

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

Owner-Operator Independent)	Case No. 09-CV-1116 (DWF/LIB)
Driver Association, Inc., a)	
Missouri non-profit entity;)	
and Stephen K. House, a)	
natural person,)	
)	
Plaintiffs,)	
)	
vs.)	St. Paul, Minnesota
)	September 21, 2012
Mark Dunaski, Ken Urquhart,)	10:45 a.m.
Christopher Norton,)	
James Ullmer, Doug Thooft,)	
and John Does 1, personally,)	
individually, and in their)	
official capacities,)	
)	
Defendants.)	
)	

BEFORE **THE HONORABLE DONOVAN W. FRANK**
UNITED STATES DISTRICT COURT JUDGE

PLAINTIFFS' MOTION FOR AN ORDER TO SHOW CAUSE

APPEARANCES:

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transcript produced by computer.

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24
25

P R O C E E D I N G S**I N O P E N C O U R T**

1
2
3 THE COURT: You may all be seated. Thank you. I
4 will apologize for the late start, although it won't detract
5 from any time we need. So, I am assuming that we will take
6 the time that we need. And if that carries us past 12:00,
7 so be it.

8 I kind of knew this would happen. This young
9 woman, single mom of two children, the last of ten
10 defendants to be sentenced in a major drug case, and she was
11 hoping for a non-prison sentence. And I think I was fair,
12 but it didn't go quite that way, as it would have perhaps in
13 State Court. But, in any event, that was my responsibility,
14 not theirs, because the lawyers did everything they were
15 supposed to do in the last case, but that is the delay.

16 The other thing that I will state that has nothing
17 to do with the motions in front of me today which I will go
18 to in just a moment after introductions is -- and it is one
19 of the few times I have been in this situation in my 28th or
20 29th year as a Judge, the last 14 here. I do want to
21 apologize for the length of time I had under advisement the
22 attorney fee issue.

23 I usually get orders out in 30 to 60 days. It
24 used to be 30, except for patent cases, and we are a very
25 busy District. And so, I can't speak for the other Judges.

1 And so I could give you a number of excuses, but they really
2 wouldn't justify it. So, I do apologize. There is no
3 reason why that order should have taken that long. And I am
4 responsible. No one else is. So, I do want to apologize
5 for the length of time that was under advisement.

6 So, with that, we can start maybe with Mr. Cullen,
7 Sr., who I haven't seen for some time. We can start with
8 introductions and go around the table, there, and then we
9 will head go over to -- and then if there is somebody else
10 in the gallery somebody wants to introduce. I will leave
11 that up to counsel.

12 MR. CULLEN, SR.: Good morning, Your Honor. For
13 the record I am Paul D. Cullen, Sr., for the Plaintiffs.
14 With me at counsel table is Paul D. Cullen, Jr., of the
15 District of Columbia Bar, and Pro Hac Vice, as I am. And
16 Albert Goins of the Minnesota Bar. And Douglas Morris, who
17 filed a declaration in this case is sitting in the audience
18 and is available to the Court at its pleasure.

19 THE COURT: Ms. Devine, we can start with you, if
20 you wish.

21 MS. DEVINE: Good morning, Your Honor, Marsha
22 Devine representing the State Defendants. Present with me
23 is Tom Vasaly, and also Captain Tim Rogotzke, who is the
24 Captain of the Commercial Vehicle Enforcement Program of the
25 Patrol.

1 THE COURT: I am glad you pronounced his name. I
2 don't know if I would have either been able to pronounce it
3 correctly -- and if I hadn't seen it, I'm not so sure if you
4 would have pronounced it correctly I could have spelled it
5 correctly.

6 MR. JACOBS: Good morning, Your Honor, Ron Jacobs
7 with the Venable Law Firm representing the Commercial
8 Vehicle Safety Alliance. With me today is Dan Herber with
9 Faegre Baker Daniels.

10 THE COURT: Have counsel discussed how they would
11 like to precede with argument? What I have kind of assumed
12 is Plaintiffs would proceed first, then I would hear from
13 each Defendant, and then any additional rebuttal or
14 surrebuttal. But, if counsel have either discussed it or
15 agreed on something else, or think there should be a
16 different order of argument, I am all ears. Does that --

17 MR. CULLEN, SR.: That is very suitable to us.

18 THE COURT: All right. Is that suitable to both
19 Defendants?

20 MS. DEVINE: Yes, Your Honor.

21 THE COURT: I will represent to you that I have
22 had an opportunity along with one of my lawyer/law clerks to
23 read all submissions that have been made. And I will also
24 acknowledge, and you will probably hear me quote, whether it
25 relates to the merits of the motion may be another matter,

1 but before the argument is over, I have also gone on to the
2 websites of the organizations, just to refresh my memory on
3 their missions, their goals of uniformity and consistency
4 and working with everyone, and some of the press releases
5 and the get-togethers including Minnesota in July where the
6 press release says: At CVSA, uniformity is the key to
7 everything that we do. Because I would say we are here
8 because of a lack of uniformity; and that you have each for
9 some reason turned over to the Federal Court how to run the
10 highways of this country. And I will have a few more things
11 to say about that, because I think, frankly, however the
12 motion turns out is almost secondary to taxpayers holding
13 some of your organizations accountable for not getting
14 together and saying, you know, we are going to act
15 consistent, instead of inconsistent, with our missions and
16 purposes and we are going to work this out. Especially when
17 most law students would fail a test as Justice Rehnquist
18 said in the opinion I quoted in my Order, if they had to
19 distinguish between probable cause that this Patrol drafted
20 on their own and the organizations all ignored with the
21 passive or acquiescence, and they say acting in concert
22 with, it is difficult for me to understand, to tip my hand,
23 how these organizations would surrender to a Federal Judge
24 how to regulate the trucking industry when you knew full
25 well what the Patrol here decided to do.

1 And I can give you some quotes, which I will, both
2 in my opinion and any decision I make, because my criticisms
3 of the procedural history of this case and public agencies,
4 including the other federal agency who is not here, not
5 carrying out their responsibilities and turning it over to a
6 Federal Judge, my criticisms will be the same in
7 observations, apart from -- people I think will be asking
8 how much attorney fees and costs all of these things have
9 done when Justice Rehnquist has said, we can't define the
10 difference between probable cause and reasonable articulable
11 suspicion, because it involves this plethora, and I will be
12 quoting from that in my opinion, maybe today, and yet that
13 is what we are here for, because everybody couldn't get
14 together.

15 And you are going to tell me, Mr. Cullen, which is
16 mostly true, that you approached them two or three times,
17 the organizations, right after the injunction, which I
18 essentially adopted their General Order which they said they
19 were going to do without this litigation, and then the other
20 organizations we'll never know what went on beyond the
21 scenes, because there was no discovery, ignored, apparently
22 no serious discussion. And if they talked to a
23 constitutional law scholar, they were seriously misinformed,
24 or as one of the organizational people called it, to lawyer
25 it up.

1 So, as you can tell, it is difficult for me to
2 understand why the organizations would want to surrender
3 this to a Federal Court, because I think as this becomes
4 more public, people are going to see that the mission
5 statements that are pervasive, saying the key is promoting
6 and coordinating uniformity, that wasn't done by the
7 organizations in this case.

8 And it is shocking to me, actually, that this is
9 being turned over to a Federal Judge, so I can, I guess,
10 help people carry out their mission that are all over their
11 websites.

12 Or, in one case, bear with me just a moment. "Why
13 join CVSA? Uniformity is the key to everything we do." And
14 then it goes on to talk about consistency, coordination,
15 uniformity, creating uniform standards across the country.
16 And if we are here on some issue other than the difference
17 between probable cause and reasonable articulable suspicion,
18 when as Justice Rehnquist, the Late Justice Rehnquist said
19 in the opinion I quoted, "Articulating precisely what
20 reasonable suspicion and probable cause mean is not
21 possible." And then he goes on to explain why it is not
22 possible. And yet that is what we are here for.

23 Whether it is actionable or not is a separate
24 matter. That is essentially what we are here for, because
25 Minnesota has been using before I ever entered my decision,

1 probable cause. And knowing that full well, these
2 organizations decided we are going to use reasonable
3 articulable suspicion, because maybe they got lawyered up or
4 talked to a lawyer. They must not have read this opinion
5 where they say, you really can't make such distinctions when
6 you get right down to it, because they are common sense -- I
7 am quoting Justice Rehnquist again. "They are common sense,
8 non-technical conceptions that deal with the factual and
9 practical considerations of everyday life on which
10 reasonable and prudent men, not legal technicians act." And
11 yet the groups couldn't get together and say, let's see if
12 we can come up with something to serve all truckers, protect
13 the public and have this uniformity which we say is the key
14 to everything we do.

15 Well, we don't have uniformity, do we, as we come
16 before me today. And so, we will see, because I think
17 probably -- and I will say one other thing that relates to
18 the one non-party, and I intend to save some of this for the
19 end, but just to focus some of the argument.

20 I would respectfully suggest that contrary to the
21 footnote in the non-party's brief, footnote 3, on page 5,
22 quote, "This is best left to future cases and other
23 jurisdictions."

24 I suspect you will all be held accountable for
25 saying: Well, then you should really -- don't promote or

1 suggest we are promoting consistency, especially when it is
2 mostly taxpayer's money driving most of these things, maybe
3 not so much the Plaintiffs. I would think that that is
4 probably the most inefficient and expensive way, and it will
5 maximize inconsistency and non-uniformity.

6 And I must say, I said little during the five or
7 six-day trial, but apparently it didn't matter to the
8 organizations that two or three million dollars had been
9 spent on attorney fees trying to resolve this, and that the
10 Patrol had come up with, whether it was because of this
11 lawsuit or as they said had nothing to do with it, this is
12 the new standard we came up with that I found acceptable,
13 apparently that wasn't something worthwhile discussing
14 between the parties.

15 But, during the trial, I also observed, I didn't
16 put it in any finding or conclusions, that there was kind of
17 a de-emphasis on uniformity and consistency. And it was so
18 ironic as I went through my trial notes that were quite
19 voluminous to think of truckers going interstate, and that
20 it is one rule in this state, and another rule in that, in
21 the next state. And when as Chief Justice Rehnquist said,
22 "I challenge somebody to lay out the fine distinctions
23 between probable cause and reasonable and articulable
24 suspicion."

25 Well, that is exactly what has happened, separate

1 from the Plaintiff's argument that they are acting in
2 concert and at the first visible sign of promotion of the
3 Court's Order. And their own General Order was a few days
4 after the Motion was filed in June of this year for the
5 contempt charge.

6 But, like we have told law school classes, the
7 trend across the country is no oral argument -- not in our
8 District. And I also say it to the class I teach at one of
9 the law schools on pretrial civil litigation. Well, judges
10 rarely come into the courtroom without questions for
11 lawyers. I don't think I admitted that Judges come in very
12 often and give a little speech, but I don't think I will
13 apologize for my comments. I guess that focuses, without
14 oversimplifying, the contempt focus of the parties, because
15 I think the -- I will just, since I have said what I said,
16 and probably put disproportionately or otherwise, some
17 criticism on both the Defendants here and an organization of
18 safety, federal group that is not here, I will say that in
19 this instance I think that the Plaintiff has a -- even if
20 you are right about what happened, I think it is a hard hill
21 to climb for the contempt, even though these organizations
22 are going to be criticized for turning this over to a
23 Federal Judge and leave it to every jurisdiction to do their
24 own thing, especially when the Supreme Court can't
25 distinguish between these two concepts. And you try to get

1 them to discuss it, but I think while I may conclude that
2 silence is acquiescence, or turning a blind eye, I don't
3 know if that is tantamount to acting in concert, which I
4 guess that is what we are here for, that would rise to the
5 level of contempt; but, we will soon find out.

