as a dangerous industry. Danger to the public has lain at the center of the hours of service rules since 1935. See, e.g., 79 Cong. Rec. 12,212 (1935) (statement of Rep. Monaghan) (coining term "truckathon" to describe the "brutal, inhumane, and dangerous practice whereby drivers of busses and trucks are compelled to work 18 to 20 hours a day, to the detriment of their own health and the danger of the public who travel the highways of our country").

Such dangers led us to reject a Fourth Amendment challenge to random drug tests for drivers of city-owned trucks in *Krieg v. Seybold*, 481 F.3d 512 (7th Cir. 2007). We determined that operating "large vehicles and equipment" was a "safety-sensitive job," *id*. at 518, noting that the job was "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences." *Id*., quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 628 (1989). The agency's estimate regarding the public safety benefits of ELDs indicates the dangerousness of the industry: ELDs are estimated to

save 26 lives, prevent 562 injuries, and avoid 1,844 vehicles crashes per year. U.S. Dep't Trans., Regulatory Impact Analysis, Executive Summary at vi, Table 4 (Nov. 2015). All of these factors thus weigh in favor of treating commercial trucking as a dangerous industry. For purposes of the Fourth Amendment, commercial trucking is a pervasively regulated industry.

2. *Reasonableness of the ELD Mandate*

The ELD mandate must still pass a three-part reasonableness test: (1) the regulatory scheme must be informed by a substantial government interest; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the inspection program must provide a constitutionally adequate substitute for a warrant.

We have already addressed the first element. The public safety concerns inherent in commercial trucking give the government a substantial interest.

The ELD mandate also meets the second element. ELD records and administrative inspection of them are necessary to further the government's regulatory scheme. As noted above, falsification and errors in the traditional paper records are a widespread problem. See *supra*, Part I-A; 65 Fed. Reg. 25,540, 25,558 (May 2, 2000). During the agency's listening sessions, drivers said that motor carriers sometimes pressure them to alter their paper records. Final ELD Rule, 80 Fed. Reg. at 78,320, 78,323, 78,325. Automatic recording

and warrantless inspection of those records offer a reasonable method to combat this problem. ELDs should not only help discover hours of service violations but also deter such violations.

Warrantless inspection of hours of service records at roadside inspections and during audits is not new. Such reviews of the paper records have long been central to enforcement of the hours of service. See 49 C.F.R. § 395.8(k)(2) (2014). Since the search occurs when law enforcement reviews the hours of service data – not during the driver's collection and storage of the data – ELDs do not create a search regimen substantially different from what has occurred with the paper records for generations of drivers. Making the records more reliable does not affect the reasonableness of the resulting searches. It is also a reasonable way to achieve the regulatory goals.

The ELD mandate meets the third element because the agency provides a constitutionally adequate substitute for a warrant. To meet this third requirement, the inspection must (1) advise the owner of the commercial property that the search is made pursuant to the law and has a properly defined scope, and (2) must limit the discretion of the inspecting officers. *Burger*, 482 U.S. at 703. The ELD mandate does both.

First, 49 C.F.R. § 395.24(d) and § 395.22(j) advise drivers and motor carriers that authorized safety officials may search ELD data pursuant to law. The rules also limit the scope of the inspections to ELD records. *Id*.; see also Final ELD Rule, 80 Fed. Reg. at 78,296-97.

In addition, the data recorded by ELDs are intentionally limited, restricting the scope of the information available to law enforcement. *Id.* at 78,322-23.

Next, the discretion of inspecting officers is limited in two important ways. First, the ELD mandate authorizes officers to inspect only ELD data; it does not provide discretion to search a vehicle more broadly. Second, § 31137(e)(3) requires the agency to take steps to ensure that law enforcement uses ELDs only to enforce compliance with the hours of service rules. The agency acknowledged this during rulemaking, Final ELD Rule, 80 Fed. Reg. at 78,322, and the agency issued a memorandum limiting the use of ELD records to enforcement of the hours of service requirements. Memorandum from William A. Quade, Assoc. Adm'r for Enforcement, Federal Motor Carrier Admin. (Dec. 4, 2015).[4] Taken together, these protections create a constitutionally adequate substitute for a warrant in the commercial trucking industry. Because the agency's promulgation of the ELD mandate passes the three-part test of *Burger*, it is reasonable within the meaning of the Fourth Amendment.

