No. 15-3756

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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

Petitioners,

vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION; et al,

Respondents.

On Appeal from Final Agency Action by the Federal Motor Carrier Safety Administration
FMCSA – 2010-0167

PETITIONERS' OPENING BRIEF

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GLOSSARY

APA	Administrative Procedure Act
CMV	Commercial Motor Vehicle
ELD	Electronic Logging Devices
EOBR	Electronic On Board Recorders
FMCSA	Federal Motor Carrier Safety Administration
FMCSR	Federal Motor Carrier Safety Regulations
HOS	Hours of Service
MCSAP	Motor Carrier Safety Assistance Program
NPRM	Notice of Proposal Rulemaking
OOIDA	Owner-Operator Drivers Association, Inc.
RODS	Record of Duty Status
RIA	Regulatory Impact Analysis
SNPRM	Supplemental Notice of Proposed Rulemaking

JURISDICTIONAL STATEMENT

The Petitioners seek review of FMCSA's Final Rule mandating the use of Electronic Logging Devices promulgated on December 11, 2015, and published at 80 Fed. Reg. 78292 (December 16, 2015). Short Appendix (S.App. 1). The Petition for Review was filed on December 11, 2015. This Court has jurisdiction to review this rule under 28 U.S.C. § 2342(3). S.App. 145.

ISSUES PRESENTED FOR REVIEW

1. 49 U.S.C. § 31137(a) provides that "the Secretary of Transportation *shall* prescribe regulations… requiring a commercial motor vehicle… be equipped with an electronic logging device to improve compliance by an operator… with hours of services regulations…." Section 31137(f)(1)(A) defines an electronic logging device as one that "is capable of recording of driver's hours of service and duty status accurately and automatically…." Is the Final Rule arbitrary and capricious because it does not mandate devices capable of recording a driver's hours of service and duty status automatically?

2. 49 U.S.C. § 31137(e)(2) and (3) provide that the Secretary "shall institute appropriate measures" to preserve the confidentiality and use of personal data contained in an electronic logging device and disclosed to law enforcement officials during actions taken to enforce safety regulations. Is the Final Order arbitrary and capricious because the Secretary undertook no appropriate measures

to secure the confidentiality of and to restrict the use of personal data by either state or federal enforcement officials?

3. The Secretary has a statutory obligation under 49 U.S.C. §§ 31136(c)(2)(A) and 31502(d) to consider the costs and benefits of a regulation. Because ELDs do not automatically record a driver's changes in duty status, they provide no advantage over paper log books which also require drivers to enter changes in duty status manually.

   a. Does the inability of ELDs to improve the accuracy of driver Records of Duty Status by operating automatically preclude any finding that costs under the Final Rule are justified when no benefits are obtained?

   b. FMCSA's Regulatory Impact Analysis failed to test the stated purpose of the regulation—to increase compliance with the hours of service rules. Does this failure preclude any determination that FMCSA's cost benefit analysis was the product of reasoned decision making?

4. The pervasively regulated industry exception to the Fourth Amendment's warrant requirement has been limited exclusively to the search of business premises pursuant to administrative inspections. Does the Final Rule violate the Fourth Amendment rights of drivers by authorizing the warrantless search of drivers for law enforcement purposes?

THE FINAL RULE AT ISSUE HERE

Petitioners challenge a Final Rule by the Federal Motor Carrier Safety Administration (FMCSA) mandating the use of electronic logging devices (ELDs) to record the location and activities of truck drivers who are required under federal rules to keep a record of their duty status (RODS) while operating commercial motor vehicles in interstate commerce. S.App. 1.

STATEMENT OF THE CASE

In 2011 this Court struck down a previous effort by the FMCSA to mandate the use of electronic monitoring devices in commercial motor vehicles (CMVs). This Court found that FMCSA's final rule did not address the statutory requirement found in 49 U.S.C. § 31137(a) (2011)(S. App. 129) that its "regulation shall ensure that the devices are not used to harass vehicle operators." *OOIDA v. FMCSA,* 656 F.3d 580, 582 (7th Cir. 2011)(*"OOIDA I"*). Subsequently, Congress amended Section 31137 by directing the Secretary of Transportation to prescribe regulations "(1) requiring [that] a commercial motor vehicle involved in interstate commerce…be equipped with an electronic logging device to improve compliance by an operator of a vehicle with hours of service regulations prescribed by the Secretary; and (2) ensuring that an electronic logging device is not used to harass a vehicle operator." 49 U.S.C. § 31137(a)(1), (2) (2014)(S.App. 130). The amended statute defines the term "electronic logging device" to mean a device that is

"capable of recording a driver's hours of service and duty status, accurately and automatically…." Section 31137(f)(1)(A). S.App. 132.

Sections § 31137(e)(2) and (3) impose upon the Secretary the duty to institute appropriate measures to address how enforcement officers deal with information acquired by them from ELDs during enforcement actions. S.App. 132. Additionally, FMCSA is required to consider costs and benefits before prescribing safety regulations. 49 U.S.C. §§ 31136(c)(2), 31502(d). S.App. 135, 127.

1. Parties

Petitioners Mark Elrod and Richard Pingel are professional owner-operator truck drivers who operate CMVs in interstate commerce. Mr. Elrod resides in the State of Indiana, and Mr. Pingel resides in the State of Wisconsin. The Owner-Operator Independent Drivers Association, Inc. (OOIDA), is a not-for-profit corporation incorporated in 1973 under the laws of the State of Missouri, with its principal place of business in Grain Valley, Missouri. OOIDA is the largest international trade association representing the interests of independent owner-operators, small-business motor carriers, and professional drivers. The approximately 157,000 members of OOIDA are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA, Richard Pingel and Mark Elrod each filed written comments with FMCSA in connection

with its consideration of the Final Rule challenged here. Sep.App. 173, 175, 227. Petitioners Elrod and Pingel are members of OOIDA.

FMCSA is an agency within the U.S. Department of Transportation and has jurisdiction over a variety of activities of motor carriers and their drivers including activities related to the safe operation and maintenance of equipment (trucks) used to haul freight in interstate commerce.

2. General Regulatory Background

The FMCSA has addressed the problem of driver fatigue by implementing hours of service (HOS) regulations. 49 C.F.R., Part 395. These regulations establish several different types of duty statuses that must be accounted for including on-duty driving, on-duty not driving, off-duty, personal conveyance, and sleeper berth time. 49 C.F.R. § 395.8(b).

In order to ensure compliance with the HOS regulations, drivers are required to maintain an accurate and current RODS (49 C.F.R. § 395.8), which is an accounting of when, and for how long, the driver: 1) drove the truck (on-duty driving); 2) performed work other than driving (on-duty not-driving); and 3) did not perform any work (off-duty and sleeper-berth). 49 C.F.R. § 395.8. Historically, paper log books have been used to document a driver's time spent in each duty status category. Paper log books are filled out and signed by the driver.

A violation of the HOS regulations (including log book violations) may result in a driver being placed out-of-service. 49 C.F.R. § 395.13.

Technological advances have resulted in the development of devices known as ELDs that provide different levels of automation in the electronic maintenance of a driver's RODS. The ELD mandated in the Final Rule automatically keeps track only of how long someone *drives* a truck and where they are located throughout the day. In order for an ELD to record the hours a driver spent on-duty not driving and off-duty, the driver is required to make manual entries into the ELD. FMCSA acknowledges this limitation of the final ELD rule. 80 Fed. Reg. at 78368, col. 1, S.App. 78. Even though the mandated ELD can automatically record driving time, it will not maintain an accurate record of duty status unless the driver has manually entered accurate changes in duty status information into the ELD. ELDs therefore provide no advantage over paper log books in keeping an accurate record of a driver's compliance with the HOS rules.

FMCSA estimates that the Final Rule would subject 3.51 million drivers to the requirement of using ELDs. 2015 RIA, Sep.App. 382. The Final Rule at issue here is the culmination of several earlier rulemaking proceedings beginning in 1996 in which the potential use of electronic recording devices was raised and/or considered. *See* James Johnston Declaration. S.App. 149.

STANDARD OF REVIEW

The Court reviews a final rule under the Administrative Procedure Act (APA) *de novo* to determine whether it is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, contrary to a constitutional right, power, privilege or immunity, in excess of statutory jurisdiction, authority or limitations or short of statutory rights, or without observance of procedure required by law. 5 U.S.C. § 706(2)(A) – (D). An agency's interpretation or application of a statute is a question of law reviewed *de novo*. *Texas Eastern Products Pipeline Co. v. OSHA,* 827 F.2d 46, 47 (7th Cir. 1987).

SUMMARY OF THE ARGUMENT

The controlling statute mandates that the Secretary "shall prescribe regulations" requiring that certain commercial motor vehicles be equipped with an "electronic logging device" to improve driver compliance with federal HOS regulations. An electronic logging device is defined in the statute to mean a device that is "capable of recording a driver's hours of service and duty status accurately and automatically…." 49 U.S.C. §§ 31137(a)(1), (f)(1)(A). The Secretary admits that the ELD specified in the Final Rule does not conform to the statutory definition because it is incapable of automatically recording a driver's hours of service and changes in duty status. S.App. 78. This failure to implement the

statutory mandate defies a statutory limitation on FMCSA's authority and renders the Final Rule arbitrary and capricious. *OOIDA I,* 656 F.3d at 587.

The purpose of Section 31137(a)(1) is to improve driver compliance with HOS regulations. Because the ELDs prescribed by the Final Rule cannot record non-driving time automatically, there is virtually no chance that the goal of increased compliance with HOS rules can be achieved. The great bulk of HOS violations found today result from inaccurate driver entry of changes in duty status. Manual entry of inaccurate data into ELDs provides no improvement over the manual entry of such data into paper log books. Petitioners filed comments to FMCSA showing how ELDs easily mask HOS violations based upon incorrect manual entries of changes in duty status. Sep.App. 187. FMCSA failed to deal with this analysis relying on nothing but wishful thinking to support its assertion that HOS compliance would improve. There are no discernible benefits available to offset the substantial intrusion of driver privacy interests discussed below. *Dimeo v. Griffin,* 943 F.2d 679, 681 (7th Cir. 1991). FMCSA's cost benefit analysis fares no better. No analysis reflecting performance of existing ELD use was undertaken. FMCSA's cost benefit analysis thus failed to test the statutory purpose of the regulation— to increase compliance with the HOS rules.