6 I will file a decision within 30 to 45 days in the
7 case. I will try to hold closer to 30, and then we will go
8 from there. I will offer any services that we can provide
9 for any global discussions, whether it is other agencies,
10 just the parties here, we will offer our services if we can
11 be of assistance. But, otherwise, that is the time frame.

12 Mr. Cullen, and I will tell you all that my
13 remarks won't be taken off any of your time, so we can
14 proceed as you wish. And if you are thinking, well, I wish
15 the Judge wasn't so bashful about what is on his mind, I
16 guess that is up to you. So --

17 MR. CULLEN, SR.: We are very familiar with your
18 approach to these matters, Your Honor, and it is very
19 helpful to hear from you in your opening remarks.

20 Whatever differences and difficulties there may be
21 in applying the principles of reasonable articulable
22 suspicion and probable cause in a given case, that there
23 would be overlap in evidence in what would be relevant to
24 either one. I don't think those are the issues that are
25 before us.

1 Your Order correctly differentiates between
2 reasonable articulable suspicion and the level of
3 information that an officer has to have before he can detain
4 a person for further questioning in this case on the subject
5 of the fatigue, and a stronger body of information that he
6 needs, we call that probable cause --

7 THE COURT: -- for the out-of-service.

8 MR. CULLEN, SR.: -- for the actual
9 out-of-service.

10 THE COURT: And the irony is, and maybe it affects
11 the outcome here, maybe it doesn't, the irony is that we
12 never addressed -- or one of the issues never got put --
13 well, it did get put in front of me. But, the irony is that
14 this very staged, and I think acceptable -- I don't mean to
15 concede the Plaintiff found it all acceptable and
16 constitutional, the irony between these other associations
17 just flat out ignoring, even if we forget this legislation
18 was never here and all of the money and time and expertise
19 that was spent by all of the folks here, except for the two
20 new counsel that are here for Alliance, is they came up
21 with -- the Patrol came up with this staged level, with
22 reasonable articulable suspicion, and then probable cause
23 based upon their experience in the field, I presume with the
24 help of their lawyers, you know, a year and a half before I
25 made my decision. And yet apparently somebody threw that in

1 the wastebasket as they got together when you tried to put
2 that in front of them. And there will be different takes on
3 that. But, it just seemed like, well, now this a good venue
4 to discuss this and come up with a policy once and for all,
5 since everybody brags about the uniformity and consistency
6 that the organization's mission is.

7 It was the General Order by the people who should
8 be deciding their best, and of course I acknowledge that you
9 and your client didn't find it credible that, well, they
10 would have been doing these new approaches without this
11 lawsuit. And your view from the beginning was, well, this
12 was a response to the lawsuit. Obviously, I approved what
13 they did and said it was entirely constitutional. But, it
14 was their kind of General Order that came in -- well,
15 initially in May, May 5th of 2010, updated on August 24th of
16 2010, that apparently whoever makes these decisions, apart
17 from kind of the straw vote, ballot vote, because there is
18 no minutes of how serious people were about discussing what
19 is the right thing to do for the public, for the truckers,
20 for safety. And to try to -- no, I agree. There wasn't an
21 agreement on everything. I am sorry to interrupt you. But,
22 yeah, the irony is, it came out of their hard work.

23 MR. CULLEN, SR.: True. I would say just in
24 response to your opening comments, I don't think this case
25 deals with or turns on the fact that the tools that you put

1 into your Final Order are sometimes imprecise. Reasonable
2 articulable suspicion versus --

3 THE COURT: Oh, I agree with that.

4 MR. CULLEN, SR.: -- probable cause. But, those
5 are the tools that we have to work with.

6 And your formulation in your Final Order is rock
7 solid constitutional law. And I notice that it was repeated
8 by the Supreme Court in the recent Arizona case dealing with
9 immigration law and the ability of the state to enforce
10 immigration law. And they said that it is too early to
11 decide whether the state will apply these principles of
12 reasonable articulable suspicion when confronting someone
13 who might be an illegal alien, and probable cause. Let's
14 see how that plays out as a practical matter. I will get
15 you the citation, because I don't think it is in the brief.
16 But, in that case, *Arizona versus the United States*.

17 THE COURT: I am familiar with it.

18 MR. CULLEN, SR.: It was very, very clear that
19 they affirmed the framework which is in your opinion. There
20 is something called reasonable articulable suspicion, and
21 that is what you need as a minimum to detain someone in an
22 administrative inspection if you want to go beyond the terms
23 of that inspection and look into fatigue.

24 And if you do that and if you have reasonable
25 articulable suspicion, which they didn't have with the

1 Plaintiff House, then you can formulate probable cause. So,
2 whatever the practical problems are and the imprecision in
3 those tools, those are the tools that we are dealing with.

4 THE COURT: Right. And I --

5 MR. CULLEN, SR.: And that is what this case is
6 about. And the CVS Order, it is interesting, no one on the
7 other side contests that the criteria, which became
8 effective April 1 is totally inconsistent with your Order
9 and the constitutional foundation upon which it rests.

10 THE COURT: And --

11 MR. CULLEN, SR.: That's not a serious question.

12 THE COURT: I will just explain to all three
13 parties, the reason I made the comments that I did was --
14 no, I don't disagree that that is not the issue here with
15 respect to the focus of your Motion for Contempt.

16 I raised it because it is kind of confirmation,
17 and it probably does -- and I was careful to say early on in
18 my remarks, a number of my remarks, while they may show up
19 as more than complimentary observations in an opinion, have
20 little to do with the merits of the motion. But, the irony
21 is, is that seeing this General Order, and the Order, and
22 even if they did consult lawyers and may have been
23 misinformed in my judgment, you have got the U.S. Supreme
24 Court saying, these terms are very difficult.

25 And in fact another phrase by His Honor is they

1 are not readily or even usefully reduced to a neat set of
2 legal rules and yet that is exactly what happened here.
3 They said, well, for some reason, maybe I will never know
4 why, but I don't need to know to rule fairly on the merits
5 today. Someone sat down as if they were constitutional law
6 experts, and they obviously ignored most of what has been
7 said by the Supreme Court saying, be careful, because you
8 can't really distinguish these like you can preponderance
9 and reasonable doubt, as Justice Rehnquist goes on. And
10 they consciously decided to -- whether it was ignore the
11 order or not, say we are not doing what Minnesota did there
12 in that General Order, we don't have to. And so you wonder
13 if we gave them the test.

14 So, no, I understand, I suspect they are going to
15 agree that this case doesn't turn on the practical
16 application or the nuances with that. I think that everyone
17 is probably going to agree on that. So, admittedly, many of
18 my remarks have little to do with the ultimate merit of what
19 is in front of me.

20 MR. CULLEN, SR.: I think they provide an
21 important contextual analysis that the merits ultimately
22 will come before you in. And they are helpful in that
23 regard, certainly.

24 I would like to start telling you where we would
25 like to wind up at the end of this, and then it might make

1 the arguments and the paths that I outline for you to get
2 there more understandable.

3 We would like to accomplish two things through
4 this proceeding. First, we need, and I think the Minnesota
5 State Patrol Defendants need an order from you that the
6 out-of-service criteria, as revised, violates your Final
7 Order and the constitutional principles upon which it is
8 based.

9 THE COURT: They have already said they are going
10 to follow their General Order, not the -- apart from the
11 constitutional implications, they've already said they are
12 going to follow the General Order, not the April 1st --

13 MR. CULLEN, SR.: That is what Captain Rogotzke
14 said. But, as we point out in our brief, and we represent
15 thousands of drivers --

16 THE COURT: That is true.

17 MR. CULLEN, SR.: -- who are looking for
18 certainty. We think his hands are tied because that
19 out-of-service criteria has been incorporated into Minnesota
20 law. And so we doubt that Captain Rogotzke has the
21 authority to ignore it, because it is embodied in Minnesota
22 law. An order, a definitive order on this subject would get
23 them off the hook and would give substance to something that
24 I think a Captain in the Minnesota State Patrol, with all
25 due respect, simply doesn't have authority to do.

1 THE COURT: What is your -- unless I am mixing
2 apples and oranges, what is your response to the notion by
3 one or more Defendants that that is contrary to the position
4 that you took during the case saying, look it, those aren't
5 binding substantive rules. And so that Minnesota is free to
6 come up with -- they are free to come up with their standard
7 on what they are going to do --

8 MR. CULLEN, SR.: All right, we addressed the
9 out-of-service criteria in the abstract, as offered by CVSA,
10 and it was discussed in the rulemaking 10 or 15 years ago.
11 I have two, two points. One is fairly quick. This is the
12 Minnesota State Patrol's April 1, 2012 re-publication of the
13 out-of-service criteria, Exhibit A.

14 THE COURT: Right.

15 MR. CULLEN, SR.: I note that their collaborator
16 CVSA and the Minnesota State Patrol are identified there.
17 This is showing in concert and collaboration.

18 This is the policy statement which we quote in the
19 brief. And I will move it up a little bit. The purpose of
20 this part is to identify violations that render the
21 commercial vehicle operator unqualified to drive, or out of
22 service.

23 The necessity for all enforcement personnel to
24 implement and adhere to these standards is a matter of law.
25 And that has a great -- that is found in the CVSA's version

1 and adopted and re-published by the State Patrol. So, it is
2 their responsibility to do that as a matter of law.

3 So, whether or not they have flexibility is quite
4 a different matter. They are required, according to this,
5 this is what they are instructed by the State Patrol, the
6 necessity for all enforcement personnel to implement and
7 adhere to these standards as a matter of law. And I think
8 that comes in Minnesota by Minnesota General Statutes
9 221.605, Subdivision 3.

10 The next point, and let me step back and give a
11 setting for this. This out-of-service criteria, the
12 fatigue, does not fit the mold of your typical
13 out-of-service criteria, which in almost all cases provides
14 enforcement tolerances that the officer in the field is to
15 look at.

16 Let's say you have brake linings. And without
17 being technically correct, but relatively correct, brake
18 linings have to have a standard of 1. If you are off that
19 standard and you reach a standard of 2, it is a violation.
20 Okay? You can be issued a citation for it. But, the CVSA
21 will issue a criteria that says, if you are out of it and
22 you reach standard level 3, you are out of service. Those
23 provide enforcement tolerances based on an evaluation of how
24 far from the good standard you are.

25 And that is, in a sense, it says, they are all

1 violations. They can all be issued citations for it. But,
2 we really recommend, and if you follow our guidance, and you
3 remember, you should really put them out of service when
4 they get so far out of tolerance to reach a level 3.

5 Look, however, at the fatigue out-of-service
6 criteria. And it is qualitatively different. It is item 6.
7 And this establishes an evidentiary standard. It doesn't
8 tell you about levels 1, 2 and 3, as to how thick your brake
9 linings are, or anything like that. It says, when so
10 fatigued that the driver should not continue the trip based
11 on reasonable articulable suspicion, that is not like the
12 discretionary, what level of thickness are your brake
13 liners, or anything else that you can measure empirically.

14 It provides no standard as to what fatigue is and
15 how seriously fatigued you ought to be before CVSA -- it
16 says "if you are so fatigued," and that is conclusory. But,
17 it doesn't offer you a way to measure that. It says
18 reasonable articulable suspicion, and that shifts into an
19 evidentiary standard which conflicts with your Order. And
20 they are required to follow that, as the policy statement
21 says, as a matter of law.