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[4] We take judicial notice of the memorandum under Fed. R. Evid. 201. See *Fornalik v. Perryman*, 223 F.3d 523, 529 (7th Cir. 2000); *United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999). Petitioners had an opportunity to file supplemental briefing regarding this document. The memorandum did not need to be issued by notice-and-comment rulemaking. While the statute elsewhere requires the Secretary to proceed by regulation, see 49 U.S.C. § 31137(a), the provision in question here requires only that the Secretary "institute appropriate measures." § 31337(e)(3). The memorandum meets that requirement.

Accordingly, the Federal Motor Carrier Safety Administration's final ELD rule codified at 49 C.F.R. Pts. 385, 386, 390, and 395 is not arbitrary or capricious, nor does it violate the Fourth Amendment. The petition for review is DENIED.

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

January 12, 2017

Before

WILLIAM J. BAUER, *Circuit Judge*

MICHAEL S. KANNE, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 15-3756

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., MARK ELROD, and RICHARD PINGEL,
Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,
Respondents.

On Petition for Review of the Final Rule of the Federal Motor Carrier Safety Administration.

FMCSA-2010-0167

ORDER

On consideration of the petitioners' petition for rehearing and rehearing en banc, filed on December 14, 2016, no judge in active service has requested a vote on the petition for rehearing en banc, and all judges on the original panel have voted to deny the petition.

Accordingly, petitioners' petition for rehearing and rehearing en banc is DENIED.

49 U.S.C. § 31137. Electronic logging devices and brake maintenance regulations

(a) Use of electronic logging devices. – Not later than 1 year after the date of enactment of the Commercial Motor Vehicle Safety Enhancement Act of 2012, the Secretary of Transportation shall prescribe regulations –

(1) requiring a commercial motor vehicle involved in interstate commerce and operated by a driver subject to the hours of service and the record of duty status requirements under part 395 of title 49, Code of Federal Regulations, be[1] equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary; and

(2) ensuring that an electronic logging device is not used to harass a vehicle operator.

(b) Electronic logging device requirements. –

(1) In general. – The regulations prescribed under subsection (a) shall –

(A) require an electronic logging device –

(i) to accurately record commercial driver hours of service;

(ii) to record the location of a commercial motor vehicle;

(iii) to be tamper resistant; and

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[1] So in original. Probably should be preceded by "to".

(iv) to be synchronized to the operation of the vehicle engine or be capable of recognizing when the vehicle is being operated;

(B) allow law enforcement to access the data contained in the device during a roadside inspection; and

(C) except as provided in paragraph (3), apply to a commercial motor vehicle beginning on the date that is 2 years after the date that the regulations are published as a final rule.

(2) Performance and design standards. – The regulations prescribed under subsection (a) shall establish performance standards –

(A) defining a standardized user interface to aid vehicle operator compliance and law enforcement review;

(B) establishing a secure process for standardized –

(i) and unique vehicle operator identification;

(ii) data access;

(iii) data transfer for vehicle operators between motor vehicles;

(iv) data storage for a motor carrier; and

(v) data transfer and transportability for law enforcement officials;

(C) establishing a standard security level for an electronic logging device and related components to be tamper resistant by using a methodology endorsed by a nationally recognized standards organization; and

(D) identifying each driver subject to the hours of service and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

(3) Exception. – A motor carrier, when transporting a motor home or recreation vehicle trailer within the definition of the term "drive-away-tow-away operation" (as defined in section 390.5 of title 49, Code of Federal Regulations), may comply with the hours of service requirements by requiring each driver to use –

(A) a paper record of duty status form; or

(B) an electronic logging device.

(C) Certification criteria. –

(1) In general. – The regulations prescribed by the Secretary under this section shall establish the criteria and a process for the certification of electronic logging devices to ensure that the device meets the performance requirements under this section.