As to drivers' constitutional privacy interests, FMCSA asserts that the proposed ELD recording of a driver's activities and whereabouts each 24 hours is

not a search or seizure. If it were, FMCSA relies exclusively on the pervasively regulated industry exception to the Fourth Amendment's warrant requirement. *New York v. Burger,* 482 U.S. 691 (1987). This exception is not available here for several reasons:

1. This exception applies only to the inspection of business premises, not persons.
2. This exception applies only to administrative inspections. Section 31137 mandates the use of ELDs directly for law enforcement purposes.
3. Mandating the use of ELDs does not further the regulatory scheme because it provides no improvement over the use of paper log books.
4. The Final Rule does not include regulations that serve as a constitutionally adequate substitute for a warrant.

The Secretary's failure to institute appropriate measures to ensure that law enforcement officers in the field preserve confidentiality and limit the use of ELD data obtained from drivers as required by Section 31137(e)(2) and (3) fails to implement a statutory mandate, also rendering the Final Rule arbitrary and capricious.

Section 31137(a)(2) requires that the Secretary shall prescribe regulations ensuring than an ELD is not used to harass a vehicle operator. After being rebuffed by this Court for completely ignoring this provision in *OOIDA I,* the

Secretary now imposes a miserly interpretation of harassment, robbing this provision of any value. Further, the Final Rule injects a poison pill into the procedural framework that discourages drivers from seeking the agency's help to address harassment. At the same time FMCSA washes its hands of any direct responsibility for ensuring that ELDs are not used to harass drivers. The Final Rule fails again to implement the statutory mandate on harassment.

ARGUMENT

I. THE FINAL RULE DOES NOT IMPLEMENT THE STATUTORY MANDATE TO RECORD CHANGES IN DUTY STATUS AUTOMATICALLY

A. FMCSA Admits That The ELD Rule Does Not Meet The Statutory Mandate for Automatic Recording

The Secretary is directed by statute to require that commercial motor vehicles operated by drivers subject to HOS regulations be equipped with an electronic logging device that is capable of recording a driver's hours of service and duty status accurately and *automatically*…" 49 U.S.C. § 31137(f)(1)(A) (emphasis added). The SNPRM did not propose a rule that would satisfy this statutory mandate. SNPRM, Sep.App. 127, 139. OOIDA filed comments with FMCSA objecting extensively to the rule as proposed. Sep.App. 181-184.

The definition of an ELD in the Final Rule bears no relationship to the definition imposed by Congress.

> § 395.2 Definitions
>
> Electronic logging device (ELD) means a device or technology that automatically records a driver's driving time and facilitates the accurate recording of the driver's hours of service, and that meets the requirements of subpart B of this part.

Final Rule, 80 Fed. Reg. at 78383, S.App. 93. The revised version of 49 C.F.R. § 395.26(b) identifies the data items that will be *automatically* recorded by an ELD. Changes in non-driving duty status are not included. Final Rule § 395.26(b), 80 Fed. Reg. at 78386 col. 1, S.App. 96. The task of entering a driver's change in duty status when not driving is left to manual entry by the driver, just as it is when the driver enters changes in his duty status in a paper log book. 49 C.F.R. §§ 395.24(b) and 395.26(c). Final Rule, 80 Fed. Reg. at 78386, S.App. 96. FMCSA has admitted that the Final Rule does not satisfy the statutory mandate for automatic recording of all changes in a driver's duty status:

> The Agency acknowledges that technical specifications in this rule do not include ELDs that automatically record a driver's duty status, other than on-duty driving time. Although technology currently exists that could track a driver's every movement, including whether a driver is sleeping, this type of technology is not regularly employed in electronic recorders used to record drivers' HOS. FMCSA does not believe that Congress, in directing the Agency to require use of ELDs, envisioned this level of monitoring and the inherent privacy of invasion that would occur.

80 Fed. Reg. at 78368 col. 1, S.App. 78. FMCSA's statement that Congress could not have meant what it said in the statute because of a potential privacy problem is based upon nothing but pure speculation. Congress required automatic recording of

a driver's changes in duty status to correct the weakest link in providing accurate records of duty status. Automatic recording would likely produce a more accurate picture of a driver's compliance with the HOS rules. Manual entry is open to inaccuracies and manipulation whether such entries are made in a paper log book or an ELD.

"The cardinal rule of statutory interpretation is that courts must first look to the language of the statute and assume that its plain meaning accurately expresses the legislative purpose." *U.S. v. Miscellaneous Firearms, Explosives, Destructive Devices and Ammunition*, 376 F.3d 709, 712 (7th Cir. 2004)(citations omitted). FMCSA's argument that Congress could not have meant what it said in the statute should not be given any weight by this Court.

Congress may restrain an agency by mandating standards from which no variance is permitted. *Alabama Power Co. v. Costle*, 636 F.2d 323, 357 (D.C. Cir. 1979): "[T]here exists no general administrative power to create exemptions to statutory requirements based on the agency's perception of costs and benefits." Before a court can approve an agency's proposed or actual exemption from a statutory command because the agency predicts difficulties of undertaking the regulation, the court "is to carefully study the governing statute to ascertain whether it authorizes approaches that deviate from the legislative mandate in response to concerns about the feasibility." *Alabama Power*, 636 F.2d at 360.

While an agency is not "required to do an impossibility," the agency bears a heavy burden to demonstrate the existence of an impossibility. *Id.* at 359.

When dealing with a statutory mandate, "shall means shall." *Center for Biological Diversity v. Norton*, 254 F.3d 833, 837-38 (9th Cir. 2001)(citations omitted). By using "shall," "Congress could not have chosen stronger words to express its intent" that an action be mandatory. *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

The Final Rule fails to implement the specific statutory mandate in 49 U.S.C. § 31137(a) and is arbitrary and capricious. *Public Citizen v. FMCSA*, 374 F.3d 1209, 1216 (D.C. Cir. 2004); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.,* 463 U.S. 29, 43 (1983); *United Mine Workers v. Dole,* 870 F.2d 662, 663 (D.C. Cir. 1989). This Court endorsed this principle in its 2011 decision in *OOIDA I*:

> Adherence to this rule is essential because it goes directly to the scope of the authority delegated to an agency by Congress; when an agency ignores a mandatory factor it defies a "statutory limitation on [its] authority." *United Mine Workers v. Dole,* 870 F.2d 662, 673 (D.C. Cir. 1989). Such an act is necessarily arbitrary and capricious.

OOIDA I, 656 F.3d at 587. The inability to automatically record changes in duty status is a fatal flaw in the Final Rule and cripples FMCSA's ability to "improve compliance by an operator of a vehicle with hours of service regulations…." 49 U.S.C. § 31137(a)(1) (2014). S.App. 130.

B. The Final Rule Does Not Improve Hours of Service Compliance

In order for enforcement officials to determine a driver's compliance with the Hours of Service rules, they must be presented with an accurate record of the amount of time the individual spent during the work day in various duty statuses—on-duty driving, on-duty not-driving, and off duty. Driving time may be automatically recorded by an ELD, but that does not mean the driver complied with the HOS rules. Unless the driver manually enters all non-driving activities into the ELD accurately, then the driver's on-duty driving time recorded by an ELD may not comply with the HOS rules - not even the first minute of driving. The ELD may show a driver to be in compliance with the rules when he is not. Therefore, law enforcement and proponents of ELDs have a false impression of improved compliance and increased safety over the use of paper logbooks.

OOIDA's comments filed with FMCSA showed that the vast majority of HOS violations occur because drivers are pressured to log their non-driving time incorrectly to maximize their driving time, not because they drive in excess of the maximum time permitted by the rules. Sep.App. 269 -279. According to FMCSA statistics, driving past the 11th hour accounted for only 0.9 percent of HOS violations in 2009.[1] Sep.App. 19. For these reasons, the automatic recording of changes in duty status is a critical statutory requirement if ELDs are to fulfill their

[1] Preliminary Regulatory Evaluation, Table 31, p. 52, FMCSA-2010-0167-0003.

purpose, to improve HOS compliance. Without such an automatic capability, drivers' ELD time logs are no more reliable than paper books. Without improvement, FMCSA cannot justify their cost and significant intrusion into driver privacy. *Dimeo,* 943 F.2d at 681.

OOIDA's comments included a hypothetical set of logbooks illustrating how the proposed ELD would only appear to improve HOS compliance, but can easily be used by a driver to mask non-compliance. *See* OOIDA's May 23, 2011 comments submitted in the original NPRM. Sep.App. 1. OOIDA has updated and simplified the analysis below.

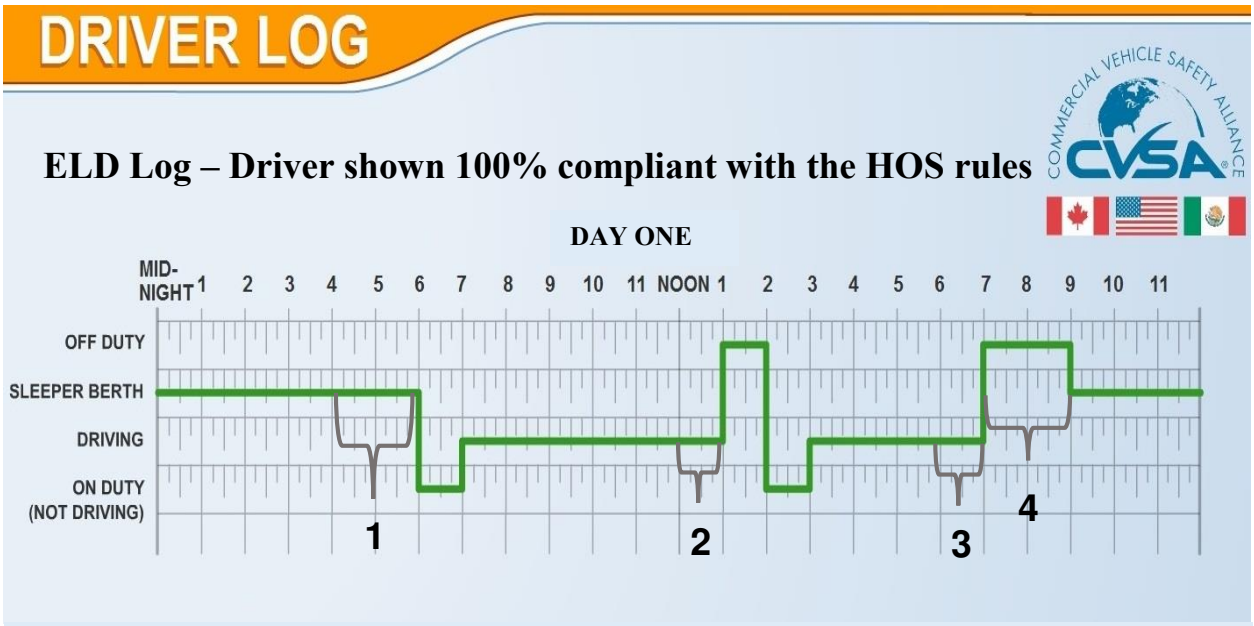
The illustration below uses the FMCSA-mandated form for RODS in both paper logbooks and ELD displays. There are two logbook pages completed for each day. The first, the ELD Log, shows the driver to be in 100% compliance with the HOS rules all day. But the numbered annotations show when the driver violated the HOS rules by not manually logging his non-driving duty-status into the ELD correctly, not taking a required rest break, and driving in excess of the time permitted by the HOS rules. All of these violations are hidden or masked by the ELD. In the second daily graph, the Accurate Log, the driver's changes in duty-status are logged correctly, allowing the reader to determine when the driver exceeded the driving time permitted by the HOS rules and when he did not take a rest break required under the rules. Note that both the ELD Log and the Accurate

Log show the same exact driving time as automatically recorded by the ELD, but this function did not prevent the driver from driving in excess of the time limits set by the HOS rules.