22 So, this is a, you know, it is a round peg in a
23 square hole. It does not establish any kind of criteria or
24 standard. It establishes an evidentiary guide which is
25 completely out of sync with your Final Order and the

1 Constitution.

2 THE COURT: And in fact, relevant or not today, as
3 I am quite certain one of opposing counsel will point out
4 when they have the opportunity is, obviously, one of the
5 separate grounds for attacking this was that
6 unconstitutionally vague argument that, well, how are we to
7 come up with some criteria that is objective by any measure
8 to declare someone out of service? Obviously, that was in
9 part litigated --

10 MR. CULLEN, SR.: Sure.

11 THE COURT: -- in front of me.

12 MR. CULLEN, SR.: We are not attacking the
13 imprecision of this. God knows that, I mean, it is
14 seriously flawed in a variety of respects that aren't before
15 Your Honor this morning, declare the driver out of service
16 until no longer impaired.

17 THE COURT: The 10 hours is gone, you are saying.

18 MR. CULLEN, SR.: The 10 hours is gone. We don't
19 have a standard to put him out of service. We don't have a
20 standard of how fatigued you have to be, nor do we have a
21 standard as to how alert he has to be.

22 And if you will recall Major Urquhart's testimony,
23 they put somebody out of service, they do not supervise
24 them, they do not insist that the person get sleep. And
25 very often, the officer will go home for the night and there

1 is no one to re-inspect the driver, even today.

2 So, there are lots of flaws with this that are not
3 before Your Honor. All right? They will await another
4 court, another day, perhaps.

5 What is before Your Honor is the fact that this
6 particular so-called out-of-service criteria establishes no
7 criteria at all. And that is obvious just from looking at
8 it. But, it does substitute an evidentiary standard, which
9 is diametrically opposed to the very clear and precise
10 standard in your Final Order.

11 Reasonable articulable suspicion, probable cause,
12 it is rock solid in the Constitution, and so it does make a
13 difference. This is a square peg in a round hole, as I say.
14 It does not conform to your usual types of out-of-service
15 criteria.

16 Nobody on the other side has contested that that
17 criteria is inconsistent with your order, none of them, at
18 least in their opposing papers. I would be most interested
19 if they had views on that to express to Your Honor this
20 morning.

21 CVSA does not deny in its papers that it had
22 actual knowledge of the Final Order when they went through
23 this amending process. Mr. Morris is here today, but his
24 affidavit was before opposing parties. None of them
25 contested the fact that your Final Order and your interim

1 Order -- your first findings and conclusions were before
2 CVSA in April. Your final September 21st order is before --
3 was before them when they had their September meeting a year
4 ago, and so they had actual knowledge --

5 THE COURT: I don't --

6 MR. CULLEN, SR.: -- which was the standard.

7 THE COURT: I will be surprised if -- I don't
8 think that is an issue at all today.

9 MR. CULLEN, SR.: It is a jurisdictional fact.

10 THE COURT: I don't think that's -- I don't think
11 that that is a defense or an issue raised, even assuming
12 that there is not a jurisdictional impediment. I think
13 there is no --

14 MR. CULLEN, SR.: Sure.

15 THE COURT: I don't think anybody could critically
16 make that argument, especially when it just mirrors the
17 General Order. I actually think they are probably going to
18 concede that regardless, without giving me all of the detail
19 of why the CVSA ignored the General Order and my Order, that
20 they weren't obligated to follow it, and for the reasons I
21 have stated. But no, I don't think there is any claim of
22 ignorance. For some reason, they just didn't like the
23 Order, didn't like the General Order of what Minnesota was
24 doing, or found it wasn't constitutionally necessary.

25 MR. CULLEN, SR.: Insofar as Minnesota is

1 concerned, they weren't at liberty to change it. Insofar as
2 the rest of the country is concerned, they ought not have
3 changed it, because your Order is rock solid,
4 constitutionally. Putting aside the practical implications
5 of discerning a difference, it is rock solid
6 constitutionally. And you should issue a finding to that
7 effect, because -- I wish FMCSA were here today. That would
8 have been very helpful. And we kept Your Honor apprised of
9 our -- they knew about our motion. We sent it to them. We
10 even sent them our reply papers, recently. But, they are
11 not. And so, for better or worse --

12 THE COURT: And neither party, it is true -- but
13 let's finish the rest of the story -- it is true that as the
14 Defendant, one or both Defendants or CVSA says, well, you
15 didn't join them at the lawsuit.

16 It is also true that notwithstanding their
17 paramount mission, there was no motions to intervene by
18 anybody, either. So, they weren't here for my suit,
19 apparently were indifferent to it, and neither was the
20 Federal Motor Carrier Safety Administration. And so, no,
21 there were no motions to intervene. Back then I thought
22 even if we were never to meet again, there might have been,
23 because of the overarching -- their first priority is trying
24 to create uniform standards for the whole country for
25 obvious reasons, I think.

1 MR. CULLEN, SR.: Sure. And the drivers want
2 uniform standards.

3 THE COURT: I would think so.

4 MR. CULLEN, SR.: And you are in a position, Your
5 Honor, to give us --

6 THE COURT: And the public appreciates --

7 MR. CULLEN, SR.: The public at large needs it,
8 everyone needs it. You're in a position to give us those
9 standards. You should hold that the out-of-service
10 criteria, as amended, is inconsistent with your Order, and
11 unconstitutional on its face, given applicable
12 constitutional principles.

13 THE COURT: Now, what of the Defense's point of
14 view, not so much the State -- well, they are going to say,
15 we weren't really acting in concert. We are complying with
16 the Order. And we will see where they focus. But, I am
17 sure counsel for CVSA was going to say, well, you know, that
18 issue isn't in front of you, Judge. We are absent a
19 contempt finding. That issue is not in front of you on
20 whether what we did was -- whether this standard meets
21 constitutional muster. Of course, you saw what they said.

22 MR. CULLEN, SR.: I believe it is pretty much
23 before you. And I will get into CVSA's presence before the
24 Court and the fact that you have all of the powers that you
25 need with someone with actual notice and significant

1 contacts within Minnesota. You have powers to act. And
2 just the second goal, and then I will get back just to the
3 points I wanted to raise and answer your questions on those.

4 You should issue a show cause order and require
5 CVSA to come here on a date certain, 30 days out, you pick a
6 date, to show cause why they should not be held in contempt
7 of court. And I will stipulate today that barring anything
8 unforeseen, the Plaintiffs will consent that CVSA can purge
9 itself of contempt by rescinding the Order -- or the
10 criteria, rather. Rescind the out-of-service criteria, and
11 that will give us uniformity which is constitutional
12 throughout the country, a very important goal to everyone
13 involved, drivers, enforcement officers, the public at
14 large.

15 We are not here to punish the CVSA. We are not
16 here to punish the Minnesota State Patrol. But, we are here
17 to get uniformity and certainty of what the rules are. And
18 your Order is rock solid, constitutionally. What CVSA did
19 is clearly not -- and if you issue a show cause order, we
20 will stipulate that they may purge themselves of contempt by
21 rescinding it.

22 And they are meeting, all of CVSA, just so you
23 know, is meeting in Portland, Oregon for the next week or
24 so -- Portland, Maine, I'm sorry, starting, I believe,
25 Sunday. All of the people that need to get together to

1 rescind this Order are going to be sitting up in Portland,
2 Maine for the next week. And it would be a very timely act
3 on their part to rescind this. And Your Honor is in a
4 position to give them some guidance as to why that should be
5 useful in an order earlier. And it really postpones the
6 final decision on contempt.

7 You are merely saying, you have got to come in in
8 30 days and show cause why I won't hold you in contempt.
9 And the Plaintiffs are willing to withdraw their motion or
10 allow you to purge yourself if you merely rescind something
11 that you don't contest is wrong.

12 I mean, they may come in this morning and try and
13 show you that it is right, and we would be interested in
14 that argument. The Patrol, of course, informed enforcement
15 personnel when they published this under their own name, and
16 CVS's name that they are required to use this. And they did
17 this sometime in April. And they didn't change their mind
18 until June 21st, 10 days after we signed, that we filed the
19 motion for order to show cause. And there is no evidence in
20 the record right now other than this publication by the
21 Minnesota State Patrol instructing its officers to follow
22 it. There is no indication that they gave the same
23 June 21st instructions earlier.

24 They heard about it. And the only thing in the
25 record is that apparently Captain Rogotzke says that he

1 voted against the Amendment. Well, if he voted against it
2 because it was unconstitutional, they never should have
3 published it in this form. They should have done what they
4 did on June 21st a lot earlier. But, we suspect that they
5 might have had a variety of motives unrelated to your Final
6 Order for voting against it.

7 But, the sad fact is that the Patrol is required
8 to follow what CVSA does because of the statute, because of
9 the contractual obligations under the MOU, and their General
10 Order which they are required to follow by your Order. All
11 right?

12 So, they are bound to do it. And the fact that
13 they didn't vote for it is really quite beside the point.
14 There are three or four reasons why they have no choice
15 right now. You can get them off the hook on that statutory
16 obligation that they have. And that is what you should do.

17 Turning briefly to CVSA. Actual knowledge, we've
18 discussed that. They are in privity with the Minnesota
19 State Patrol. And this just comes from our brief. And Your
20 Honor has cited most of it.

21 THE COURT: It is all over their website.

22 MR. CULLEN, SR.: It's all over the website. This
23 is from the MOU. CVSA is responsible for the administering
24 and enforcing of motor carrier safety and hazardous
25 materials laws in the United States, down to the bottom, by

1 providing the framework for uniformity, compatibility and
2 reciprocity. That is in our brief and you have seen it in
3 a half a dozen locations. So that they have common
4 interest, privity of contracts through the MOU,
5 broadly-circulated statements of purpose to get everyone,
6 including Minnesota, to follow them.

7 They have designated -- we are talking now about
8 contacts within Minnesota that give you personal
9 jurisdiction over them. They have designated Captain
10 Rogotzke as their contact person, and that is an exhibit to
11 the Morris -- one thing I would like you to notice, Captain
12 Rogotzke is here. And on his official Minnesota State
13 Patrol Uniform is a CVSA pin, that is more than a minimal
14 contact in Minnesota. He is their man in Minnesota. And I
15 think most enforcement officers that are in the Commercial
16 Section wear CVSA pins as part of their official uniform,
17 showing a distinct presence here for the purposes of
18 personal jurisdiction and the various points that you
19 pointed out in the *K-Tel* case.

20 Minnesota's -- the CVSA mail ballots on the
21 question of amending the out-of-service orders to Minnesota,
22 Minnesota mailed back their cast ballot from Minnesota. The
23 Minnesota State Patrol includes a link to CVSA on its
24 website.

25 There were two exhibits filed by counsel, and you

1 will look right down there, plain as day, on the Minnesota
2 State Patrol website, there is a link to CVSA's website.
3 And there is a strong identity of interest between the
4 Minnesota State Patrol Defendants and CVSA. Uniformity,
5 compatibility, reciprocity.

6 THE COURT: They were here earlier this year to
7 give out some awards, and I guess the quote is, "In
8 furtherance of improving uniformity in the enforcement of
9 highway safety standards across the continent," is what the
10 statement said in their press release when they came to
11 Minnesota to give out -- I think it was a contest sometime
12 this summer. I obviously wasn't at it.

13 MR. CULLEN, SR.: Yeah, it is not a close
14 question, Your Honor. The *International Shoe* and the
15 contacts you went through, and *K-Tel*, there are an abundance
16 of contacts here to warrant your exercise of jurisdiction
17 over them.

18 In terms of ripeness, there are a couple of points
19 that should be made. This is paragraph 4B of your Final
20 Order. "Defendants shall not rescind or modify so as to
21 reduce the procedures established by General Order
22 10-25-002, unless the Court for good cause shown by the
23 Defendants modifies those requirements established under
24 10-25-002.