(2) Effect of noncertification. – Electronic logging devices that are not certified in accordance with the certification process referred to in paragraph (1) shall not be acceptable evidence of hours of service

and record of duty status requirements under part 395 of title 49, Code of Federal Regulations.

(d) Additional considerations. – The Secretary, in prescribing the regulations described in subsection (a), shall consider how such regulations may –

(1) reduce or eliminate requirements for drivers and motor carriers to retain supporting documentation associated with paper-based records of duty status if –

(A) data contained in an electronic logging device supplants such documentation; and

(B) using such data without paper-based records does not diminish the Secretary's ability to audit and review compliance with the Secretary's hours of service regulations; and

(2) include such measures as the Secretary determines are necessary to protect the privacy of each individual whose personal data is contained in an electronic logging device.

(e) Use of data. –

(1) In general. – The Secretary may utilize information contained in an electronic logging device only to enforce the Secretary's motor carrier safety and related regulations, including record-of-duty status regulations.

(2) Measures to preserve confidentiality of personal data. – The Secretary shall institute appropriate measures to preserve the confidentiality of

any personal data contained in an electronic logging device and disclosed in the course of an action taken by the Secretary or by law enforcement officials to enforce the regulations referred to in paragraph (1).

(3) Enforcement. – The Secretary shall institute appropriate measures to ensure any information collected by electronic logging devices is used by enforcement personnel only for the purpose of determining compliance with hours of service requirements.

(f) Definitions. – In this section:

(1) Electronic logging device. – The term "electronic logging device" means an electronic device that –

(A) is capable of recording a driver's hours of service and duty status accurately and automatically; and

(B) meets the requirements established by the Secretary through regulation.

(2) Tamper resistant. – The term "tamper resistant" means resistant to allowing any individual to cause an electronic device to record the incorrect date, time, and location for changes to on-duty driving status of a commercial motor vehicle operator under part 395 of title 49, Code of Federal Regulations, or to subsequently alter the record created by that device.

(g) Brakes and brake systems maintenance regulations. – The Secretary shall maintain regulations on improved standards or methods to ensure that

brakes and brake systems of commercial motor vehicles are maintained properly and inspected by appropriate employees. At a minimum, the regulations shall establish minimum training requirements and qualifications for employees responsible for maintaining and inspecting the brakes and brake systems.

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49 U.S.C. § 31102
Motor carrier safety assistance program

(a) In general. – The Secretary of Transportation shall administer a motor carrier safety assistance program funded under section 31104.

(b) Goal. – The goal of the program is to ensure that the Secretary, States, local governments, other political jurisdictions, federally recognized Indian tribes, and other persons work in partnership to establish programs to improve motor carrier, commercial motor vehicle, and driver safety to support a safe and efficient surface transportation system by –

* * *

(3) adopting and enforcing effective motor carrier, commercial motor vehicle, and driver safety regulations and practices consistent with Federal requirements; and

* * *

(c) State plans. –

(1) In general. – In carrying out the program, the Secretary shall prescribe procedures for a

State to submit a multiple-year plan, and annual updates thereto, under which the State agrees to assume responsibility for improving motor carrier safety by adopting and enforcing State regulations, standards, and orders that are compatible with the regulations, standards, and orders of the Federal Government on commercial motor vehicle safety and hazardous materials transportation safety.

(2) Contents. – The Secretary shall approve a State plan if the Secretary determines that the plan is adequate to comply with the requirements of this section, and the plan –

(A) implements performance-based activities, including deployment and maintenance of technology to enhance the efficiency and effectiveness of commercial motor vehicle safety programs;

(B) designates a lead State commercial motor vehicle safety agency responsible for administering the plan throughout the State;

(C) contains satisfactory assurances that the lead State commercial motor vehicle safety agency has or will have the legal authority, resources, and qualified personnel necessary to enforce the regulations, standards, and orders;

(D) contains satisfactory assurances that the State will devote adequate resources to the administration of the plan and enforcement of the regulations, standards, and orders;