For this illustration, the driver is to pick up a load of produce from a wholesale distributor and deliver that load to a grocery outlet facility 450 miles away. This example assumes, just as an ELD does, that a driver just completed a sufficient off-duty period required by the HOS rules before beginning a new work-day and new work-week. If the driver actually performed any on-duty not-driving work in the time leading up to this example, then ***none*** of the on-duty driving time recorded in these examples would be in compliance with the rules.

On Day One, the ELD Log shows perfect compliance with the HOS rules. But the Accurate Log showing the driver's actual changes of duty status would allow law enforcement to discern violations of the HOS rules.

DAY ONE

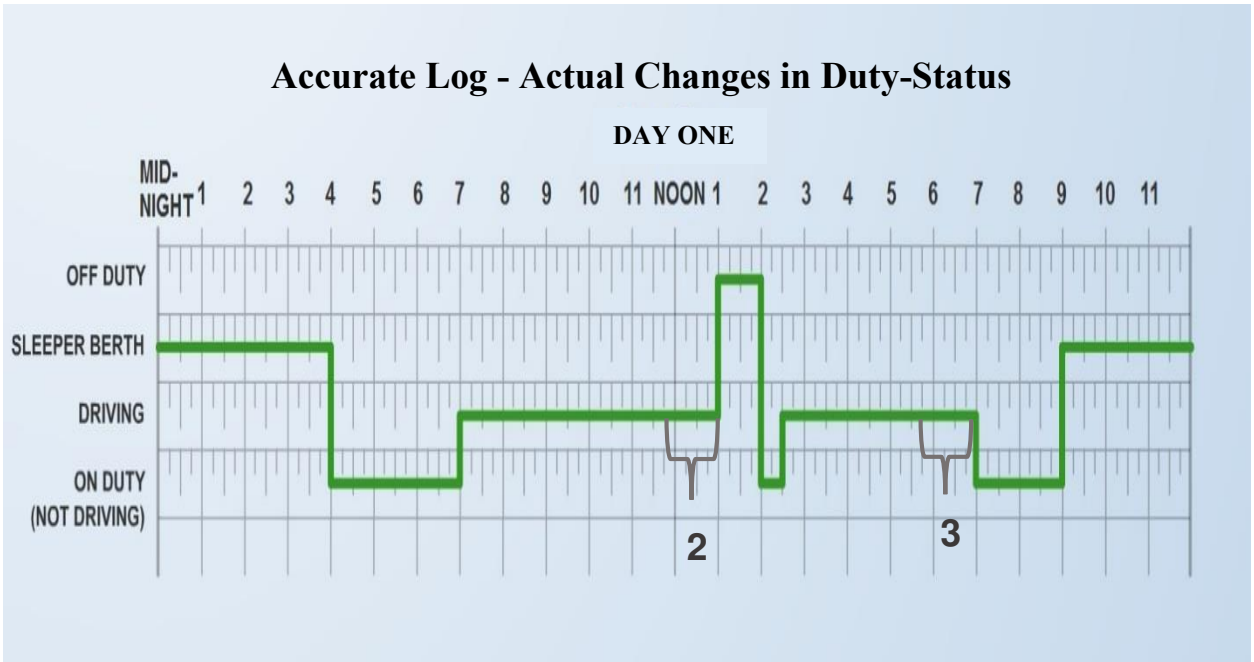


Numbers denote HOS violations hidden or masked by ELD Log:

1. & 4: Log Entry Violations

2. Excessive Driving/Missed Rest Break Violations

3: Excessive Driving Violation



Numbers denote violations discernible on Accurate Log:

2. Excessive Driving/Missed Rest Break Violation

3. Excessive Driving Violation - revealed by logbook

Violations by the ELD user on Day One occurred as follows:

1. 4:00 a.m. - 6:00 a.m. **Log Entry Violation under 49 C.F.R. § 395.8** - The driver failed to manually enter his change in duty status into the ELD when he left the sleeper berth at 4:00 a.m. and went on-duty (not-driving) by starting the reefer unit in order to cool the trailer to the temperature required for the produce, and performed a pre-trip inspection. The driver did not manually enter his correct duty status into the ELD until 6:00 a.m.

2. 12:00 p.m.-1:00 p.m. **Excessive Driving/Missed Rest Break Violation under § 395.3(a)(3)** -At noon, the driver failed to take a 30 minute rest break that he was required to take within 8 hours after actually going on duty at 4 a.m. But because he did not manually enter the beginning of his on-duty work day until 6 a.m., the ELD shows him complying with the rest break rule at 1 p.m.

3. 6:00 p.m. - 7:00 p.m. **Excessive Driving Violation under § 395.3(a)(2) for 1 hour** - Because the driver went on-duty at 4 a.m., the driver's 14 hour window to complete his driving for the day expired at 6:00 p.m. But the ELD Log shows his actual driving until 7 p.m. to be lawful, and would have allowed him to drive until 8 p.m.

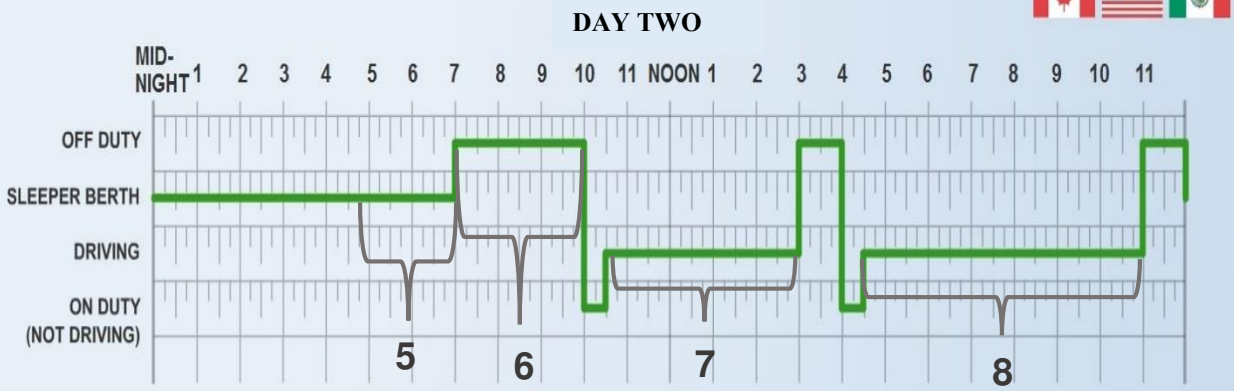
4. 7:00 p.m. to 9:00 p.m. **Log Entry Violation under 49 C.F.R. § 395.8** - The driver parked his truck at the receiver and is told he might be unloaded that night. Nevertheless, he manually entered his status into the ELD as “off-duty”

even though he actually remained on-duty doing paperwork, checking the truck, and waiting to unload. Once he realized he would not be allowed to unload, he actually went off-duty when he went into the sleeper at 9:00 p.m.

DAY TWO

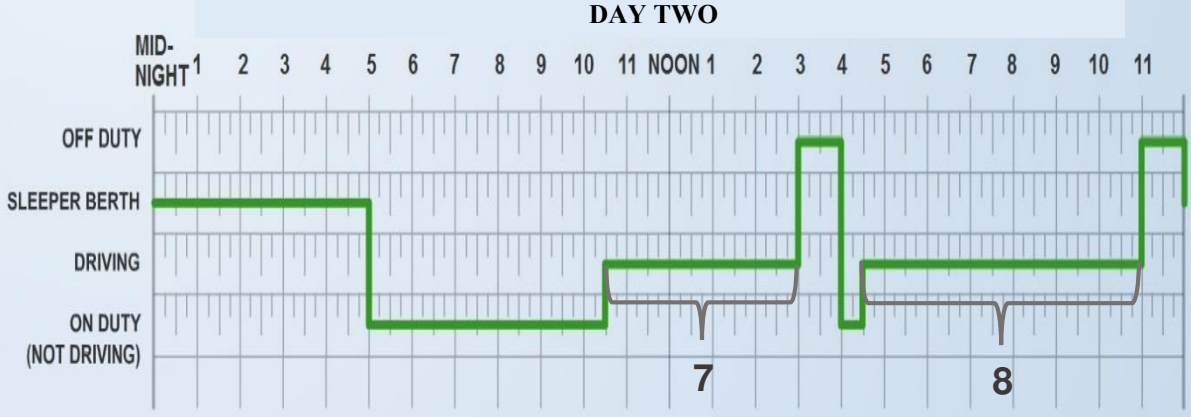
DRIVER LOG

ELD Log – Driver shown 100% compliant with the HOS rules



Numbers denote HOS violations hidden or masked by ELD Log:
5 & 6 Log Entry Violations
7 & 8 Excessive Driving Violations

Accurate Log – Actual Changes in Duty Status



Numbers denote violations discernible on Accurate Log:
7 & 8 Excessive Driving Violations

5. 5:00 a.m. to 7:00 a.m. **Log Entry Violation under 49 C.F.R. § 395.8** - The driver left the sleeper berth at 5 a.m. but incorrectly left the ELD duty-status on "sleeper berth" while he went on-duty to report to the dock supervisor, and received an unloading dock assignment and number to unload.