25 At the very least, instead of just casting a

1 ballot against it, for whatever motives you might have had,
2 the Patrol should have come in here and said, look, we have
3 got a problem. We have got to follow these things under the
4 statute. We have to make some modifications to your Final
5 Order, so that -- to deal with this new out-of-service
6 criteria for fatigue. And that is a violation that was, in
7 my mind, ripe soon after the Patrol learned that this thing
8 was approved, not later than April 1 when they published the
9 modified version. They should have been in here long before
10 they went to press with that with their own version of it,
11 long before CVSA -- if you look at the timeline, OOIDA found
12 out about it in the middle of February, but it was probably
13 known in the end of December when the ballots were counted.

14 THE COURT: I got the impression, separate from
15 this issue, I got the impression from reading the brief, if
16 not your brief, the affidavits, that OOIDA officers went --
17 shortly after the September order, the injunctive relief
18 that implemented, continued that General Order -- went to
19 the meetings and so forth and wanted to discuss some
20 proposals, at least one related precisely to this. You
21 know, there was one that didn't. And basically, it was
22 tabled once.

23 By what I see, there obviously were discussions
24 behind the scenes by somebody, because they brought it in.
25 And the next thing -- so, I mean, that probably isn't an

1 issue either, because shortly after September your client
2 went to one of these get-togethers, and then either the
3 first or second time they said we want to move this or
4 discuss it, and it got tabled. And after that the balloting
5 started sometime later.

6 MR. CULLEN, SR.: We had a proposal that I believe
7 came in April saying, we're off the out-of-service criteria
8 that you have until you have an effective way to identify
9 and measure fatigue in the field with enforcement officers.
10 And they put that aside for further study. I don't know who
11 is studying it.

12 There was a -- as far as we know, there was
13 something rejected at the September meeting, but we don't
14 know what the proposal was. And although CVSA probably does
15 know, they didn't tell us in their disclosures what that
16 proposal was. But, something was rejected, and we do know
17 that in December the proposal that was ultimately adopted
18 was mailed out. And we found out about that middle of
19 February, I think.

20 THE COURT: Why don't I hear from Ms. Devine or
21 Mr. Vasaly. I'm not sure who is going to address the Court,
22 so --

23 MR. CULLEN, SR.: Thank you, Your Honor.

24 THE COURT: Maybe they both are. But, there will
25 be time for rebuttal.

1 MS. DEVINE: Thank you, Your Honor.

2 THE COURT: I was over to your, for that -- I was
3 going to use the word sad, but let's use a different word,
4 party for Ken Kohnstamm.

5 MS. DEVINE: I saw you there, but didn't have any
6 interaction with you.

7 THE COURT: Right. Well, there was a big turnout,
8 so --

9 MS. DEVINE: Right, it was honoring him.

10 THE COURT: An honor well-deserved.

11 MS. DEVINE: Absolutely. Your Honor, we are here
12 for a very narrow purpose, and that is because the
13 Plaintiffs issued a Motion for an Order to Show Cause. The
14 standard of review here is whether they have come forward
15 with clear and convincing evidence that shows that the
16 Patrol, I will refer to Defendants as the Patrol.

17 THE COURT: Fair enough.

18 MS. DEVINE: That the Patrol is in contempt of the
19 Court's Order.

20 There is, first of all, absolutely no evidence
21 that has been brought forward by Plaintiffs that the Patrol
22 has failed to comply with the Court's Order.

23 The Patrol took very seriously the Court's Order,
24 as indicated in Captain Rogotzke's Affidavit. The Patrol
25 followed the Order, followed the Court's injunctive Order,

1 rescinded out-of-service orders, has done ongoing training,
2 specifically, about the limitations and restrictions that
3 the Patrol put into place which were not in place in 2008,
4 namely the General Order that you referred to earlier, that
5 indicated that reasonable articulable suspicion was needed
6 to expand a routine inspection to inquire about fatigue, and
7 that probable cause -- that the driver due to fatigue was
8 too impaired; that there was an imminent risk to the public
9 if that driver continued to drive due to that impairment.
10 And the Patrol has followed that.

11 The Patrol has spent a significant amount of money
12 in attorney's fees and expenses because it didn't have these
13 limitations and restrictions in place in 2008 when Plaintiff
14 House was put out of service. And it is not about to
15 violate the Injunctive Order and subject the state and the
16 public, as you referred to earlier, to more financial
17 exposure by not following the Order.

18 The Patrol has no incentive not to follow the
19 Order especially after going through the trial. The Patrol,
20 as you know, has made significant changes. The Patrol
21 follows that General Order. And in referring to Captain
22 Rogotzke's Affidavit, you can see, and he has set forth what
23 he does, that out-of-service orders and citations are
24 required at the same time. That is what the probable
25 cause -- that is where the probable cause comes into effect,

1 here. And there has to be supervisory approval before the
2 out-of-service order citation can be issued. And those are
3 reviewed on a very regular basis by Captain Rogotzke,
4 himself, to ensure that that policy, which the Court
5 incorporated into its Injunctive Order, is being followed.
6 The training has been ongoing.

7 The Court in its decision did not make a
8 determination about what the minimum standard,
9 constitutional standard should be, but rather indicated that
10 the Patrol's voluntary decision, as you referred to earlier,
11 of using reasonable articulable suspicion and probable cause
12 was constitutionally adequate.

13 And Plaintiffs are arguing that somehow the Court
14 should issue a new Order and indicate what that standard
15 should be. We are not here to reargue what the standard
16 should or should not be. The Court heard testimony based
17 on --

18 THE COURT: Six or seven plus, six days,
19 five days?

20 MS. DEVINE: Yes, it was a very long trial. The
21 Court indicated that the enforcement was not
22 unconstitutionally vague with respect to what constituted
23 fatigue. And we are not here to talk about whether there
24 should be different levels of enforcement criteria or
25 standards in the CVSA booklet or not.

1 The issue here is narrow. There is absolutely no
2 evidence that the Patrol encouraged or participated with the
3 CVSA to change its out-of-service Order concerning fatigued
4 drivers. The Affidavit of Tim Rogotzke very specifically
5 indicates that no person from the Patrol participated on the
6 Driver Enforcement Committee or the Executive Committee,
7 which was apparently responsible for the language in the
8 CVSA booklet that comes out every year.

9 And in addition, Tim Rogotzke did not, on behalf
10 of the Patrol, support the change that the CVSA was
11 recommending.

12 THE COURT: What is missing -- and I suppose by
13 saying that, you know, I am inviting an excursion off the
14 record of things that aren't in front of me. But, what is
15 missing, of course, it seemed so logical, even apart from
16 the most pervasive word in everybody's websites, their
17 guidelines, their mission is uniformity, coordination. And
18 in fact, that is probably why the public of all government
19 agencies are so cynical because people don't sit down like
20 the private sector does.

21 Well, here, what is missing is -- well, wait a
22 minute. We have got five or six days, apart from the
23 millions of dollars that were spent, and all of the time,
24 whether Minnesota was trying to be a pioneer or not. And
25 apart from my Order, really, here is a General Order that

1 the Patrol did. And it is just difficult for me to
2 understand why the CVSA said to the Highway Patrol, take a
3 hike, pal. You guys didn't know what you were doing. We
4 are going to ignore it. I mean, that is what is implied
5 here in the surface.

6 That is why I think if this goes more public, a
7 lot of people are going to be very critical of this process.
8 Frankly, no matter what my decision was, they are saying,
9 well, we would like to see the discussion that was had at
10 the highest level of why they ignored that whole process
11 that was carefully put in place, long before my Order,
12 because that was your view.

13 Look at what the Patrol has done? They studied
14 this, they examined it, they were doing things nobody else
15 was doing. Then this meeting comes in and of course there
16 is nothing in the record about, well, how do they get from A
17 to Z? And that is the part that -- and again, you may
18 appropriately say, well regardless of what went on behind
19 the scenes, that doesn't equate to contempt or anything
20 close to it.

21 And we will get to that separate issue of, well,
22 apart from once that was in place, you heard what Mr. Cullen
23 said in his brief, well then you are obligated to follow it.
24 And then he put up the exhibits. But, I won't speculate
25 about what happened, but it just -- it makes -- it is the

1 typical cynical view that the Government has of government
2 regulation. Everybody ignored everybody. Even if you
3 ignore all of the time that was spent here, your client did
4 all of this work for a General Order. And there is nothing
5 in the file about, well, how did they discuss that? Who sat
6 down and said, how, folks, did you come -- that is the part
7 that is perplexing to me that everybody is comfortable
8 turning this over to a Federal Court to say, I guess you
9 will have to tell us what we need, how to do our business.

10 MS. DEVINE: Well, as you know, Your Honor, I am
11 not here representing the CVSA, which is a nonprofit
12 organization.

13 THE COURT: Oh, of course not. I would think your
14 client would be a little frustrated to say, well, look it,
15 we tried to talk to them. We tried to go in at the highest
16 level and say, we have been through all of this, and here is
17 how we arrived at what we did.

18 And folks, we did this long before a Federal Judge
19 stepped in, because we are the experts, not him. And he
20 adopted our Order. And so why shouldn't we give serious
21 thought to this, especially when you are drawing a very
22 fine, someone would say, almost artificial line on this
23 reasonable articulable suspicion that the Supreme Court has
24 a difficult time explaining to people?

25 MS. DEVINE: Right. Judge, I think that a couple

1 of things need to be clarified. First of all, the policy
2 statement which Mr. Cullen read to you was only part of the
3 policy statement.

4 THE COURT: That is true.

5 MS. DEVINE: And it very specifically indicates
6 that except where state, provincial, territorial or federal
7 laws preclude enforcement of the named item motor carrier
8 safety enforcement personnel and their jurisdiction, shall
9 comply with these out-of-service violation standards.

10 They are standards. And this policy, very
11 specifically, excepts the Patrol, the State, from following
12 these standards if the law in the jurisdiction says
13 otherwise. And the law in this jurisdiction is your Order.
14 And the Court has the evidence in Captain Rogotzke's
15 Affidavit that the Patrol has been following your Court
16 Order.

17 THE COURT: That is why, again I am careful to
18 say, that some of this may not relate to the merits. Maybe
19 the Plaintiffs won't concede that. I think that is what it
20 is, but it still doesn't explain why they are encouraging
21 non-uniformity, because that is what that is doing, saying,
22 you know, highway patrolmen? We don't care what you did,
23 you are wrong. And here is what we are going to do instead.
24 We are going to consciously lower the standard, because we
25 don't care about uniformity. I mean, that is the part --

1 MS. DEVINE: I can't speak to what the CVSA did --

2 THE COURT: No, but I --

3 MS. DEVINE: But, I can tell you that we have
4 indicated to the CVSA our concern about the inconsistency,
5 as we have also indicated to the FMCSA our concern.

6 The other thing that I think is significant here
7 is that the evidence shows, I believe it is in Mr. Morris'
8 Affidavit, shows that they are a member of the CVSA. And
9 that in February of 2012 they knew about these proposed
10 changes.

11 And as was characteristic throughout the trial, or
12 prior to the trial, prior to the summons and complaint being
13 filed, not once did OOIDA contact the Patrol and say, we are
14 aware there is going to be a change in this out-of-service
15 criteria. Can we get together and talk about it? Not once
16 did the Cullen Law Firm contact either me or Mr. Vasaly to
17 say, you know, we are aware of this. What can we do about
18 it and try to work together?

19 We, the Attorney General's Office, was not aware
20 that there was an issue here until we received their Motion
21 to Show Cause. And the Patrol thought it was ludicrous that
22 anybody would be challenging, bringing such a motion, and
23 somehow claiming that the Patrol wasn't following the Court
24 Order, or that the Patrol wouldn't, when the policy, the
25 CVSA policy clearly says, when excepted by the

1 jurisdiction's law, because they were following it.