(E) provides a right of entry (or other method a State may use that the Secretary determines is adequate to obtain necessary information) and inspection to carry out the plan;

(F) provides that all reports required under this section be available to the Secretary on request;

(G) provides that the lead State commercial motor vehicle safety agency will adopt the reporting requirements and use the forms for recordkeeping, inspections, and investigations that the Secretary prescribes;

(H) requires all registrants of commercial motor vehicles to demonstrate knowledge of applicable safety regulations, standards, and orders of the Federal Government and the State;

(I) provides that the State will grant maximum reciprocity for inspections conducted under the North American Inspection Standards through the use of a nationally accepted system that allows ready identification of previously inspected commercial motor vehicles;

(J) ensures that activities described in subsection (h), if financed through grants to the State made under this section, will not diminish the effectiveness of the development and implementation of the programs to improve motor carrier, commercial motor vehicle, and driver safety as described in subsection (b);

(K) ensures that the lead State commercial motor vehicle safety agency will coordinate the plan, data collection, and information systems with the State highway safety improvement program required under section 148(c) of title 23;

(L) ensures participation in appropriate Federal Motor Carrier Safety Administration information technology and data systems and other information systems by all appropriate jurisdictions receiving motor carrier safety assistance program funding;

(M) ensures that information is exchanged among the States in a timely manner;

(N) provides satisfactory assurances that the State will undertake efforts that will emphasize and improve enforcement of State and local traffic safety laws and regulations related to commercial motor vehicle safety;

(O) provides satisfactory assurances that the State will address national priorities and performance goals, including –

> **(i)** activities aimed at removing impaired commercial motor vehicle drivers from the highways of the United States through adequate enforcement of regulations on the use of alcohol and controlled substances and by ensuring ready roadside access to alcohol detection and measuring equipment;
>
> **(ii)** activities aimed at providing an appropriate level of training to State motor

carrier safety assistance program officers and employees on recognizing drivers impaired by alcohol or controlled substances; and

(iii) when conducted with an appropriate commercial motor vehicle inspection, criminal interdiction activities, and appropriate strategies for carrying out those interdiction activities, including interdiction activities that affect the transportation of controlled substances (as defined in section 102 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 802) and listed in part 1308 of title 21, Code of Federal Regulations, as updated and republished from time to time) by any occupant of a commercial motor vehicle;

(P) provides that the State has established and dedicated sufficient resources to a program to ensure that –

(i) the State collects and reports to the Secretary accurate, complete, and timely motor carrier safety data; and

(ii) the State participates in a national motor carrier safety data correction system prescribed by the Secretary;

(Q) ensures that the State will cooperate in the enforcement of financial responsibility requirements under sections 13906, 31138, and 31139 and regulations issued under those sections;

(R) ensures consistent, effective, and reasonable sanctions;

(S) ensures that roadside inspections will be conducted at locations that are adequate to protect the safety of drivers and enforcement personnel;

(T) provides that the State will include in the training manuals for the licensing examination to drive noncommercial motor vehicles and commercial motor vehicles information on best practices for driving safely in the vicinity of noncommercial and commercial motor vehicles;

(U) provides that the State will enforce the registration requirements of sections 13902 and 31134 by prohibiting the operation of any vehicle discovered to be operated by a motor carrier without a registration issued under those sections or to be operated beyond the scope of the motor carrier's registration;

(V) provides that the State will conduct comprehensive and highly visible traffic enforcement and commercial motor vehicle safety inspection programs in high-risk locations and corridors;

(W) except in the case of an imminent hazard or obvious safety hazard, ensures that an inspection of a vehicle transporting passengers for a motor carrier of passengers is conducted at a bus station, terminal, border crossing, maintenance facility, destination, or other location where a motor carrier may

make a planned stop (excluding a weigh station);

(X) ensures that the State will transmit to its roadside inspectors notice of each Federal exemption granted under section 31315(b) of this title and sections 390.23 and 390.25 of title 49, Code of Federal Regulations, and provided to the State by the Secretary, including the name of the person that received the exemption and any terms and conditions that apply to the exemption;