6. 7:00 a.m. to 10:00 a.m. **Log Entry Violation under 49 C.F.R. § 395.8** - The driver manually entered into the ELD the incorrect status as "off duty," while he remained on-duty to unload his truck. By 7:00 a.m., the driver is still on-duty in the check-in area waiting for his number to be called, but the ELD shows that he is off-duty. At 7:30 a.m., the driver bumped the dock and began to unload with a pallet jack, which took two and half-hours. Only at 10:00 a.m. did the driver first input his correct on-duty not driving status into the ELD while he continued to unload the truck. But he had actually been on-duty not-driving since 5:00 a.m.

7. 10:30 a.m. to 3 p.m. and **8.** 4:30 p.m. to 11:00 p.m. **Excessive Driving Violation under § 395.3(a)(1).** Because the driver did not actually go-off duty for 10 consecutive hours after working on Day One, ***none*** of the driver's driving time on Day Two was permitted under the rules. Because the driver did not correctly input his non-driving duty status, the ELD record shows all of this driving to be in compliance with the rules.

In this example, the ELD record would display that the driver was in 100% compliance with the rules. In reality, the driver committed four logbook violations

by not manually entering his correct duty status into the ELD, violated the rest break rule, and violated the driving time limits under §395.3 for 12 of the driver's 21.5 hours of driving. When the driver continued driving without taking a break at 12:00 p.m. on Day One, he should have been placed "out of service" and taken off the road under §395.13(b). He could have been placed out of service under §395.13(b) again after 6 p.m. when he started driving in violation of the time limits allowed by the rules, and placed out of service again for the same violation at any time he drove the truck on Day Two.

But because the ELD showed the driver to be 100% compliant at all times, the driver would presumably be permitted to continue to operate by law enforcement officers inspecting trucks and checking ELDs. The HOS violations would continue to pile up, unnoticed. Because the ELD does not have an accurate record of all on-duty time, the driver will easily be able to drive beyond the weekly driving limits established in § 395.3(b).

This inability of the ELD to provide any appreciable improvement in the accuracy of a driver's RODS and compliance with the HOS rule over paper logbooks is dramatic. This illustration demonstrates why FMCSA was not able to provide any concrete assessment of the potential benefits of ELDs in its cost/benefit analysis. In the publication of the final rule, FMCSA did not provide one Log Book example showing how the ELD could make any difference from

paper logbooks in improving actual compliance with the rules. ELDs make drivers look more compliant, but will actually give persons interested in highway safety, and the law enforcement inspectors who will rely upon them, a false sense of driver compliance and improved highway safety.

II. THE FINAL RULE FAILS TO ENSURE THAT ELDS ARE NOT USED TO HARASS DRIVERS

A. There Is No Textual Support For FMCSA's Narrow Interpretation of Its Duty to Ensure Against Harassment

Section 31137(a)(2) requires that the Secretary prescribe regulations "ensuring that an electronic logging device is not used to harass a vehicle operator." Having been rebuffed by this Court in its earlier attempt to ignore this statutory mandate (*OOIDA I*), FMCSA now proceeds to define its obligation so narrowly as to render it meaningless:

> Thus, in today's rule the Agency tied the definition of "harassment" to violations of the HOS rules set forth in part 395 and a related regulation, § 392.3, prohibiting carriers from requiring drivers to drive when their ability or alertness is impaired due to fatigue, illness or other causes that compromise safety.

80 Fed. Reg. at 78325-26, S.App. 35-36. The definition of harassment set forth in § 390.36 of the Final Rule implements this narrow view. 80 Fed. Reg. at 78383, S.App. 93. Thus, FMCSA effectively avoids its responsibility for dealing with driver harassment linked to an ELD unless it is also linked to a very limited subset

of the FMCSRs. In effect, FMCSA has granted exemptions for forms of harassment not linked to violations of the hours of service or fatigue regulations.

The statute provides absolutely no textual basis for linking harassment only to situations involving "violations" of the HOS rules. Section 31137(a)(2) sets forth an unqualified direction to ensure that an "electronic logging device is not used to harass a vehicle operator." There is simply nothing in the statute that limits the agency's obligation to ensure against harassment only where violations of HOS or fatigue rules are involved.

OOIDA provided extensive comments on the subject of harassment. FMCSA did not respond to the substance of those comments. Sep.App. 196-202. Consider a driver who, on a given day has ample "legal" hours remaining to drive under the HOS rules, but who pulls over because of inclement weather or difficult traffic conditions. Because of information provided by the ELD, motor carriers know when the truck has stopped and whether the drivers could drive further without violating HOS regulations. Under FMCSA's narrow view of its responsibilities, motor carriers may harass such a driver with impunity and push him to operate unsafely in bad weather or under conditions that a professional driver deems imprudent because further driving would not violate the HOS rules. FMCSA provided no answer to OOIDA's comment on this type of situation.

OOIDA complained about the use of ELDs to "beep" or "ping" a driver to get his attention while he is trying to sleep—a particularly nasty form of harassment. FMCSA properly claims credit for requiring all ELDs to have a "mute" function for such alarms which allows drivers to get some undisturbed rest. 80 Fed. Reg. at 78326; S.App. 36. But "beeping" a sleeping driver does not, in and of itself, cause a violation of the HOS rules. Does the "mute" function ordered by FMCSA reach beyond its own narrow interpretation of Section 31137(a)(2)? Probably so. It addresses harassment not specifically linked to an HOS violation. Mandating a mute button is a very sensible requirement completely in sync with the FMCSA's unqualified mandate to ensure that ELDs are not used to harass. But there is no room for this provision under FMCSA's narrow view of Section 31137(a)(2). FMCSA's determination to limit its responsibilities under Section 31137(a)(2) to HOS and fatigue violations has no support in the language of the statute and makes no practical sense.

In *OOIDA I,* this Court was critical of the superficial and perfunctory treatment given to the harassment question in that earlier case:

> The Agency must articulate a reason for its action that demonstrates a "rational connection between the facts found and the choice made."
>
> ****
>
> Its explanation may not be superficial or perfunctory. Instead, the Agency must cogently explain why it has exercised its discretion in a given manner…. such that we can be sure that the decision was the

> product of reasoned decisionmaking…. When this standard has not been met, it is necessary to vacate the agency's action.

OOIDA I, 656 F.3d at 588 (internal quotation marks and citations omitted). The same criticism may be applied to FMCSA's current rule on harassment.

B. Neither Budgetary Concerns Nor Administrative Convenience Excuse Failure to Implement a Statutory Mandate

FMCSA asserts that narrowing the unqualified obligation to ensure against harassment will provide administrative convenience for its staff and will ameliorate unquantified budgetary concerns. 80 Fed. Reg. at 78326 col. 1; S.App. 36. But such considerations do not allow an agency to ignore the plain words of a statute. Administrative convenience is not a reason for FMCSA to ignore the statutory mandate on harassment and the order of this Court in *OOIDA I* to fully address potential harassment. "Considerations of administrative difficulty, delay, or economic cost will not suffice to strip a statute of its fundamental importance." *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*, 449 F.2d 1109, 1114-15 (D.C. Cir. 1971); *see also Scherr v. Volpe*, 466 F.2d 1027, 1033 (7th Cir. 1972). ("The procedural steps outlined in section 102 apply notwithstanding considerations of administrative difficulty, delay or economic cost."), (citing *Calvert Cliffs',* 449 F.2d at 1115). While agencies frequently decline to initiate rulemaking or make findings because of resource constraints, an agency cannot do so in the face of a statutory mandate. *Forest Guardians v.*

Babbitt, 174 F.3d 1178, 1192 (10th Cir. 1999) (rejecting Secretary's "impossibility" defense for failing to meet statutory deadline); *cf. WildEarth Guardians v. EPA*, 751 F.3d 649, 655 (D.C. Cir. 2014) (finding that a statutory provision that the Administrator shall "from time to time" revise the list of air pollutants was not a mandate, and thus the Administrator could exercise reasonable discretion in determining when to add source to the list). Agencies may generally invoke extrinsic considerations if Congress has authorized rather than mandated agency action. Not so here where there is a mandate that "the Secretary shall" ensure that ELDs are not used to harass.

If a statute requires the agency to promulgate a rule, the agency must comply, even if it has competing priorities and if it would much prefer not to do so. *Biodiversity Legal Foundation. v. Badgley*, 309 F.3d 1166, 1178 (9th Cir. 2002)(finding the district court had no discretion to consider agency's stated priorities in light of express deadline in the statute, and reversing the district court's ruling on that basis). In the case of *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001), the Secretary of Commerce argued that the agency could not conduct mandated studies or obtain samples for required testing due to a lack of cooperation. The court found the Secretary could not "use insufficient evidence as an excuse for failing to comply with the statutory requirement," and that by doing so, the Secretary, "acted contrary to law and abused his discretion." *Id.* at 1071.

In *Natl. Assoc. of Regulatory Utility Commissioners v. U.S. Dept. of Energy*, 736 F.3d 517 (D.C. Cir. 2013), the court considered whether the Secretary of Energy complied with his statutorily-required obligation to determine whether utility fees were adequate. The D.C. Circuit found "the Secretary may not comply with his statutory obligations by 'concluding' that a conclusion is impossible." *Id.* at 519, citing *Public Citizen v. FMCSA*, 374 F.3d at 1221 ("[R]egulation would be at an end if uncertainty alone were an excuse to ignore a congressional command to 'deal with' a particular regulatory issue."); *Consolidated Edison Co. of N.Y. v. U.S. Dept. of Energy*, 870 F.2d 694, 698 (D.C. Cir. 1989)(difficulty of completing a measurement did not relieve the agency from complying with statutory mandate). The word "shall" is a good indicator that agencies are constrained in their ability to defer decisions for budgetary reasons or because of alleged inconvenience or difficulty. As seen in the above cases, the word "shall" should be read to contain an implicit, but necessary and unavoidable, statutory mandate. FMCSA offers no justification for ignoring this mandate.

C. Procedural Obstacles Imposed Upon Driver Complaints

FMCSA has imposed obstacles on drivers who wish to complain about harassment that are wholly inconsistent with the agency's obligation to ensure that ELDs are not used to harass. The Final Rule narrowly defines harassment as an action involving the use of ELD data that the motor carrier knew or should have

known would cause the driver to violate the fatigue rule under 49 C.F.R. § 392.3 and any part of the entire HOS rules contained in 49 C.F.R. Part 395. 49 C.F.R. § 390.36(a).