2 And the fact that there is a booklet that has a
3 logo on it, the CVSA logo doesn't mean that there is
4 collaboration in terms of supporting something that is
5 improper. But, even so, the policy, itself, in the first
6 pages, here, indicates that the Patrol is excepted, the
7 states are excepted from following the criteria if the law
8 in that particular jurisdiction says otherwise.

9 So, the fact that Captain Rogotzke has a CVSA pin
10 is really kind of fishing to pull anything in, because the
11 bottom line is the Plaintiffs haven't come forward with
12 anything that shows that the Patrol was corroborating, or
13 somehow using the CVSA to carry out some unconstitutional
14 purpose.

15 THE COURT: Now, as to the -- you also heard Mr.
16 Cullen say, well, given the state statute framework in
17 Minnesota, that unless I get -- I won't -- this is a phrase,
18 it probably wasn't his phrase, get you off the hook, or the
19 Patrol, you must follow that policy. He used that phrase,
20 as a matter of law, and said you must follow that because of
21 the state statute.

22 MS. DEVINE: Well, if you read the state statute
23 to say that it incorporates the out-of-service criteria,
24 then it also incorporates the policy which gives exception
25 to the Patrol in following provisions within the

1 out-of-service criteria that are inconsistent with state
2 law. And if they were to follow this, taking Mr. Cullen's
3 argument a step further, assuming that they are bound by the
4 state law, then they are also bound by the fact that there
5 is this exception. And that because the Court's Injunctive
6 Order here is the law in this jurisdiction, that is the law
7 that they are required by statute to follow. And in fact,
8 they are doing that. So, I think that that is really
9 significant.

10 What the Plaintiffs are trying to do here is to
11 obtain injunctive relief and declaratory judgment under the
12 guise of this Motion for an Order to Show Cause. The
13 Plaintiffs, apparently OOIDA, went to the CVSA and tried to
14 get the out-of-service criteria for fatigue changed or
15 omitted. And that didn't work. They didn't like what the
16 CVSA did, and now they are here trying to get this Court to
17 issue an order that would have national effect. Certainly
18 the Court's injunctive order is mandatory in Minnesota. But
19 it is not mandatory in other states.

20 Now, OOIDA could certainly take it to other states
21 and argue that it is authoritative, but different states
22 have different ways of enforcing violations of the Federal
23 Motor Carrier Safety Regulations and out-of-service
24 criteria. Some issue citations, some only issue
25 out-of-service orders, some issue both. So, what might work

1 in Minnesota may not work in other states. But, it is up to
2 that state to determine, based on their state law, what
3 applies. And it is not for this Court to order another
4 jurisdiction about how to run that particular jurisdiction.

5 Now, if the Plaintiffs want to change the
6 out-of-service criteria in other jurisdictions and obtain
7 injunctive relief, a declaratory judgment against the CVSA,
8 and there is some way to do that, they certainly can do
9 that; but, not under the guise of this motion, not in this
10 venue, and not here.

11 The Plaintiffs seem to want this Court to issue an
12 out-of-service order -- to rule that an out-of-service order
13 requires probable cause. Plaintiffs' seem to want to
14 relitigate what constitutes a detention. I think in their
15 papers they talked about what constitutes an arrest. The
16 Court never decided whether issuing an out-of-service order
17 to House constituted an arrest, or what the minimum
18 constitutional standard was.

19 In fact, the Court specifically indicated that the
20 concern was that Ullmer and Norton didn't have reasonable
21 articulable suspicion at the time to determine that House
22 was too impaired due to fatigue to safely operate his motor
23 vehicle. And that it was the continued duration of the
24 detention beyond the routine level 3 inspection, as well as
25 the broad scope of the questioning by Ullmer and Norton that

1 constituted the seizure in this particular instance of
2 violating House's right to be free of an unreasonable
3 seizure.

4 The Court only ruled that the restrictions and
5 limitations that the Patrol had enforced had created, that
6 is, probable cause to issue out-of-service orders. And
7 citations were constitutionally adequate.

8 The Patrol is very concerned about being able to
9 continue to, and intends to continue to enforce the Order.
10 It wasn't necessary between April 1st and June 21st when
11 Captain Rogotzke sent out its memo to remind the Patrol to
12 do something that it already knew it had to do where there
13 was no confusion, and that is to follow the Court's Order,
14 Injunctive Order, which it was already doing.

15 It is only because the motion got filed that the
16 Patrol felt that it needed to be clarified because people,
17 of course, would know that the motion was filed, and maybe
18 not understand the legal ramifications of the motion.

19 So, here what we have is -- we have before you the
20 Plaintiff's Motion for an Order to Show Cause that the
21 Patrol is in contempt, with absolutely no evidence brought
22 forward by the Plaintiffs that the Patrol has actually
23 violated and not followed the probable cause standard that
24 they voluntarily created and that this Court said was
25 constitutional.

1 They haven't met this very narrow standard of
2 review. There is no evidence that the Patrol violated the
3 Injunctive Order or that they encouraged or participated
4 with the CVSA to change the standard to reasonable
5 articulable suspicion. And issuing another order when the
6 Injunctive Order is clear and unambiguous is, first of all,
7 exceeding the purpose of this motion. And secondly, it is
8 not necessary because the Patrol is very aware of what its
9 obligations are under the Injunctive Order and has been
10 following them.

11 So, we respectfully request that the Plaintiffs'
12 Motion be denied with respect to the Patrol. Thank you.

13 THE COURT: Thank you. I'll hear from counsel for
14 CVSA. Obviously, you are at a small disadvantage, and you
15 are probably going to say, no, we poured over all of those
16 transcripts -- but there is a rather extensive history here,
17 but you may well appropriately say, well, the history is
18 fine, maybe important in other circumstances, but not really
19 relevant to the legal merits.

20 I will just observe, unrelated to the case, given
21 the firm that you are from, that one of the finest lawyers I
22 have known, and he is one of the reasons I am here, John
23 French. I was at his funeral. And I think some of the
24 other lawyers in the room probably know that by reputation
25 he was one of the finest lawyers.

1 And the irony always is, when he was at Harvard
2 with Justice Scalia and Richard Arnold, it was John who was
3 editor of the Law Review he died, recently. And he was the
4 Co-chair of Paul Wellstone's Committee and had tried a case
5 with me as a State Judge, and is one of the reasons that I
6 was recommended to His Honor, or to the President by
7 Wellstone. But, yeah, because for most of the local lawyers
8 that I know, Mr. Goins I am sure knows, John died recently
9 and was a fine human being and lawyer. And a humble man for
10 being from Harvard, too -- no offense to everybody else, but
11 enough said about that. But since I was talking about
12 another lawyer, Ken Kohnstamm, as well. So, whenever you
13 are ready.

14 MR. JACOBS: Well, thank you, Your Honor. We very
15 much appreciate you having us here today. And you are
16 absolutely right that I have done my best to bring myself up
17 to speed on this whole thing, but I apologize if I get some
18 dates wrongs or things like that in my head. Certainly,
19 there is a lot of history, here, between the parties.

20 THE COURT: All right.

21 MR. JACOBS: I think -- excuse me. One of the
22 things I do want to thank you for all of your comments about
23 CVSA and the process, and certainly I will bring that back
24 to my client to make sure they understand your concerns.
25 And it is important, I think, to recognize that CVSA is a

1 nonprofit organization made up of law enforcement, industry,
2 truck drivers. It's a very collaborative body.

3 So, in some sense, there is a bit of herding of
4 cats involved when you are working on such a collaborative
5 process. We, obviously, did not put into the record sort of
6 all of the discussions, the deliberations. We didn't think
7 it was relevant today. But, certainly if you feel that you
8 would like to know that, we would be happy to provide
9 additional information.

10 I think what we did make clear is that CVSA was
11 not acting at the behest of or the request of the Minnesota
12 State Patrol in order to try and circumvent your Order in
13 some way, shape or form, or anything like that at all. It
14 was a long -- and as it is laid out in the timeline, a
15 variety of processes that went on.

16 And I think one of the things, if I could from Mr.
17 Morris' Declaration, as to the ballot, itself, that it lays
18 out a fairly lengthy description of why it is that the CVSA
19 considered the fatigue criterion, why it was thinking about
20 changing it, and some of the issues that were involved.

21 And as was said, the fatigue criterion is
22 different than a lot of the other criteria. It is much
23 different to say that a brake line has to be a certain
24 thickness, or fatigue is different. So, CVSA is struggling
25 and working with finding out what the right approach to the

1 out-of-service criterion is. It is an ongoing iterative
2 process.

3 I think it was interesting, if I understood sort
4 of the Plaintiffs' request, that if CVSA rescinded this
5 version of the criterion and went back to the criterion that
6 was in place before, there may actually be less uniformity,
7 Your Honor, because that criterion provided no level of
8 suspicion that is required. And certainly, in Minnesota, it
9 would be your Order and the standards that the Patrol has
10 adopted. But, in other states, there may be other standards
11 that have been adopted that perhaps other states think that
12 reasonable suspicion is appropriate.

13 So, I think that in many ways, as I understand it,
14 this attempt to put reasonable suspicion in, though maybe
15 not the right answer, or it got to the right place
16 immediately was an attempt by CVSA to try and provide some
17 clarity and some guidance to the criterion that exists, that
18 is out there.

19 So, I just want to make sure that your
20 understanding of the process is that it is ongoing --

21 THE COURT: And like I said, I will be careful to
22 say that I am not so sure I have to reach some of those
23 issues. That may or may not be conceded by the Plaintiff,
24 the whole process, itself. But it is, I think, frankly
25 speaking, and actually my opinion about this, since this

1 opinion does not go to the merits, as far as I can see,
2 whether it is joined by what I think is going to be
3 increasing criticism by the public as this gets out more,
4 apart from what the truck drivers feel, saying if your
5 primary purpose is trying to promote uniformity, you have
6 completely failed, because you should have given an
7 explanation to somebody why you just took the State Patrol's
8 General Order and threw it in the wastebasket and why you
9 went to this line that even educated constitutional law
10 scholars have a hard time drawing, separate from what is
11 constitutional here, because I won't keep repeating what
12 Justice Rehnquist said. But, he and many judges said, very
13 difficult to draw that line, which implies that someone
14 quite deliberately said, we are going to separate ourselves
15 from this General Order that the Patrol worked so hard on,
16 apart from the fact that I followed it, as well.

17 I mean, that's careful, again to say, I don't know
18 that -- I don't have to step behind the scenes, and I won't
19 speculate. But, I think it is a fact of life and we will
20 soon find out that no matter how I decide this, I think --
21 and especially if there is more litigation, especially if
22 the State Patrol after the two years is done changes their
23 General Order, you are going to see a big backlash, apart
24 from all of the money that is being spent on the
25 non-uniformity. That is my only concern.

1 And you will be fully within your discretion to
2 say, well, even if you are right, Judge, we don't concede
3 that. You don't have to reach any of those issues. This is
4 a contempt motion. I concede that.

5 It seems like these organizations wouldn't want a
6 Federal Court to be deciding standards on the highway. But,
7 in any event -- no, I acknowledge what you said. And I
8 think some of these issues are going to continue to exist,
9 frankly, no matter how I decide this motion, to some point.

10 The Plaintiff has some other issues that I am
11 either going to have to agree to say yes or no to, or up or
12 down. I interrupted you, and I'm sorry.