(Y) except as provided in subsection (d), provides that the State –

> **(i)** will conduct safety audits of interstate and, at the State's discretion, intrastate new entrant motor carriers under section 31144(g); and
>
> **(ii)** if the State authorizes a third party to conduct safety audits under section 31144(g) on its behalf, the State verifies the quality of the work conducted and remains solely responsible for the management and oversight of the activities;

(Z) provides that the State agrees to fully participate in the performance and registration information systems management under section 31106(b) not later than October 1, 2020, by complying with the conditions for participation under paragraph (3) of that section, or demonstrates to the Secretary an alternative approach for identifying and immobilizing a motor carrier with serious safety

deficiencies in a manner that provides an equivalent level of safety;

(AA) in the case of a State that shares a land border with another country, provides that the State –

(i) will conduct a border commercial motor vehicle safety program focusing on international commerce that includes enforcement and related projects; or

(ii) will forfeit all funds calculated by the Secretary based on border-related activities if the State declines to conduct the program described in clause (i) in its plan; and

(BB) in the case of a State that meets the other requirements of this section and agrees to comply with the requirements established in subsection (l)(3), provides that the State may fund operation and maintenance costs associated with innovative technology deployment under subsection (l)(3) with motor carrier safety assistance program funds authorized under section 31104(a)(1).

* * *

(k) Plan monitoring. –

* * *

(2) Withholding of funds. –

(A) Disapproval. – If, after notice and an opportunity to be heard, the Secretary finds that a State plan previously approved under

this section is not being followed or has become inadequate to ensure enforcement of State regulations, standards, or orders described in subsection (c)(1), or the State is otherwise not in compliance with the requirements of this section, the Secretary may withdraw approval of the State plan and notify the State. Upon the receipt of such notice, the State plan shall no longer be in effect and the Secretary shall withhold all funding to the State under this section.

(B) Noncompliance withholding. – In lieu of withdrawing approval of a State plan under subparagraph (A), the Secretary may, after providing notice to the State and an opportunity to be heard, withhold funding from the State to which the State would otherwise be entitled under this section for the period of the State's noncompliance. In exercising this option, the Secretary may withhold –

(i) up to 5 percent of funds during the fiscal year that the Secretary notifies the State of its noncompliance;

(ii) up to 10 percent of funds for the first full fiscal year of noncompliance;

(iii) up to 25 percent of funds for the second full fiscal year of noncompliance; and

(iv) not more than 50 percent of funds for the third and any subsequent full fiscal year of noncompliance.

* * *

49 C.F.R. § 350.215 What are the consequences for a State that fails to perform according to an approved CVSP or otherwise fails to meet the conditions of this part?

(a) If a State is not performing according to an approved plan or not adequately meeting conditions set forth in § 350.201, the Administrator may issue a written notice of proposed determination of nonconformity to the Governor of the State or the official designated in the plan. The notice will set forth the reasons for the proposed determination.

(b) The State will have 30 days from the date of the notice to reply. The reply must address the deficiencies or incompatibility cited in the notice and provide documentation as necessary.

(c) After considering the State's reply, the Administrator will make a final decision.

(d) In the event the State fails timely to reply to a notice of proposed determination of nonconformity, the notice becomes the Administrator's final determination of nonconformity.

(e) Any adverse decision will result in FMCSA –

(1) Withdrawing approval of the Plan and withholding all MCSAP funding; or

(2) Finding the State in noncompliance and withholding –

(i) Up to 5 percent of MCSAP funds during the fiscal year that the FMCSA notifies the State of its noncompliance;

(ii) Up to 10 percent of MCSAP funds for the first full fiscal year of noncompliance;

(iii) Up to 25 percent of MCSAP funds for the second full fiscal year of noncompliance; and

(iv) Not more than 50 percent of MCSAP funds for the third and any subsequent full fiscal year of noncompliance.