As a condition to filing a written harassment complaint, the driver must confess to FMCSA how he violated the fatigue or HOS rules. 49 C.F.R. § 386.12(b)(3)(iii)(C). This admission can have significant negative consequences on a driver's employability and career. FMCSA reports such violations on drivers' Pre-Employment Screening reports provided to potential employers (see 49 U.S.C. § 31150). Such violations make drivers less employable. While FMCSA's harassment rule summarizes FMCSA's intent to protect drivers from retaliation after filing a harassment claim (*see* 49 C.F.R. § 386.12(b)(3)) those protections are vague, are attached to no process, and fail to commit the agency to any particular action. Furthermore, the rule does not shield drivers from the negative employment decisions of future employers, does not shield drivers from future FMCSA enforcement actions against them for the violations admitted, and does not shield drivers from state prosecution and fines for the reported violation. Under this approach, a driver has everything to lose and nothing to gain by filing a harassment complaint. As a practical matter, the "admission of violation" requirement acts as a poison pill; it all but forecloses any FMCSA investigation of harassment and, therefore, fails to ensure that ELDs are not used to harass drivers.

Suppose the harassment takes the form of a carrier insisting a driver prepare a false entry of duty status, a very common situation. Because the driver capitulates to the request, there would be no detectable (recorded) violation upon which to base a complaint because of the false entry of duty status. Would the driver have to turn himself in for violating Part 395 before filing his complaint? A driver is then burdened with a requirement of proving *actual knowledge* on the part of the carrier – a requirement that a well-represented carrier will hide behind even when the facts are otherwise clear. Such complaints would result in a fight between the driver and an army of lawyers representing the motor carrier in a "he said, they said" contest. In the meantime, FMCSA has assigned itself a completely passive role with no duty to investigate or take any action on its own. What about drivers who are regularly harassed by motor carriers, but who nevertheless resist pressures to violate safety regulations? Such drivers have no protection under FMCSA's approach to harassment. These procedures are totally ineffective in dealing with harassment.

Despite the abundant downside to confessing violations of the safety rules, the Final Rule affords drivers no reward or benefit from a successful harassment claim. The anti-harassment enforcement process adopted by FMCSA is, therefore, likely to go unused by drivers, and the agency has no other enforcement plan to fulfill its statutory mandate to ensure that ELDs are not used to harass drivers.

III. THE FINAL RULE PROVIDES NO SUPPORT FOR A FINDING THAT ELDS WILL MATERIALLY REDUCE HOURS OF SERVICE VIOLATIONS AND CRASH RISK

A. FMCSA's Roadside Intervention Model Has No Basis in Provable Fact and Relies Solely on Unsupported Assumptions

The Regulatory Impact Analysis (RIA) prepared by FMCSA in support of the Final Rule explains the benefits (rationale) of the Rule to be that "increasing the use of ELDs will improve compliance with the HOS rules and improve safety by decreasing the risk of fatigue-related crashes attributable to violations of the applicable HOS regulations." (2015 RIA at i). Sep.App. 357. The 2015 RIA analysis is seriously flawed. Five years ago when vacating the 2010 Final Rule on EOBRs, this Court cited the D.C. Circuit's warning that "to fulfill the agency's duty to 'deal[ ] with' the issue of EOBRs" it must take "the seemingly obvious step of testing existing EOBRs on the road" to properly evaluate the safety benefits of mandatory ELD implementation on HOS compliance and crash reduction. *OOIDA I,* 656 F.3d at 589, citing *Public Citizen*, 374 F.3d at 1221-22. Despite the optional motor carrier use of AOBRD's, a similar device, since 1988 (49 U.S.C. § 395.15), FMCSA readily admits that it has yet to test existing devices, stating in the publication of the Final Rule: "FMCSA will conduct a regulatory effectiveness study at an appropriate time following the compliance date." 80 Fed. Reg. 78307, col. 1. S.App. 17. According to the agency, only then could it determine whether ELD use had any impact on HOS compliance. *Id.*

Rather than attending to the "seemingly obvious," FMCSA bases its safety benefit analysis on a model that ignores the performance of existing electronic log use and any data generated from information recorded by the devices. Instead the analysis relies on a model that purports to "predict" future crash risk based upon a formula wholly divorced from the performance of any electronic device. The "Roadside Intervention Model" purports to correlate the mere citation for an FMCSR violation during a roadside inspection— no matter what the violation— with a reduction in crash risk. 80 Fed. Reg at 78352 (S.App. 62), citing 2015 RIA Appendix E. Sep.App. 491. The model includes any and all FMCSR violations, not only HOS violations. 2015 RIA Appendix E. Sep.App. 492. Significantly, the "roadside inspection" analysis does not consider the use of ELDs in the detection of FMCSR violations, never mentioning the term even once.

In relying on the roadside inspection model, FMCSA ignored the results of its safety benefits study published in 2014. *Evaluating the Potential Safety Benefits of Electronic Hours of Service Recorders Final Report,* FMCSA (April 2014)("2014 Safety Study"). Sep.App. 91. In publishing the Final ELD Rule, FMCSA acknowledged that twenty-one of the twenty-two commenters on the 2014 Safety Study criticized the Study. 80 Fed. Reg. at 78361, col. 2. S.App. 71. With respect to support for the Final Rule, FMCSA states:

> While the Agency acknowledges commenters' concerns about the study, we did not rely on its conclusions to establish the safety benefits of ELDs relative to paper logs. The Safety Benefits Analysis in the RIA uses a different measure of HOS violation rates, a different data set and a different study design to demonstrate a reduction in HOS violations attributable to ELD use.

80 Fed. Reg. at 78361, col. 3. S.App. 71. The 2014 Safety Study was directed to examine the precise safety concern that ELD use is intended to remedy— HOS compliance to decrease the risk of fatigue-related crashes. Yet FMCSA was forced to ignore the results of that study conceding that "[d]ue to limited data, the study could not evaluate the effect of ELDs on DOT-reportable and fatigue-related crashes." 80 Fed. Reg. at 78362, col.1. S.App. 72. In fact, the 2014 Safety Study concluded that "[n]o differences were found between the EHSR [ELD] cohort and the non-EHSR cohort for USDOT-recordable and fatigue-related crash rates." 2014 Safety Study. Sep.App. 145.

Unfortunately for the agency, FMCSA's alternative safety evaluation model never tests the premise used to justify the Final Rule. The analysis does not test the effectiveness of installed electronic devices as suggested by the D.C. Circuit and this Court. FMCSA acknowledges that "[t]he Agency was not able to construct statistically significant measures of safety improvements for carriers that installed ELDs by directly examining the crash data of these carriers because a crash is a rare occurrence for an average CMV." 2015 RIA. Sep.App. 390. Instead, the agency constructs a safety predictive model based upon unsupportable

assumptions. The Roadside Intervention Model analyzes the purported safety benefits of mandatory ELDs by attempting to equate crash risk reduction to FMCSR violation citations. The analysis counts each FMCSR violation found in a roadside inspection as an equivalent for a point of crash reduction. "Since the occurrence of a single violation implies a certain degree of crash risk, each inspection that uncovers and corrects at least one violation can be interpreted as reducing crash risk." *Id.* Sep.App. 492. The agency explains:

> The model *assumes* that observed deficiencies (i.e., violations) discovered at the time of an intervention can be converted into crash risk probabilities. This *assumption* is based on the *premise* that detected violations represent varying degrees of mechanical or judgmental faults and, further, that some are more likely than others to play a contributory role in motor carrier crashes.

Id. (emphasis added). Sep.App. 492. The model layers unsupported assumptions upon each other with no reportable data linking any assumption to ELD use or to evidence collected from actual reportable crashes. Even FMCSA concedes that "[t]he accuracy of FMCSA's safety benefits estimates is highly contingent on the *assumptions* the Agency has made about the applicability of these data." 2015 RIA. Sep.App. 413. Further, the benefits conclusions drawn in the 2015 RIA are statistically suspect. The safety benefit analysis in the RIA derives its conclusions from application of the roadside inspection model to inspection results from just five motor carriers out of a possible 539,000, all of which had installed AOBRDs (an early version ELD) because each had a greater than average HOS violation

record. The five self-selected carriers represent only 0.00093 percent of the regulated motor carrier industry.

Moreover, the model's formulation is not only refuted by common sense, but by FMCSA's own actual data collection. The model counts each HOS violation as of equal value to any other. So, a form and manner violation (a minor error in a paper log book) would be credited for a crash risk reduction that is equivalent to violating the 11 and 14 hour driving rules. This defies reason— how can form and manner violations (minor errors in time and dates for example) pose an equal higher crash risk to driving more hours than allowed under the rules? 2015 RIA Table 11. Sep.App. 392.

The Roadside Intervention Model introduces yet another assumption which is wholly disconnected from recorded evidence and reason. FMCSA arbitrarily *assumes* that a roadside intervention (citation) has a positive deterrent effect for a finite period of time. To determine the "duration" of the reduction in crash risk, the model groups violations that are similar in nature and "*thought"* to have equal crash risks. 2015 RIA. Sep.App. 514. The 2015 RIA used the crash risk probability for the group that included "unsafe driving, fatigued driving, and improper loading." *Id.* However, only "fatigued driving" can be associated with HOS compliance and then only tenuously with ELD use. The "duration" assigned to this group is thirty days. *Id.* The RIA nowhere explains its methodology for

assigning the "duration" factor. The "duration" factor is combined with "crash risk probability" to calculate a "prediction" as to crash risk reduction for a particular FMCSR violation.

B. HOS Rule Compliance Data Is Stale and Unreliable

There is no mystery as to the reason FMCSA has resorted to relying on a predictive rather than an evidence based model to attempt to support the benefits analysis for the Final Rule. By its own admission, "FMCSA has not undertaken a comprehensive survey of drivers to measure the level of noncompliance with the HOS rules since enactment of the 2003 HOS rule." 2015 RIA Appendix D. Sep.App. 456. As a result, any concrete data for the benefits analysis in the 2015 RIA "has been taken verbatim from the RIAs prepared for the 2003 and 2005 HOS rules." *Id.*

FMCSA has consistently recognized this data to be insufficient to support mandatory use of electronic logging devices. Final Rule HOS, 68 Fed. Reg. at 22489, col 1. In 2010 FMCSA used its analysis from the 2003 Regulatory Impact Analysis for the HOS NPRM as a proxy for any current analysis. FMCSA's 2010 RIA for the Final EOBR Rule[2] readily admitted that it "lacks sufficient data" to analyze the effects (benefits) of the proposed rule. 2010 RIA. Sep.App. 583.

[2] Regulatory Impact Analysis of Electronic On-Board Recorders. Docket No. FMCSA-2004-18940-1157.