13 MR. JACOBS: That is quite all right, Your Honor,
14 thank you very much. I do want to also put up, perhaps --
15 well, what I should say is this -- to suggest that CVSA can
16 be held in contempt of this Court's Order, I think, goes
17 several states -- leaps beyond what the law holds in terms
18 of having actual notice, which as you rightly say, point
19 out, we don't question that. But that we either act in
20 privity with or we act in concert with --

21 THE COURT: That is the issue.

22 MR. JACOBS: And that is the crux of the matter
23 for CVSA, absolutely. And I think if you look at the
24 various cases that have been cited in the briefs, there is a
25 sense there that the non-party contemtor is doing something

1 to cause the party to be in contempt, or is going around the
2 Court's Order. Whether it be an abortion clinic protestor
3 who shows up and organizes the protest, who is there to
4 block, whether it is someone in a school desegregation case
5 on the school property, they are doing something beyond the
6 publishing of the criterion, they are causing a violation of
7 the Court's Order.

8 I think the statement is made clear that it is not
9 violating your Order right now, and that it is following
10 your Order, as a matter of fact, and that it is not
11 compelled to violate your Order by state law.

12 Because even though the CVSA criteria are adopted
13 by state law, that includes various policy statements in
14 their criteria that say, subject to state law, federal law,
15 and so it introduces, we recognize, a certain sense of
16 un-uniformity or dis-uniformity; but, it certainly
17 recognizes that in certain states there might be different
18 reasons and different standards that exist.

19 So, we don't have a case here as far as -- we
20 don't have a case here where the Minnesota State Patrol ran
21 to CVSA and said: Hey, if you can change your criteria, we
22 can follow -- you know, force us to follow your criteria, we
23 can get around that Judge's Order. That is not the kind of
24 case we have here, which it seems to me the contempt
25 standards for non-parties really gets to is where you are

1 trying to evade the Court's Order. And that is certainly
2 not at all what is happening here.

3 And it does seem to me that it is an attempt to
4 bring the CVSA criterion in for a facial challenge before
5 this Court, and that wasn't what was done before. Your
6 Honor mentions that you were surprised that CVSA and others
7 didn't intervene in the case before. And I think one of the
8 reasons is that the case really focused on the conduct, the
9 specific conduct. There was the stop that involves the
10 Plaintiff and then the Patrol's sort of reaction to that.

11 It wasn't sort of a broad attack on the CVSA
12 criteria at that point in time, and so it didn't seem that
13 it was necessary to be before this Court, I think. So, it
14 wasn't a sense of trying to ignore the Court or anything
15 like that, it just didn't seem -- there's a lot of
16 jurisdictions and a lot of litigation that goes on around
17 the country, so it just wasn't sort of something that seemed
18 as if it was an absolute essential to shape the criteria in
19 the right way.

20 I think the key point to our jurisdictional
21 arguments really is that unless you find that CVSA acted in
22 concert with the State Patrol, unless it stepped into the
23 shoes of the State Patrol, then that is what the cases say
24 that the Court doesn't have jurisdiction over the
25 non-parties. And that is really what our point is on the

1 jurisdictional front is you have to find that there is
2 active concert between the parties; that CVSA has done
3 something to get around the Court's Order. And that is just
4 not what we have in this case, Your Honor.

5 I think we put the evidence on to show that CVSA
6 was not in any way trying to help the state violate your
7 Order, or that the state was not trying to get CVSA to help
8 violate your Order. And that there is no evidence that your
9 Order has been violated. There is no evidence that a driver
10 has been taken out of service based on reasonable suspicion,
11 instead of probable cause, or anything like that, here.

12 THE COURT: All right.

13 MR. JACOBS: Okay?

14 THE COURT: One of the things that Mr. Cullen -- I
15 suppose I should be careful to say Mr. Cullen, Sr.. one of
16 the things that Mr. Cullen had suggested that, quite
17 separate from this case and really separate from -- so I
18 don't confuse the issue, separate from the substantive
19 arguments and merits in the briefs you have each made and
20 arguments today, one thing that he said that isn't unusual
21 to hear a moving party for contempt say is, well, at a
22 minimum, Judge, you should file an order to show cause and
23 serve on your client as to why they shouldn't come in here
24 and be held in, I would call it, constructive civil contempt
25 of court. They are saying not punishing for a past action,

1 but trying to secure compliance with existing orders.

2 I mean, reading your brief and, I mean,
3 procedurally that is not an uncommon thing to hear. In
4 fact, sometimes, then, even before you would have got here
5 today, you might have had one or more parties saying, well,
6 we don't concede the arguments of any of the parties, but if
7 you really are going to go through with this over our
8 objection, there is some additional discovery. Or, let's
9 ignore discovery, we have the right to an evidentiary
10 hearing. And oftentimes they mean by that some type of
11 testimonial hearing, maybe not.

12 And so, I am assuming by everything you have said
13 and the way the briefs have read, that when you want a
14 ruling from this Court and see no need to, even assuming --
15 in other words, there is no basis to hale your client into
16 court because there has been no showing of this clear and
17 convincing showing on the contempt issue as it relates to
18 this acting in concert with. There is other bases for
19 liability they have raised, but you are saying it ought to
20 end right here.

21 MR. JACOBS: That is our position, yes, Your
22 Honor. It is that there has been no evidence that the
23 Patrol is in contempt. There is no evidence that CVSA has
24 been in active concert with the Patrol. So, if there is no
25 contempt by the party, and then -- and CVSA, I think it is

1 clear, does not take people out of service, itself. It is
2 not as if CVSA has sort of a rent-a-cop arrangement where
3 they come in and say, reasonable suspicion here, here is an
4 out-of-service order.

5 So, there is nothing that CVSA has done to violate
6 your Order in any way, shape or form. And that I think that
7 perhaps the better long-term approach is that CVSA continues
8 to study this, to talk to the various fatigue experts and
9 figure out how it works, that Minnesota may be a slight
10 outlier at this point in time, but it may not be by next
11 year.

12 There's a lot of pieces that go into figuring out
13 what the out-of-service criteria are. This may be a
14 situation where you said that perhaps where it was
15 over-lawyered. I think here if you talked to my client,
16 perhaps it was one that was under-lawyered, quite frankly.

17 THE COURT: It could have been. It could have
18 been. Yeah, that could have been.

19 MR. JACOBS: And so now that they have seen that
20 CVSA understands where OOIDA is coming from on this, there
21 may be -- the process will play out effectively and we don't
22 think that it is appropriate at this point in time to be
23 brought back in in any way, shape or form.

24 THE COURT: All right. Thank you.

25 MR. JACOBS: Okay?

1 THE COURT: And if something else comes up, I will
2 let you respond, but --

3 MR. JACOBS: Great. Thank you, Your Honor.

4 THE COURT: -- we will hear some brief rebuttal
5 from Mr. Cullen, Sr..

6 Are you going to clear all of this up, Mr. Cullen?

7 MR. CULLEN, SR.: I hope so. At the end, if there
8 is any lack of clarity, please let me know what areas they
9 are in. And I will move on until you give up.

10 The point made by both opposing counsels is that
11 there is no clear and convincing evidence that there has
12 been a violation of your order.

13 THE COURT: That is what they said in their briefs
14 and today.

15 MR. CULLEN, SR.: Yeah. Well, let me -- there are
16 two reasons, two things to look at, here. One, as I have
17 put up on the screen and I will put it up again, this is
18 Rule 4B. The Defendants are in direct violation of that,
19 because they have allowed or observed the degradation of
20 your Order through the amendment of the CVSA out-of-service
21 criteria, which is embodied in your Order, and they didn't
22 come before you.

23 THE COURT: You heard what Ms. Devine said about
24 that. One, they don't control it; CVSA does. They also say
25 there is no evidence here that we haven't done anything

1 other than comply with -- followed through with our General
2 Order, which is also complying with your order. What of
3 that response that they have made, that we voted against it,
4 and really whether we voted against it or not, we complied
5 with the Order from day one.

6 MR. CULLEN, SR.: That is a factual representation
7 that has to be tested. We have shown you circumstances in
8 which we ought to be able to test that. We don't have
9 access to their enforcement activities on a daily basis.
10 And that is important, because let's step back and look at
11 what your Final Order really was.

12 It describes how someone, a CVSA-instructed
13 officer, trained officer, conducts a level 1, 2 or 3 North
14 American Standard Inspection. And the CVSA out-of-service
15 criteria blows right through everything that Order tries to
16 do.

17 You don't intrude with questions about fatigue
18 unless you first have reasonable articulable suspicion.
19 Everyone who has been subjected to an inspection, arguably,
20 has been harmed and injured.

21 Whether they were found out-of-service for fatigue
22 or not, the initial process which Your Honor sets up, you
23 don't go beyond that level 3 inspection of looking at the
24 logbook and their license and medical card, you have no
25 right to go beyond that to make an assessment of probable

1 cause or anything unless there is reasonable articulable
2 suspicion.

3 The CVSA Amended Order doesn't mention that
4 threshold requirement. They have to have some reason to
5 make inquiry into your state of alertness or your fatigue.
6 And I would say that anyone who has been subjected to a
7 level 3 inspection has been harmed on the surface, because
8 the CVSA new Amended Order pays no attention to the very
9 careful details of what you outlined.

10 THE COURT: Let's just assume that is exactly
11 correct. What they are saying and the State Patrol is
12 saying, and they wouldn't concede that, but let's just say
13 for the purpose of my question, that is exactly the way it
14 is. They are saying that, well, this is a contempt order.
15 And there are two things: The Patrol denies that they are
16 in any way not complying with the Order here in Minnesota;
17 and secondly, that there is no -- either coming from the
18 non-party side or their side, no proof that anyone is acting
19 in concert with one another or aiding and abetting one
20 another. That is really, I think, the issue they have put
21 in front of me. And you put in front of me. And you, of
22 course, are saying, no we have enough here to get beyond
23 that. We have got enough to get beyond that.

24 MR. CULLEN, SR.: Let's turn to each of those
25 points. I don't think I -- in looking at all of the cases

1 that have been decided in this area, Your Honor, I don't
2 think that there is anything clearer, any clearer case of
3 people acting in concert with each other than the memorandum
4 of understanding, which is set forth in our brief, calling
5 by reason of contractual obligations that they will all work
6 together for uniformity, consistency, reciprocity.

7 And I don't know how you can get a clearer, better
8 documented case of people in privity with one another,
9 sharing common goals, which is really the test. And we
10 don't have to go in the back rooms which we were excluded
11 for, to identify the conversations that went on, if any.
12 They are, as a matter of law, in privity with one another.
13 Their goals which they signed on to when they signed this
14 memorandum of understanding was to collaborate with CVSA.

15 I have never seen a case that is, as a matter of
16 law, more clear and conclusive on the idea of privity and
17 joint activity. And it is clearer here than you are going
18 to get in any other case that I have ever seen. And they
19 have done it by contract. And you don't really get beyond
20 that.

21 Now, counsel tries, you know, and I think perhaps
22 misspoke; but, they point to the exception of the
23 applicability of their memorandum of understanding with
24 local law, and she said, federal law. That is not what it
25 says.

1 The memorandum of understanding, where I have
2 highlighted it here, it is very plain. Except where a
3 member jurisdiction's laws preclude enforcement of a named
4 item -- that is not your Final Order. It is the Statutes of
5 the State of Minnesota. And the Statutes of the State of
6 Minnesota do not preclude enforcement of a named item, they
7 compel enforcement of the named item. And that is Minnesota
8 General Statutes 221.605, Subdivision 3.

9 THE COURT: That is where the two of you part
10 company, of course. They are saying that is no such thing.

11 MR. CULLEN, SR.: I don't recall that they said
12 that there is no such thing as that statute we all --

13 THE COURT: No, the statute is there; but they are
14 saying there is no such -- that is not -- that statutory
15 framework does not require them to follow the rules of that
16 organization. That is what they are saying.