* * *

DEPARTMENT OF TRANSPORTATION

Federal Motor Carrier Safety Administration

49 CFR Parts 385, 386, 390, and 395

[Docket No. FMCSA-2010-0167]

RIN 2126-AB20

Electronic Logging Devices and Hours of Service Supporting Documents

AGENCY: Federal Motor Carrier Safety Administration (FMCSA), DOT.

ACTION: Final rule.

SUMMARY: The Federal Motor Carrier Safety Administration (FMCSA) amends the Federal Motor Carrier Safety Regulations (FMCSRs) to establish: Minimum performance and design standards for hours-of-service (HOS) electronic logging devices (ELDs); requirements for the mandatory use of these devices by drivers currently required to prepare HOS records of duty status (RODS); requirements concerning HOS supporting documents; and measures to address concerns about harassment resulting from the mandatory use of ELDs. The requirements for ELDs will improve compliance with the HOS rules.

* * *

II. Executive Summary

This rule improves commercial motor vehicle (CMV) safety and reduces the overall paperwork burden for both motor carriers and drivers by increasing the use of ELDs within the motor carrier industry, which will, in turn, improve compliance with the applicable HOS rules. Specifically, this rule: (1) Requires new technical specifications for ELDs that address statutory requirements; (2) mandates ELDs for drivers currently using RODS; (3) clarifies supporting document requirements so that motor carriers and drivers can comply efficiently with HOS regulations; and (4) adopts both procedural and technical provisions aimed at ensuring that ELDs are not used to harass CMV operators.

* * *

For the purposes of HOS enforcement, FMCSA requires all ELDs to record location in a way that provides an accuracy of approximately a 1-mile radius during on-duty driving periods. However, when a CMV is operated for authorized personal use, the position reporting accuracy, as required by section 4.3.1.6(f), is reduced to an approximate 10-mile radius, to further protect the driver's privacy. While a motor carrier could employ technology that provides more accurate location information internally, when the ELD transmits data to authorized safety officials, the location data will be limited to the reduced proximities.

* * *

To meet roadside electronic data reporting requirements, under section 4.9.1 of the technical specifications, an ELD must support one of two options for different types of electronic data transfer. The first option is a telematics-type ELD. At a minimum, it must electronically transfer data to an authorized safety official on demand via wireless Web services and email. The second option is a local transfer method-type ELD. At a minimum, it must electronically transfer data to an authorized safety official on demand via USB2.0 and Bluetooth. Additionally, both types of ELDs must be capable of displaying a standardized ELD data set in the format specified in this rule to an authorized safety official on demand. To ensure that authorized safety officials are always able to receive the HOS data during a roadside inspection, a driver must be able to provide either the display or a printout when an authorized safety official requests a physical display of the information. Display and printouts will each contain the same standardized data set identified in section 4.8.1.3 of the technical specifications. Motor carriers will be able to select an ELD that works for their business needs since both types of ELDs will transfer identical data sets to law enforcement.

* * *

Authorized safety officials who conduct roadside enforcement activities (*i.e.*, traffic enforcement and inspections) or compliance safety investigations will be able to select a minimum of one method of electronic data transfer from each type of ELD.

* * *

18. Amend part 395 by adding a new subpart B, consisting of §§ 395.20 through 395.38, and Appendix A to Subpart B of Part 395, to read as follows:

Subpart B – Electronic Logging Devices (ELDs)

* * *

§395.22 Motor carrier responsibilities – In general.

* * *

(i) *Record backup and security.* (1) A motor carrier must retain for 6 months a back-up copy of the ELD records on a device separate from that on which the original data are stored.

(2) A motor carrier must retain a driver's ELD records so as to protect a driver's privacy in a manner consistent with sound business practices.

(j) *Record production.* When requested by an authorized safety official, a motor carrier must produce ELD records in an electronic format either at the time of the request or, if the motor carrier has multiple offices or terminals, within the time permitted under § 390.29 of this subchapter.

§395.24 Driver responsibilities – In general.

(a) *In general.* A driver must provide the information the ELD requires as prompted by the ELD and required by the motor carrier.