FMCSA acknowledged in 2010 that, in its final rule, "many elements of the analysis of benefits and costs of this rule use estimates…were derived from [its] 2003 estimates concerning the effects of HOS rules." 75 Fed. Reg. at 17211, col. 2. *See* also NPRM-EOBR, 72 Fed. Reg. at 2343, col. 1. But FMCSA had admitted that in 2003 "there were insufficient economic and safety data to justify an EOBR requirement at that time." Final Rule-HOS, 68 Fed. Reg. at 22489, col. 1. FMCSA admitted in 2010 that "it would have been preferable to use more recent analysis that reflects current regulations, however current data are unavailable and analysis of the 2005 HOS rule did not reexamine the costs and benefits of full compliance with the HOS regulations." 2010 RIA. Sep.App. 584. When publishing the 2010 final rule, FMCSA noted that "due to data limitation, [it] used outdated studies in the analysis for this rule." 75 Fed. Reg. at 17211, col. 2. Sep.App. 530.

Nevertheless, FMCSA again uses this data as its baseline, and without any additional data collection, FMCSA extrapolates data to "estimate" costs and benefits of the "expected increase" in HOS compliance with the adoption of ELDs. 2015 RIA Appendix D. Sep.App. 456.

Commenters expressed concern over the lack of data measuring safety benefits for the Final Rule. The George Washington University Regulatory Studies Center noted the deficiency in FMCSA's data collection and analysis. 80 Fed. Reg. at 78306, col. 2-3. S.App. 16. GWU commented that data could be collected from

roadside inspections and crash reports which actually linked ELD use to HOS violations which FMCSA did not do. *Id.* In response, FMCSA acknowledged that it had not yet studied the effectiveness of the electronic devices, stating:

> And in response to the comments from George Washington University, FMCSA will conduct a regulatory effectiveness study at an appropriate time following the compliance date. The Agency will then be in a position to compare HOS violation rates in the years prior to the ELD mandate and during the years that follow implementation of the ELD mandate.

80 Fed. Reg. at 78307, col. 1. S.App. 17.

FMCSA's cost/benefit analysis depends to a significant degree on demonstrating that ELDs will reduce crash risk by improving compliance with the HOS rules. Such a demonstration necessarily implies the ability to measure historic HOS compliance levels as a baseline for measuring improvements or potential improvements as a result of use of ELDs. The 2015 RIA relies on the same data as the 2010 RIA which informs us that "determining the true degree of non-compliance is difficult," and that "it is still not possible to determine the level of non-compliance." Sep.App. 584. Similarly, now, FMCSA states:

> ELD data are not continuously monitored by carriers or enforcement staff for violations, and even if they were, not all HOS violations, such as those not related to driving time, would be documented. Consequently, the Agency cannot assume that ELD use would lead to perfect compliance with the HOS regulations.

2015 RIA. Sep.App. 390.

The best that FMCSA can say is that the stale and inadequate data used "support an *inference* that compliance with an EOBR remedial directive *could* reduce a carrier's HOS-related violations." *Electronic On-Board Recorders for Hours of Service Compliance,* 72 Fed. Reg. 2365, col. 2 (emphasis added). But inferences that something could happen are no substitute for a record based on the ***actual testing of electronic logging devices*** both the D.C. Circuit and this Court have found to be necessary to support the agency's cost benefit analysis. FMCSA's analysis fails to support the conclusion that the Final Rule will improve HOS compliance under § 31137.

C. FMCSA Has Not Met Its Legal Burden to Show That the Benefits Outweigh the Costs of Mandated ELD Implementation

Before enacting a regulation, FMCSA must consider the "costs and benefits" of such enactment. 49 U.S.C. §§ 31136 (c)(2)(A) and 31502(d). S.App. 135, 127. Congress authorized mandatory ELDs "to *increase compliance* by operators of the vehicles with hours of service regulations." 49 U.S.C. § 31137(a). As demonstrated above, ELDs will do nothing more than substitute one way of manually entering changes in duty status (log books entries) for another (manual ELD entries by driver). Both electronic and manual recording of hours of service are susceptible to the same manipulation of the on duty not driving and off duty categorizations, realizing no reduction in HOS violations. The 2014 Safety Study which purported to measure the effect of ELD use on fatigue related crashes

showed no difference between users and non-users. Sep.App. 145. But FMCSA has ignored the results of that Study. Thus, the Final Rule does nothing to secure the *benefits* of improved compliance with HOS requirements or reduction in crash risk. The agency cannot justify the substantial economic and privacy *costs* imposed by the mandated use of ELDs.

In a rulemaking proceeding, "an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Manufacturers Association v. State Farm,* 463 U.S. at 43 (citation omitted); *Public Citizen*, 374 F.3d at 1216; *Shurz Communications Incorporated v. Federal Communications Commission,* 982 F.2d 1043, 1049 (7th Cir. 1992); *National Telephone Cooperative Association v. Federal Communications Commission,* 563 F.3d 536, 540 (D.C. Cir. 2009)(if data in the rulemaking record demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, the rule cannot stand); *Black v. Educational Management Credit Corporation,* 459 F.3d 796, 800-801 (7th Cir. 2006) (Court's task on appellate review is to determine if agency action is based on a consideration of relevant factors). Where, as here, Congress has required that the agency "perform a proper cost/benefit analysis" the agency must provide a careful justification to "override a negative cost/benefit analysis." *Gas Appliance Manufacturers*

Association, Inc. v. Department of Energy, 998 F.2d 1041, 1045 (D.C. Cir. 1993). The D.C. Circuit struck down a rule based upon an incomplete and faulty cost/benefit analysis stating "DOE has so far identified no bases for disregarding the outcome of such an analysis to impose a standard that fails that test." *Id.*

In *Advocates for Highway and Auto Safety v. FMCSA*, 429 F.3d 1136 (D.C. Cir. 2005), the Court found regulations governing driver training arbitrary and capricious because the agency improperly imputed an economic benefit based upon one set of factors, to the wholly different training program which was the subject of the challenged regulations. *Id.* at 1146. The Court found "the agency adopted a rule with little apparent connection to the inadequacies it purports to address." *Id*. at 1145. In finding the cost/benefit analysis offered by FMSCA insufficient to support its conclusions, the Court noted that estimates for crash reduction benefits were based on studies which measured the effect of more substantial training. *Id*. at 1146. The Court explained:

> Thus, from the premise that *a particular method* of driver training reduces crashes, the agency infers that *anything it calls* "driver training" will reduce crashes. This is patently illogical. . . . The agency is wrong to assume that its unstudied training program can piggyback on the demonstrated effectiveness of practical, on-the-road training, and its blithe assurance that any training is beneficial ignores the documented risks flowing from subpar training programs.

Id. (emphasis in original).

Once again, with respect to the cost/benefit analysis offered in support of the Final Rule here, the FMCSA plays fast and loose with the purported benefits it attributes to the use of ELDs. The statutory authority for mandated ELD implementation is "to *increase compliance* by operators of vehicles with hours of service regulations." 49 U.S.C. § 31137(a). However, FMCSA did not have sufficient data to make that determination. 2015 RIA, Sep.App. 390, 456; 2010 RIA, Sep.App. 583. FMCSA still has not tested existing ELDs as prior Courts addressing mandatory use have found to be a minimal requirement. With the same sleight of hand rejected by the D.C. Circuit in *Advocates*, FMCSA uses cost/benefit data determined to be inadequate in prior iterations of an electronic logging rule, and substitutes "prediction" of crash risk, for an actual test of the effect of ELDs on real-world HOS compliance. FMCSA ignores the results of the only test that purported to measure the effect of ELD use, and defaults to the deficient 2003 data as the "benefit" that justifies the "costs" of mandated ELDs in 2015. This data has not gained validity over time; the difference between 2003 and 2015 is that the passing of twelve years has made the data stale in addition to its prior unreliability. This reasoning is just as "patently illogical" as the cost/benefit analysis rejected in *Advocates*, 429 F.3d at 1146.

This Circuit has enforced the same standard. In *Shurz Communications,* the Court found that the FCC had "flunked" the test of connecting facts in the record to

standards imposed by the rules. 982 F.2d at 1049-50. In 1983, the FCC issued a tentative opinion recommending that it abandon rules based on market power traditionally garnered by the networks. *Id.* at 1046-47. Nothing was done with regard to these rules until 1990 when, after a new rulemaking, the FCC, although recognizing that network market share had been increasingly diluted, reversed itself from its prior findings. *Id.* at 1048. This Circuit found the new rules to be "arbitrary and capricious" because the FCC had failed to connect the facts to its regulatory choices.

> The Commission's articulation of its grounds is not adequately reasoned. Key concepts are left unexplained, key evidence is overlooked, *arguments that formerly persuaded the Commission and that time has only strengthened are ignored,* contradictions within and among Commission decisions are passed over in silence.

Id. at 1050. The Court found significant the failure to explain what had happened in the eight years between the tentative and final decisions. *Id.* at 1053. The Court explained that while it might be within the FCC's discretion to restrict the network's programming, "[w]hat it could not do, consistent with the principles of reasoned decision-making, was pretend that it had never found that the networks had lost market power." *Id.* at 1054. The *Shurz* Court concluded the FCC's action was "unreasoned and unreasonable, and therefore, in the jargon of judicial review of administrative action, arbitrary and capricious." *Id.* at 1055.

Likewise for the Final Rule here. In 2003, FMCSA conducted studies regarding compliance with HOS regulations, and collected data analyzing crash rates. In 2003, FMCSA declined to require the use of electronic logging to monitor driver compliance because "'neither the costs nor the benefits of EOBR systems are adequately known,' because there is no 'significant market' for the devices, and because the amount of HOS-noncompliance that EOBRs would detect is unknown, as the agency 'did not test the (very few) EOBRs currently available.'" *Public Citizen*, 374 F.3d at 1220, citing 68 Fed. Reg. at 22488. FMCSA has never updated that data. 2015 RIA. Sep.App. 390, 345. In 2014, the only safety study conducted concluded that there was no difference in HOS compliance and crash rates between users and non-users of ELDs. Sep.App. 145.

Nevertheless, FMCSA now concludes, based on the same data that it found inadequate in 2003, and findings in 2014 that ELDs made no difference to HOS compliance, that mandatory ELD use is justified to "increase compliance" with HOS regulations. Just as in *Shurz,* time has not altered the validity of the analysis conducted in 2003; nor has it altered the 2014 findings of the Safety Study. FMCSA cannot now, consistent with the principles of reasoned decision-making, pretend that that evidence never existed. The APA embodies a presumption "against changes in current policy that are not justified by the rulemaking record." *State Farm,* 463 U.S. at 42.