17 MR. CULLEN, SR.: Well, that is not what they told
18 their officers when they published the bulletin saying, it
19 is imperative that you follow this as a matter of law. You
20 have seen their officers on the stand. These are not legal
21 scholars.

22 They got a booklet like that and say, you have got
23 to follow these out-of-service criteria as a matter of law.
24 That is what they told the enforcement officers. And this
25 particular provision, which is right in the MOU, if there is

1 a conflicting state statute, then there is an exception.

2 But, it doesn't talk about anything except the
3 jurisdiction -- that is the state of Minnesota's laws. And
4 I respectfully submit that that does not include your Final
5 Order.

6 Now, we pointed out in terms of clarity for the
7 lawyers, for the drivers that are out there. We don't think
8 Captain Rogotzke has the authority to decide that it can
9 abandon CVSA's out-of-service criteria which by state
10 statute he is required to follow. And you will be doing the
11 state of Minnesota and the Minnesota State Patrol a great
12 service to declare that out-of-service criteria in violation
13 and inconsistent with your Order, and unconstitutional.

14 And why -- I don't know what the answer to this
15 is, but why are they resisting that? What harm can come to
16 the Patrol if you would make such a declaration?

17 THE COURT: If we were to roll the clock back to
18 the trial that we had, I don't recall either party standing
19 up and saying, you know, Judge, Your Order isn't going to
20 make any difference. Because unless you exempt us, in fact
21 before April 1st, 2012, there was literally no standard.
22 Then they added in that Rule 6 for fatigue, the reasonable
23 articulable suspicion. I don't recall anybody saying,
24 Judge, we will violate state statute if we follow your
25 Order, because the standard on April 1st of 2011 has no such

1 requirement of articulable suspicion or probable cause. I
2 don't recall that coming up.

3 MR. CULLEN, SR.: Two points. One, the General
4 Order has a lot of things in it about what they can and
5 can't look at. You are no longer to look at droopy eyelids
6 and all that.

7 THE COURT: Right, but that is not a state -- that
8 is not a jurisdiction's law, either.

9 MR. CULLEN, SR.: Sure. But, the CVSA's
10 memorandum of understanding cannot exempt anyone from U.S.
11 constitutional obligations, can it?

12 THE COURT: That is true.

13 MR. CULLEN, SR.: Okay, and when you say that we
14 are under those standards as of April 1st of 2011 --

15 THE COURT: They were.

16 MR. CULLEN, SR.: They sure were. You articulated
17 them in your September 21st Order.

18 THE COURT: I am talking about their standard.
19 They didn't have reasonable -- or CVSA did not have even
20 reasonable articulable suspicion, so we could assume that
21 that is what they were following. But, no, I am talking
22 about how they changed their language --

23 MR. CULLEN, SR.: They had reasonable articulable
24 suspicion, because they have to follow the U.S.
25 Constitution, as does everyone else. So, to say that CVSA

1 didn't have any reasonable articulable suspicion, probable
2 cause -- that obligation, that standard, you didn't invent
3 that.

4 THE COURT: Of course not.

5 MR. CULLEN, SR.: It didn't happen for the first
6 time in your Order. You merely observed that in this
7 context those principles apply to commercial vehicle
8 inspections.

9 But, CVSA is required before April 1st, 2012 to
10 follow those principles, and after. And that is why I am
11 rather amused at the comment of opposing counsel that if we
12 rescind the Order, things will be less clear. There will be
13 no standards. Wrong.

14 The constitutional principles that are embodied in
15 your Opinion and Final Order apply to anyone. Now, they
16 seek application in various settings, but I can assure the
17 gentleman from CVSA that if this comes into litigation in
18 West Virginia or Boston, or anywhere, that your Final Order
19 and Opinion will be presented to whatever court is looking
20 at it. And there is great clarity that will come, because
21 your opinion is directly in line with long-standing and,
22 except in CVSA, well-understood constitutional principles.
23 And if they had taken five minutes to ask a lawyer what this
24 criteria should be, it wouldn't have been written the way it
25 was.

1 So, to say that there are no standards out there
2 if you rescind the thing is simply not true. There are
3 standards. And your Opinion will stand, I hope, for a good
4 long time and will be followed by other courts, and will
5 listen with great care.

6 Did counsel for CVSA attempt to defend the
7 out-of-service criteria as revised as a valid expression of
8 constitutional principles? I didn't hear that.

9 THE COURT: No, they are saying it is not in front
10 of me. It is not in front of me today. That is what they
11 are saying.

12 MR. CULLEN, SR.: Oh, I think it is. I think it
13 is, because under Minnesota Statutes the Defendants are
14 required to follow that.

15 THE COURT: That is an issue I have to decide
16 because neither of these counsel concede that. So --

17 MR. CULLEN, SR.: Sure. And under the memorandum
18 of understanding they are required to follow that. They
19 have a contractual obligation to follow that. Talk about
20 privity, that is where that word comes from. And the
21 exception is not grounded, as it must be under this
22 contractual provision.

23 It is not grounded in Minnesota law. Minnesota
24 law affirms the out-of-service criteria. It is your
25 opinion, which is not embodied in the simple language of

1 this provision up here, statement of uniformity and
2 reciprocity, except where a member jurisdiction's laws. The
3 plain and ordinary meaning of that does not embrace your
4 opinion. So, you have to add clarity. And under the cases
5 we cite, Captain Rogotzke, although well-intentioned, and I
6 don't disagree with the position he takes, that is what they
7 should be doing. But, that is not what the organic law of
8 the state of Minnesota requires. And your opinion on the
9 subject is very important and it cannot hurt the Patrol in
10 any -- how can it hurt the Patrol? Why are they resisting
11 this?

12 THE COURT: Is it also your view that then these
13 General Orders are for not, too, to the extent they would
14 conflict with the CVSA's policies and the memorandum of
15 understanding? That those General Orders, also, because
16 they clearly would not be considered the jurisdiction's
17 laws, either, so they have kind of been -- to the extent
18 those aren't consistent with the CVSA's, they are wasting
19 your time with these -- their time, for these general
20 orders. So, they must enter those consistent with the --

21 MR. CULLEN, SR.: A real interesting question, do
22 you recognize a General Order published without notice and
23 common rulemaking as we know --

24 THE COURT: As a jurisdiction's law, I think that
25 is an easy question.

1 MR. CULLEN, SR.: Is that a jurisdictional law, I
2 don't think it is.

3 THE COURT: No, it isn't. That is not a formal
4 ruling by me, but I don't think reasonable people would
5 probably even differ on that.

6 MR. CULLEN, SR.: No. But, 221.605(3) is quite a
7 different kettle of fish. And I, for the life of me, don't
8 know why counsel for the Patrol is resisting that.

9 We are not asking for a new order, but we have --
10 your current Order requires them to follow the
11 out-of-service criteria.

12 THE COURT: And they say they are doing that.

13 MR. CULLEN, SR.: Well, they say they are not.

14 THE COURT: No, they say they are following the
15 Order and their General Order, that is what they say they
16 are doing.

17 MR. CULLEN, SR.: Yeah, but they are statutorily
18 required to follow the out-of-service criteria. And that
19 represents a significant change in circumstances since your
20 Order was published.

21 And we don't want to change your Order, except to
22 clarify that since something that is embedded in your Order
23 by reference, you made reference to CVSA's out-of-service,
24 your order does not include the April 1st, 2012 amendments,
25 which are inconsistent with your Order and unconstitutional

1 on their face.

2 THE COURT: All right?

3 MR. CULLEN, SR.: All right? And there is plenty
4 of clarity. You are the one person who can step forward and
5 provide clarity, Your Honor. Maybe it should be different,
6 maybe CVSA should have been more clear, maybe FMCSA should
7 have been involved here. There are a lot of maybes. But,
8 whatever those are, you are the man. And you can provide
9 clarity. And I still think that there are a lot of
10 underlying factual things.

11 If you schedule a show cause hearing and say you
12 are going to come before me on such and such a date and show
13 cause why you shouldn't be held in contempt, but you may
14 purge yourself and avoid putting the Court and all the
15 parties through that trouble if you rescind the Order. If
16 you do that, it will solve an awful lot of -- it will get
17 the Patrol off the hook. It will get rid of something that
18 is facially unconstitutional. There is no defense of it.
19 And they attempt none.

20 THE COURT: All right.

21 MR. CULLEN, SR.: You have the power to do that.
22 And we urge you to exercise that power, Your Honor. Thank
23 you.

24 THE COURT: Ms. Devine?

25 MS. DEVINE: Just briefly, Your Honor. What I was

1 referring to when I was talking about the exception was what
2 was the policy statement in the CVSA booklet, itself. And I
3 believe that what Mr. Cullen was referring to is the MOU.

4 The MOU, as he pointed out, provides for an
5 exception of the law in the jurisdiction. It doesn't
6 distinguish whether it is case law or statutory law, it just
7 says that the laws in that state. And it is our position
8 that that means that the MOU also provides that if the law
9 in this jurisdiction is different than what it says in the
10 CVSA North American Out-of-Service Criteria, then it is the
11 law in this jurisdiction, your Court Order, that is in
12 effect. And that is how the Patrol has interpreted that. I
13 don't think that is inconsistent with the statute and it
14 certainly isn't in violation of 221.605, Subdivision 3 or
15 any other portion of it.

16 221.605 Minnesota Statute, does not say you are
17 compelled to follow. I don't think the word compelled is
18 used in that statute. And if you take the argument of
19 Plaintiffs just a step further, if the statute does in fact
20 incorporate 221 -- excuse me, incorporate the out-of-service
21 criteria, then it also incorporates the exceptions to the
22 out-of-service criteria that are set forth in the beginning.
23 And so, it can't possibly be that the patrol is violating
24 the statute, read in its entirety. And statutes, as you
25 know, are to be given -- to not have absurd results.

1 And if you were to believe that somehow this
2 statute is now -- what the Patrol is doing is somehow
3 contrary to the state law, that would be creating an absurd
4 result and actually putting the Patrol in a position of
5 violating your Order. But, it would also mean that your
6 Order is inconsistent in the first place, which I don't
7 believe it was, and neither does the Patrol. And it is not
8 inconsistent now.

9 Again, the Patrol believes that the Court's Order
10 should be and maybe is a model for other states. We believe
11 that the probable cause standard that the Patrol voluntarily
12 decided to use to issue out-of-service orders and citations
13 is correct.

14 And we don't agree with the reasonable articulable
15 standard for issuing out-of-service orders in the CVSA's
16 booklet. But, the Patrol can't control what the CVSA does.
17 And regardless of whether the CVSA handled the matter in the
18 best way or it didn't, there is still no basis to issue a
19 contempt order.

20 The square peg and round hole that Mr. Cullen had
21 mentioned early in his argument was OOIDA's disagreement
22 with the CVSA and its contempt motion. And whether we
23 disagree or agree with what the CVSA did, the remedy is not
24 a contempt motion.

25 Whatever remedy that is, it has nothing to do with

1 the Patrol. And with respect to the issue that the Patrol
2 somehow is resisting another order, we will abide by
3 whatever the Court does order and we respect the Court's
4 decision. But, in this instance we believe that the issue
5 that is before the Court is very narrow and has to do simply
6 with whether the Order, the Motion on the Order to Show
7 Cause should be granted or not, and to what extent if it is.
8 And that is all that is before the Court at this time.

9 And that the Court's Order is clear. And asking
10 the Court to basically re-issue a whole new order is taking
11 precious time from the Court and asking the Court to do
12 something that would be redundant. And we believe that the
13 Injunctive Order was explicit, clear and unambiguous, as
14 were the ones before.