(b) *Driver's duty status.* A driver must input the driver's duty status by selecting among the following categories available on the ELD:

(1) "Off duty" or "OFF" or "1";

(2) "Sleeper berth" or "SB" or "2", to be used only if sleeper berth is used;

(3) "Driving" or "D" or "3"; or

(4) "On-duty not driving" or "ON" or "4".

(c) *Miscellaneous data.* (1) A driver must manually input the following information in the ELD:

(i) Annotations, when applicable;

(ii) Driver's location description, when prompted by the ELD; and

(iii) Output file comment, when directed by an authorized safety officer.

(2) A driver must manually input or verify the following information on the ELD:

(i) Commercial motor vehicle power unit number;

(ii) Trailer number(s), if applicable; and

(iii) Shipping document number, if applicable.

(d) *Driver use of ELD.* On request by an authorized safety official, a driver must produce and transfer from an ELD the driver's hours-of-service records in accordance with the instruction sheet provided by the motor carrier.

§395.26 ELD data automatically recorded.

(a) *In general.* An ELD provides the following functions and automatically records the data elements listed in this section in accordance with the requirements contained in appendix A to subpart B of this part.

(b) *Data automatically recorded.* The ELD automatically records the following data elements:

(1) Date;

(2) Time;

(3) CMV geographic location information;

(4) Engine hours;

(5) Vehicle miles;

(6) Driver or authenticated user identification data;

(7) Vehicle identification data; and

(8) Motor carrier identification data.

(c) *Change of duty status.* When a driver indicates a change of duty status under § 395.24(b), the ELD records the data elements in paragraphs (b)(1) through (8) of this section.

(d) *Intermediate recording.* (1) When a commercial motor vehicle is in motion and there has not been a duty status change or another intermediate recording in the previous 1 hour, the ELD automatically records an intermediate recording that includes the data

elements in paragraphs (b)(1) through (8) of this section.

(2) If the intermediate recording is created during a period when the driver indicates authorized personal use of a commercial motor vehicle, the data elements in paragraphs (b)(4) and (5) of this section (engine hours and vehicle miles) will be left blank and paragraph (b)(3) of this section (location) will be recorded with a single decimal point resolution (approximately within a 10-mile radius).

(e) *Change in special driving category.* If a driver indicates a change in status under § 395.28(a)(2), the ELD records the data elements in paragraphs (b)(1) through (8) of this section.

(f) *Certification of the driver's daily record.* The ELD provides a function for recording the driver's certification of the driver's records for every 24-hour period. When a driver certifies or recertifies the driver's records for a given 24-hour period under § 395.30(b)(2), the ELD records the date, time and driver identification data elements in paragraphs (b)(1), (2), and (6) of this section.

(g) *Log in/log out.* When an authorized user logs into or out of an ELD, the ELD records the data elements in paragraphs (b)(1) and (2) and (b)(4) through (8) of this section.

(h) *Engine power up/shut down.* When a commercial motor vehicle's engine is powered up or powered

down, the ELD records the data elements in paragraphs (b)(1) through (8) of this section.

(i) *Authorized personal use.* If the record is created during a period when the driver has indicated authorized personal use of a commercial motor vehicle, the data element in paragraph (b)(3) of this section is logged with a single decimal point resolution (approximately within a 10-mile radius).

* * *

§ 395.30 ELD record submissions, edits, annotations, and data retention.

(a) *Accurate record keeping.* A driver and the motor carrier must ensure that the driver's ELD records are accurate.

(b) *Review of records and certification by driver.* (1) A driver must review the driver's ELD records, edit and correct inaccurate records, enter any missing information, and certify the accuracy of the information.

(2) Using the certification function of the ELD, the driver must certify the driver's records by affirmatively selecting "Agree" immediately following a statement that reads, "I hereby certify that my data entries and my record of duty status for this 24-hour period are true and correct." The driver must certify the record immediately after the final required entry has been made or corrected for the 24-hour period.

(3) The driver must submit the driver's certified ELD records to the motor carrier in accordance with § 395.8(a)(2).