IV. THE FINAL RULE DOES NOT IMPLEMENT THE STATUTORY MANDATE TO INCLUDE MEASURES TO PROTECT CONFIDENTIALITY AND LIMIT USE OF DATA DISCLOSED TO ENFORCEMENT OFFICERS DURING THE COURSE OF ENFORCEMENT ACTIVITIES

49 U.S.C. § 31137(e) limits the use of ELD data by the Secretary and further mandates that the Secretary institute appropriate measures to deal with driver information collected from ELDs by enforcement officials during the course of an enforcement action. S.App. 130. Several organizations, including OOIDA, filed comments on the implications of this provision. Final Rule, 80 Fed. Reg. at 78320, col. 3, S.App. 30; OOIDA Comments, Sep.App. 175. The Secretary has taken no action to satisfy the obligations imposed by these provisions on either federal or state enforcement personnel.

It should be noted that FMCSA relies almost exclusively on state law enforcement personnel to enforce federal motor carrier safety standards. The activities of motor carriers and drivers are subject to federal safety regulations (FMCSRs) promulgated by FMCSA. FMCSRs are enforced primarily by individual states which, in exchange for federal grants under the Motor Carrier Safety Assistance Program (MCSAP) (*see* 49 U.S.C. § 31102); 49 C.F.R., Part 350), incorporate the federal standards into state law. *Nat'l Tank Truck Carriers, Inc. v. Federal Highway Administration,* 170 F.3d 203, 205 (D.C. Cir. 1999). In order to qualify for federal grants under MCSAP, a state must submit a

certification (49 C.F.R. § 350.211) to FMCSA of its compliance with numerous requirements imposed by both statute and regulation. 49 U.S.C. § 31102(b)(A)-(X); 49 C.F.R. § 350.201. If the Secretary finds that a state does not comply with MCSAP requirements, the Secretary can make a finding of non-conformity, resulting in "immediate cessation of Federal funding…" 49 C.F.R. § 350.215. By statute, the Secretary is required to make "continuing evaluation of the way the State is carrying out the plan." 49 U.S.C. § 31102(d). S.App. 140. FMCSA holds the purse strings under the MCSAP program, and it can insist that enforcement personnel in participating MCSAP states safeguard confidentiality and limit the use of driver data as a condition of federal funding.

In *OOIDA I,* this Court vacated FMCSA's final rule "because the Agency failed to consider an issue [harassment] that it was statutorily required to address." 656 F.3d at 582, 587. So too here, FMCSA has completely ignored the statutory mandate to "institute appropriate measures" to ensure that enforcement officers are directed to preserve the confidentiality of driver data transmitted to them during enforcement actions (§ 31137(e)(2)) and "to ensure [that] any information collected by electronic logging devices is used by enforcement personnel only for the purpose of determining compliance with hours of service requirements." (§ 31137(e)(3)). S.App. 130. At a minimum, FMCSA's "appropriate measures" should have added provisions to 49 C.F.R. § 350.201 as well as additions to the

items to which a MCSAP state must certify under 49 C.F.R. § 350.211. Additional regulatory provisions applicable to federal enforcement officers should also have been adopted.

Because the enforcement function is implemented primarily at the state level, it is critical that FMCSA honor its obligations under § 31137(e). Failure to do so will result in inconsistency and uncertainty for drivers who face enforcement activity as they haul freight from state to state. FMCSA has not complied with its statutory mandate to institute appropriate measures to ensure uniformity of enforcement practices among the states participating in MCSAP and at the federal level.

V. THE FINAL RULE VIOLATES DRIVERS' FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES

A. The Rule Is A Search

Except in certain well-defined circumstances, a search is not considered reasonable under the Fourth Amendment unless executed pursuant to a judicial warrant issued upon probable cause. *See Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 619 (1989).

The government-mandated 24-hour a day recording of drivers' activities in the ELD Final Rule is an intrusion upon driver privacy. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). The statute is aimed directly at drivers,

thus implicating their privacy rights. The purpose of the ELD is "to improve compliance by an operator [driver] of a vehicle with hours of service regulations…." 49 U.S.C. § 31137(a)(1). The ELD devices are intended to "accurately record commercial driver hours of service…." *Id.* at (b)(1)(A)(i). The ELD interface must be designed to aid "law enforcement review." *Id.* at (b)(2)(A). The Secretary is directed to use data gathered by ELDs "only to enforce the Secretary's motor carrier safety and related regulations, including hours of service regulations." *Id.* at (e)(1),(3).

In *United States v. Jones*, 132 S. Ct. 945 (2012), the Supreme Court found the FBI's prolonged use of a warrantless GPS tracking device on a vehicle was a search within the meaning of the Fourth Amendment:

> The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.

Id. at 949. (Recognized by the 7th Circuit in *United States v. Martin*, 807 F.3d 842, 843 (7th Cir. 2015). The Court rejected the Government's contention that no search occurred, since the Defendant had no reasonable expectation of privacy in the location of the vehicle on public roads, which was visible to all, concluding:

> [T]he Government acknowledges, "the officers in this case did more than conduct a visual inspection of the respondent's vehicle … By attaching the device to the Jeep, officers encroached on a protected area.

Jones, 132 S. Ct. at 951 (emphasis in original). Likewise here, this Court should reject FMCSA's assertion that the compulsory installation of an ELD device is not a search subject to the warrant requirements of the Fourth Amendment.[3] The constitutional focus in all cases is on the methods by which the searches are conducted. "It is the exploitation of technological advances that implicates the Fourth Amendment, not their mere existence." *U.S. v. Karo*, 468 U.S. 705, 712 (1984).

Although FMCSA claims that it seeks to obtain no more information than what is recorded in paper logbooks, under the Final Rule, the 24 hour electronic recording of data about a driver's activity and location is much more invasive. A truck traveling over public highways can easily be observed by others. But circumstances change when a driver is exposed to continuous surveillance over a long period of time. Supreme Court precedent has firmly prohibited such surveillance.

B. <u>The Rule Is A Seizure</u>

FMCSA's attempt to compel installation of ELD devices without a warrant also constitutes an unconstitutional seizure. The Fourth Amendment "protects property as well as privacy." *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 62 (1992). A

[3] *See also Kyllo v. United States,* 533 U.S. 27 (2001)(warrantless use of thermal imaging constituted a search of a home in violation of the Fourth Amendment).

seizure of property occurs when "there is some meaningful interference with an individual's possessory interests"— "however brief" the interference may be. *United States v. Jacobsen*, 466 U.S. 109, 113 n. 5 (1984).

Unless the police have complied with the Fourth Amendment's requirements, "people are entitled to keep police officers' hands and tools off their vehicles." *United States v. McIver*, 186 F.3d 1119, 1135 (9th Cir. 1999) (Kleinfeld, J., concurring in the judgment).

In *Silverman v. United States*, 365 U.S. 505 (1961) the Court concluded that installation of a listening device on the defendants' property was subject to the Fourth Amendment. Here, trucks clearly are "effects" under the text of the Fourth Amendment, *see United States v. Chadwick*, 433 U.S. 1, 12, (1977), and are therefore "constitutionally protected areas" for purposes of *Silverman*.

For many truckers, their truck is not simply a vehicle - it is also an office, and indeed, a home away from home. A governmental mandate that drivers install surveillance devices in their trucks thus constitutes a seizure of their property.

C. The Rule Does Not Qualify for the Exception for a Warrantless Search In A Pervasively Regulated Industry

Although FMCSA claims that use of ELDs does not constitute a search under the Fourth Amendment, the agency states that, if it does, it falls under the pervasively regulated industry exception to the Fourth Amendment. Final Rule, 80 Fed Reg. 78365, n. 39, S.App. 75. In *Donovan v. Dewey* the Supreme Court

held that where an individual elects to participate in a pervasively regulated business his "justifiable expectations of privacy" are necessarily diminished. *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). In such cases, reasonably defined inspection schemes accompanied by appropriate standards for implementation pose only limited threats to those limited expectations of privacy. *Id.*, 452 U.S. at 599.

In *New York v. Burger,* the Court reaffirmed the principles articulated in *Donovan*, concluding that where (1) the business in question is closely regulated, and (2) the warrantless inspections are *necessary to further the regulatory scheme*, (3) compliance with the Fourth Amendment turns on whether the inspection program, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger,* 482 U.S. at 702-703 (emphasis added). The Final Rule does not satisfy these standards.

1. The pervasively regulated industry exception applies only to business premises not persons.

Although warrantless searches of the workplace in pervasively regulated industries have been approved by the courts, this approval has not been extended to the warrantless search of an individual, the recording of a person's location, and the monitoring of that person's activities.

Burger stands for the proposition that privacy expectations are lower in "commercial premises" than in a home and that such expectations are "particularly attenuated" in "commercial property." *Burger*, 482 U.S. at 700. The problem here

is that this case does not involve the inspection of "commercial property." It involves the systematic recording of the movement and activities of individual drivers over extended periods of time by the use of sophisticated electronic devices. Those recordings must be turned over to law enforcement officers upon demand. Petitioners do not contest here the proposition that trucking has been held to be a pervasively regulated industry and that an *administrative inspection of business premises (*including equipment like trucks) has been approved where the inspection meets the requirements of *Burger*. But this case is not about the search of trucks. The statute focuses explicitly on monitoring the movement and activities of real people. For law enforcement purposes, such privacy interests demand greater protections.

The *Burger* Court specifically noted that the statute authorizing the inspection "must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his *property* will be subject to periodic inspections undertaken for specific purposes.'" *Id*. at 703, quoting *Donovan,* 452 U.S. at 600. (emphasis added). The foundation for the Court's holding in *Burger* rests on a long series of Supreme Court cases dealing exclusively with administrative inspections of commercial premises. *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970) (warrantless inspection of premises on which liquor was sold disapproved); *United States v. Biswell*, 406 U.S. 311, 315

(1972) (warrantless inspection of premises on which fire arms were sold approved); *Donovan v. Dewey*, 452 U.S. at 606 (warrantless inspection of stone-quarry under Federal Mine Safety and Health Act, 30 U.S.C. § 801 approved); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 322-325 (1978) (warrantless inspection of factory under OSHA disapproved).