15 Cullen didn't come forward, Plaintiff OOIDA didn't
16 come forward and complain about the change in 8 hours or 10
17 hours. The out-of-service criteria that was in effect in
18 2008 didn't have a time limitation. During the trial, in
19 fact, in 2010 when the 8 hours and 10 hours were added, they
20 didn't object to that. They could have, but they didn't.

21 And again, we believe that this is OOIDA's,
22 Plaintiff's way of trying to use this as a guise to get
23 something that is not at issue before this Court. Thank
24 you.

25 THE COURT: All right. Mr. Jacobs, if you wish?

1 MR. JACOBS: Thank you, Your Honor. I will be
2 very brief, here. I think the key piece here is that the
3 Plaintiff has to show by clear and convincing evidence that
4 there has been a violation of the Order. And whether they
5 are familiar with the particular enforcement actions or not
6 they haven't put in any evidence to suggest that there has
7 been a violation of your Order.

8 The MOU that has been so discussed is a contract
9 between the CVSA and the state. And the two parties to the
10 contract both understand that the contract allows for your
11 Order to take precedence over that MOU and you wouldn't
12 expect otherwise.

13 So, for the Plaintiffs to suggest that you should
14 find that the MOU doesn't recognize federal case law in a
15 situation that is interpreting other states to act just
16 completely puts the cart before the horse.

17 It is not a case where CVSA is telling the state
18 that you are in violation of the MOU; that you are out of
19 spec with the MOU. CVSA recognizes that there will be times
20 when state law is different.

21 The state statute incorporates by reference the
22 criteria. And the criteria, themselves, include clear out
23 for state or federal law, that is inconsistent with the
24 criteria. And that is what we have in this situation, we
25 believe.

1 So, I think that it is clear that there is just no
2 evidence that there is contempt, period; that there is no
3 evidence that CVSA is acting as the agent of the state in
4 order to try to get around your ruling, or that it is
5 abetting the Defendant for the purposes of advancing the
6 Defendants' interest.

7 In fact, I think you heard Ms. Devine say that the
8 state disagrees with CVSA, where they are at counter
9 purposes at some point, here, and that that will have to be
10 worked out over time to reach a consensus. Thank you, Your
11 Honor.

12 THE COURT: Mr. Cullen, briefly, I will give you
13 the last word before we adjourn. And maybe you are saying,
14 I said what I needed to say, but I will leave that up to
15 you.

16 MR. CULLEN, SR.: Something like that. I marvel
17 at the erudition of our opposing counsel, the arguments
18 made. Not one argument has been advanced to defend the
19 constitutionality of the revised out-of-service criteria.
20 That is pretty interesting to me.

21 We've asked these people to show cause why they
22 shouldn't be held in contempt and not a pinky was raised to
23 defend the constitutionality of that revised out-of-service
24 criteria, which as we all know that is the 800-pound gorilla
25 in this hearing. It is unconstitutional on its face. And

1 the Court is in a position to do something about it. And
2 you don't need CVSA to be in front of the Court.

3 That CVSA out-of-service criteria is embedded in
4 this proceeding. It has been amended. And no one stood up
5 today to defend the constitutionality of that approach. And
6 we all know that it is not constitutional.

7 THE COURT: Well, without -- I will just make a --
8 I will just give you my interpretation of how the morning
9 and briefing has gone on that issue. Without me indicating,
10 one way or the other whether it is on its face
11 unconstitutional, what I interpret -- because you are right,
12 to use your phrase I think you said they haven't raised a
13 pinky. I think the reason they haven't raised that or
14 whatever phrase we want to use is they are saying there is
15 no need for me to -- I don't get there. I do not get to
16 that issue absent a contempt finding by this Court. I think
17 that is really why they -- I haven't asked them and they
18 haven't said about what their view on the constitutionality
19 of that is, but I think they are suggesting, contrary to
20 what you have said from the very beginning -- well, Judge,
21 there is no reason to go there, you know, this is a motion
22 for -- on contempt.

23 MR. CULLEN, SR.: Apparently, they didn't listen
24 to your opening remarks about the need for clarity,
25 precision, uniformity, however you want to say it. Your

1 disappointment that FMCSA is not here, the parties are not
2 working well together and they put it before a Federal
3 Judge.

4 THE COURT: Well, Mr. Cullen, you know, this is
5 only my, I suppose, editorial observation. But, regardless
6 of how I rule on the motion in front of me, I already said
7 you will see my observations.

8 Make no mistake about it, my observation is that
9 if these agencies were doing their job we wouldn't be here
10 because we have more -- it seems to me what the Highway
11 Patrol did, they say it wasn't in response to the lawsuit,
12 you say it was.

13 The fact is their General Order is what it is, was
14 a very responsible way to deal with the issue. And when we
15 have some of the most preeminent constitutional law
16 scholars, past and present, saying be careful out there when
17 you start trying to draw a fine line between probable cause
18 and articulable -- or reasonable articulable -- because it
19 is very, very difficult to do, and most people can't do it.

20 That is what they have done. So, I think there
21 has been a disservice done to the public. And I think when
22 people start figuring -- I assume there is going to be more
23 litigation no matter what I do.

24 And again, I am quite stunned that this has been
25 turned over to the Federal Courts, because it seems like the

1 State Patrol had a solution that worked for everybody. Now,
2 that doesn't mean you agree with everything they did in that
3 General Order and wanted some other information, but
4 somebody deliberately decided that wasn't the way to go.
5 And that is something that the agencies will have to work
6 out because this is destined to be, I think unfortunately,
7 because it is going to be a lot of taxpayers' money, apart
8 from the effect on public safety and the lack of uniformity,
9 it is destined to be in the court system no matter what I
10 rule, frankly. I believe it is going to be here. Because
11 for some reason they didn't like that general -- that group
12 of people didn't like the General Order, or that was their
13 easy way out for the rest of the country.

14 But, we will see what happens, because I frankly
15 believe it doesn't go to the merits, that there is going to
16 be as this gets more public and people see some of my
17 observations, apart from the ruling, because I think sadly I
18 am not going to solve all of this.

19 You think there are certain things that I can do
20 that will resolve most of it. The other parties say to the
21 contrary. I will be making some observations. And I think
22 the more that is known about this, people are going to say,
23 why don't you remove those mission statements from your --
24 you say that is the reason for your existence? Well, you
25 haven't done any of that throughout this litigation, so why

1 don't you just pull those down? And I don't believe that
2 they have.

3 There may be a good explanation for why they just
4 put the Patrols' -- apart from my decision, into the
5 wastebasket. I just don't know what it is. And I think
6 that as people learn more about it, apart from the
7 frustration that your clients have -- but, we shall see.

8 MR. CULLEN, SR.: I don't think an order by this
9 Court can eliminate the possibility of future litigation --

10 THE COURT: No, it won't.

11 MR. CULLEN, SR.: But I think it can go a long
12 way. We need clarity. We need someone to stand up and say,
13 no one defends the constitutionality of the approach taken
14 by CVSA. It is before me. It does conflict with my Order.
15 You can provide a lot of clarity. There are four or five
16 million drivers out there who would love to have clarity,
17 and we can't get it from the Federal Government.

18 THE COURT: Well, and I must say, this is somewhat
19 repetitive, and we have been in here a long time. But, if
20 we look at how CVSA describes themselves and the federal
21 agency, how they describe themselves, and how everybody
22 collaborates and promotes uniformity, compatibility,
23 reciprocity, that is where the solution lies.

24 You know, obviously it has to pass constitutional
25 muster. And let me just give a hypothetical which I don't

1 have to reach. Maybe you suggest I should or I can or I
2 have to, and then I will just suggest one scenario that
3 might explain what has happened historically, here. Someone
4 with or without legal advice decided that the minimum
5 constitutional standard was not what the Patrol had done,
6 but was reasonable articulable suspicion.

7 Then even though they would have to ignore all of
8 the expert commentators and Justice Rehnquist and so many
9 saying, be careful when you start trying to draw the line on
10 those two concepts, because it is so very difficult to do.
11 Rather than sitting down, working out -- the inference is,
12 somebody said, we are going to go to the minimum standard
13 possible because we think this was purely voluntary by the
14 State Highway Patrol. And we are going to take a different
15 route, even if it means a lack of consistency and
16 uniformity. And then they must have decided they felt that
17 passed constitutional muster.

18 If that is what happened. It is a very sad day
19 for all of these agencies in America. Because when you have
20 got the U.S. Supreme Court saying, please don't try to draw
21 a line between these two concepts, because you can't do it,
22 you can't do it. And that is not something you should leave
23 in each individual case, as fact specific and historical as
24 it is. So, that means somebody consciously did it.
25 Maybe -- I don't know what they were thinking.

1 Now, that is one scenario that jumps off the page.
2 I don't have to decide that. I won't speculate about that.
3 You put the issues in front of me. The Defendants have put
4 the issues in front of me. And I will make my rulings.

5 I think, in the best of all worlds, these agencies
6 would get together with input from all of the players and
7 figure out something that works for each state in the
8 country. After all, this is interstate. And I think you
9 err on the side of a standard that everybody can agree meets
10 the standard. You don't go to the rock bottom minimum
11 standard. That is where all the litigation becomes -- like
12 for example, in other areas of the law in Minnesota, our
13 State Constitution is much stricter than the Federal
14 Constitution, so that is what people abide by. We can get
15 stricter, but not more lenient.

16 So, we shall see. If we can be of some help in
17 some way other than the issues in front of me, we will,
18 because there has got to be -- you know, this wasn't done
19 overnight by the State Highway Patrol when they put in, with
20 whomever they sought assistance from -- and I guess time
21 will tell, but I think we are probably absent some more
22 uniform approach, no matter what I do here, I think we are
23 destined for more litigation, it would appear, here or
24 elsewhere. So, we shall see.

25 MR. CULLEN, SR.: Thank you, Your Honor.

1 THE COURT: I will deem the matter submitted, and
2 thank everyone for their arguments.

3 I will repeat one thing. If there is something
4 that, well, a day or two goes by, whether it is because of
5 the folks getting together that are members of the CVSA, or
6 there is other guidance we can give, or if someone is
7 saying, if we only had this within the next week from the
8 Judge, or we had this now, then as long as the other parties
9 know I am being contacted, I will try and be a part of a
10 solution here, not a problem. But, otherwise, I will rule
11 on what is in front of me, get an order out, and we will go
12 from there.

13 In that context, anything further on behalf of the
14 Plaintiff, otherwise known as OOIDA, now that we are in the
15 afternoon?

16 MR. CULLEN, SR.: No, Your Honor, we are through.

17 THE COURT: For the Defendants?

18 MS. DEVINE: No, Your Honor. Thank you.

19 MR. JACOBS: No, Your Honor.

20 THE COURT: For the -- I should just say Vehicle
21 Safety Alliance, instead of using the -- it is almost easier
22 to pronounce than CVSA.

23 Anything further, Mr. Jacobs?

24 MR. JACOBS: No, thank you, Your Honor.

25 THE COURT: Thank you for your arguments. I

1 apologize for the late start. Actually, the length of the
2 arguments I kind of anticipated we might be in this
3 neighborhood, because I just wanted to hear everybody out.

4 I will deem it submitted and I hope everybody has
5 safe travels back to wherever they are going or a good
6 weekend. So, we are adjourned. Thank you.

7 (Adjournment.)

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I, Jeanne M. Anderson, certify that the foregoing
is a correct transcript from the record of proceedings in
the above-entitled matter.

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Certified by: s/ Jeanne M. Anderson
Jeanne M. Anderson, RMR-RPR
Official Court Reporter

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