* * *

Appendix A to Subpart B of Part 395 – Functional Specifications for All Electronic Logging Devices (ELDs)

* * *

4.9.1. Data Transfer During Roadside Safety Inspections

(a) On demand during a roadside safety inspection, an ELD must produce ELD records for the current 24-hour period and the previous 7 consecutive days in electronic format, in the standard data format described in section 4.8.2.1 of this appendix.

* * *

[LOGO]
U.S. Department
of Transportation

Federal Motor Carrier Safety Administration

Memorandum

MC-ECE-2016-0002

Subject: ***ACTION***: Phase I: Electronic Logging Devices and Hours-of-Service Supporting Documents Final Rule: Awareness and transition

Date: DEC 04 2015

From: William A. Quade
/s/ William A. Quade
Associate Administrator for Enforcement

Reply to Attn. of: MC-ECE

To: All FMCSA Staff

PURPOSE

The purpose of this memorandum is to provide policy and guidance for Federal Motor Carrier Safety Administration (FMCSA) personnel and Motor Carrier Safety Assistance Program (MCSAP) state partners during the first phase of the implementation of the final rule titled, "Electronic Logging Devices (ELDs) and Hours-of-Service (HOS) Supporting Documents" (ELD rule). During this implementation phase, procedures will focus on checking for Hours of Service (HOS) compliance and falsifications.

* * *

ELD Data Usage

The Moving Ahead for Progress in the 21st Century Act (P.L. 112-141) limits the way FMCSA may use ELD data. Specifically. the statute provides that FMCSA must "institute appropriate measures to ensure any information collected by electronic logging devices is used by enforcement personnel only for the purpose of determining compliance with hours of service requirements" (49 U.S.C. 31137(e)(3)). The ELD rule distinguishes between an "ELD record," which is the RODS, recorded on an ELD, that reflects the data elements that an ELD must capture, and other data that an FMS may record, but the ELD rule does not require. Through this policy, FMCSA limits the use of ELD records, as defined in 49 CFR § 395.2, for enforcement of the HOS requirements in 49 CFR Part 395. ELD records may also be used for certain additional evidentiary purposes consistent with the Agency's longstanding enforcement capabilities, including, but not limited to proving a driver was operating in interstate commerce; identifying the driver; and establishing harassment violations, which must involve the use of ELD records (see Attachment 13). Enforcement personnel may not retain ELD records unless the data is necessary for one of these purposes.

FMCSA may continue using data collected directly from the vehicle's ECM and other technology on the CMV, including FMS data (other than ELD records) collected for all other FMS functions and reports generated during the ordinary course of business. FMCSA has the authority to request these FMS records and

use them during the course of an investigation to identify or prove other violations of the regulations (e.g., 49 CFR 392.2).

* * *

ELD Data Usage – Legal Basis

As the Supplemental Notice of Proposed Rulemaking explained, "FMCSA reads these ELD data-use restrictions in the context of the regulatory structure and longstanding HOS enforcement practices in existence at the time MAP-21 was adopted, and the Agency does not infer from the provisions any congressional intent to diminish the Agency's previous enforcement capabilities. MAP-21 effectively directs the Agency to substitute the paper RODS requirement with a requirement that the same motor carriers use ELDs. While the primary purpose of drivers' RODS has always been the enforcement of the HOS rules, authorized safety officials use drivers' logs also for additional evidentiary purposes. However, the Agency's HOS regulations apply only to drivers operating in interstate commerce, and the Agency has often relied on drivers' logs to demonstrate interstate commerce as an element of FMCSA jurisdiction. Logs are also used to identify the driver, a function specifically required by 49 U.S.C. 31137(b)(2)(D) and inherent in enforcement of HOS requirements. Once established for purposes of determining compliance with the HOS requirements, such a legally essential predicate fact becomes the law in the case. The established fact may then supply an

element of proof of non-HOS violations. FMCSA believes this is a reasonable interpretation of sec. 31137(e), given the Agency's historical multipurpose use of the logbook, which Congress intends to displace through mandatory ELD use, and in light of the reference to the enforcement of "related regulations" in sec. 31137(e)(1)." 79 Fed. Reg. 17,656, 17,671 (March 28, 2014).

* * *