In *Whren v. United States*, 517 U.S. 806 (1996) Justice Scalia, writing for a unanimous court, observed that *Burger* upheld the constitutionality of a warrantless administrative inspection which he defined as "the inspection of *business premises* conducted by authorities responsible for enforcing a pervasive regulatory scheme …." 517 U.S. at 811, n. 2. (emphasis added). In no case found by the Petitioners has the Court held that individuals working in a pervasively regulated industry may be personally subjected to continuous recording of their whereabouts, and work and rest activities, by sophisticated monitoring devices over long periods of time.

2. The pervasively regulated industry exception applies only to administrative searches not searches to support law enforcement.

The *Burger* case involved efforts by the state of New York to deal with car thefts and the ability of car thieves to dispose of stolen cars at "chop shops" set up to dismantle stolen cars and sell the parts at a profit. New York enacted an administrative regime to regulate chop shops through licensing and record keeping regulations. Separate penal statutes addressed dealing with stolen vehicles and parts. The issue in *Burger* was whether New York enforcement personnel could

conduct warrantless inspections of chop shops under the administrative code where those inspections regularly uncovered evidence of criminal violations for prosecution. The majority upheld the warrantless search under the administrative regulations:

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

Burger, 482 U.S. at 717.

In the present case Congress has enacted a single statute (Section 31137) designed to support direct enforcement of the HOS regulations. The statute itself leaves no doubt that the requirement that commercial motor vehicles be equipped with ELDs is aimed directly and exclusively at the drivers of those vehicles. The purpose of the ELD is "to improve compliance by an operator [driver] of a vehicle with hours of service regulations…." 49 U.S.C. § 31137(a)(1). The ELD devices are intended to "accurately record commercial driver hours of service…." *Id.* at (b)(1)(A)(i). The ELD interface must be designed to aid "law enforcement review." *Id.* at (b)(2)(A). The Secretary is directed to use data gathered by ELDs "only to enforce the Secretary's motor carrier safety and related regulations, including hours of service regulations." *Id.* at (e)(1), (3).

In *Burger* the majority and dissenting Justices were divided over whether warrantless enforcement of the administrative regulations was being used as a

pretext for criminal enforcement. 482 U.S. at 724 (dissenting opinion). The majority opinion concluded that the administrative and penal programs were sufficiently separated to permit warrantless administrative inspections. 482 U.S. at 717. But the case at bar presents no such separation. The statutory scheme here (Section 31137) is designed to achieve direct penal enforcement of FMCSA's HOS regulations. State enforcement officers operating under MCSAP grants typically have the authority to issue criminal citations for violations of motor carrier safety regulations including hours-of-service regulations.[4] The Fourth Amendment does not permit warrantless searches to support the ordinary needs of law enforcement. *City of Indianapolis v. Edmunds,* 531 U.S. 32, 44 (2000); *Joy v. Penn-Harris-Madison Sch. Corp.,* 212 F.3d 1052, 1059 (7th Cir. 2000) (special needs exception approved where drug test results were not turned over to law enforcement personnel.). FMCSA does not contend that its warrantless surveillance of drivers

[4] *See*, for example, Illinois Vehicle Code, Article I. Federal Motor Carrier Safety Regulations, 625 ILCS 5/18b-108 ([A]ny driver who willfully violates any provision of this Chapter … is guilty of a Class 4 felony ….”); Indiana Code, IC 8-2.1-24-24, “Violation Sec. 24. A person who violates this chapter commits a Class B infraction.”); Wisconsin, W.S.A. 343.44 (“(1)(c) … No person may operate a commercial motor vehicle …[that] has been issued a federal out of service order …. (2) Any person who violates sub. (1)(c) shall forfeit $2,500 for the first offense and $5,000 for the second or subsequent offense within 10 years.”); Tenn. Code Ann. § 65-15-122(a) [E]very officer, agent or employee of any corporation, or any other person who knowingly violates or fails to comply with . . . any provision of this part, commits a Class B misdemeanor . . . .”).

using ELDs falls into the exemption for "special needs beyond the needs of ordinary law enforcement." 80 Fed. Reg. at 78365, n. 39, S.App. 75. Nor could it make such a claim because Section 31137 is specifically designed to support law enforcement.

3. Equipping trucks with ELDs does not further the regulatory scheme.

As the Petitioners demonstrated above, mandating the use of ELDs in the Final Rule is not necessary to further the regulatory scheme because they do nothing to improve compliance with the HOS rules. Therefore, this search fails to satisfy the second prong of the test set forth in *Burger*, 482 U.S. at 702-03. ELDs do not record compliance with the HOS rules any more accurately than the manual recording of entries on paper log books. Respondents do not provide any accurate and current data establishing that ELDs will enhance compliance with the HOS regulations or that such enhanced compliance will produce any favorable impact on highway safety. In the face of such deficiencies, the deployment of ELDs fails to satisfy the second prong of the *Burger* test, that such deployment necessary to further the regulatory scheme.

The statutory goal for the ELD mandate is "to improve compliance by an operator of a vehicle with hours of service regulations." FMCSA states that [[t]his rule improves commercial motor vehicle (CMV) safety. 80 Fed. Reg. at 78293, col. 2, S.App. 3. Nothing in the record of the Final Rule supports the conclusion

that these statutory and regulatory goals are furthered by the mandatory use of ELDs. As demonstrated above, the fact that drivers must manually enter changes in duty status into an ELD makes the device no better than paper logs in meeting the regulatory goal of improving compliance with the HOS rules.

FMCSA is completely unable to support its safety claims with current, reliable data. There is absolutely no data to support the proposition that ELDs are necessary (or capable of) supporting the regulatory objectives. The Final Rule does little more than substitute one method of recording duty status for another – manual ELD entries of changes in duty status for manual log book entries— but at a much greater monetary and privacy cost than paper logbooks.

4. The Final Rule does not include regulations that serve as a constitutionally adequate substitute for a warrant.

The third prong of the *Burger* analysis requires that the inspection program in terms of the certainty and regularity of its operation must provide a "constitutionally adequate substitute for a warrant." 482 U.S. at 703, citing *Donovan,* 452 U.S. at 603. The administrative regulations "must limit the discretion of the inspecting officers." *Id.* Congress enacted two provisions that directed the Secretary "to institute appropriate measures" to preserve the confidentiality of personal data disclosed to enforcing officers during a roadside inspection and limiting the use to which enforcement officers could put the data obtained from the ELD. 49 U.S.C. § 31137(e)(2), (3).

As noted earlier, FMCSA has ignored this statutory mandate and has taken no measures to define and limit the discretion of enforcement officers respecting confidentiality and use of ELD data. This is especially troublesome in the case of state enforcement officers operating under federal MCSAP grants. Drivers hauling freight across country and moving between states are forced to confront no restraints on officer discretion as well as variations in the exercise of discretion as one moves from state to state. Thus, the inspection program in terms of the certainty and regularity of its application does not serve as a constitutionally adequate substitute for a warrant. *Burger,* 482 U.S. at 702-703.

VI. PETITIONERS HAVE STANDING TO CHALLENGE THE FINAL RULE

The Hobbs Act provides a right of review to any "party aggrieved" to determine the validity of rules issued by the Secretary of Transportation. 28 U.S.C. §§ 2342(3)(A) and 2344. The statutory aggrievement standard incorporates constitutional and prudential standing requirements. *Brotherhood of Locomotive Engineers v. United States,* 101 F.3d 718, 723 (D.C. Cir. 1996). This standard is "[n]ormally satisfied by a petitioner's more than de minimus participation in the agency proceedings under review." *Id*., citing, *Southern Pacific Transportation Co. v. ICC*, 69 F.3d 583, 587-88 (D.C. Cir. 1995); *Chicago, Milwaukee, St. Paul and Pacific Railroad Co. v. Railway Labor Executives Assoc.*, 799 F.2d 317, 334 (7th Cir. 1986) (only a party before the Commission may seek judicial review of its

orders under 28 U.S.C. §§ 2342 and 2344); *Clark and Reid Co. v. United States,* 804 F.2d 3, 5-6 (1st Cir. 1986) (Hobbs Act requires participation in administrative proceeding to establish standing for judicial review.)

This Court has already found that OOIDA and two of its members had standing under the Hobbs Act to challenge the previous version of the rule on electronic logging devices. *OOIDA I,* 656 F. 3d at 585-586. With respect to the individual driver petitioners in the 2011 challenge, this Court held that where the complainant is the "object of the action…there is ordinarily little question that the action or inaction has caused him injury." *Id*., citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561-62 (1992)(internal quotation marks omitted). The Court explained:

> The three truck drivers are the "objects of the action" here. It is truck drivers who will be required to install EOBRs should they work for a carrier subject to a remedial directive, and the central purpose of the rule is to increase their compliance with HOS regulations. Although compliance is measured at the carrier level, it is the individual truck drivers whose sleep is really at issue under the HOS rules and whose status is being tracked on a day-to-day basis.

OOIDA I, 656 F.3d at 585. The Court made similarly short work of FMCSA's challenge to OOIDA's standing. "As a trade association that includes truckers and represents their interests, OOIDA meets the requirements of associational standing; it has Article III standing because the individual truckers do. *Id*. at 585-86, citing

Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002).

The Final Rule challenged here is a continuation of the same agency effort to satisfy the statutory command to FMCSA to adopt regulations governing the use of electronic logging devices. OOIDA and its members have participated at every stage of the agency proceedings on these issues. Declaration of James Johnston (S.App. 147). OOIDA and member Petitioners Mark Elrod and Richard Pingel submitted comments to FMCSA on the Rule challenged here. (Sep.App. 173, 227). OOIDA and the individual driver Petitioners have satisfied the constitutional and prudential requirements to establish their standing in this matter.

CONCLUSION

For the foregoing reasons the Petition for Review should be granted.

Respectfully submitted,

Dated: March 29, 2016

/s/ Paul D. Cullen, Sr.

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No. 15-3756

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.; et al,

Petitioners,

vs.

UNITED STATES DEPARTMENT OF TRANSPORTATION; et al,

Respondents.

On Appeal from Final Agency Action by the Federal Motor Carrier Safety Administration
FMCSA – 2010-0167

DECLARATION OF JAMES JOHNSTON IN SUPPORT OF PETITIONERS' BRIEF

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March 29, 2016

Counsel for Intervenor

I, James Johnston, declare as follows:

1. I am President and CEO of the Owner Operators Independent Driver's Association. I have served the Association in that capacity for more than 41 years. I have personal knowledge of the facts stated in this declaration.

2. OOIDA is the largest international trade association representing the safety and economic interests of independent owner-operator truck drivers, small-business motor carriers, and professional drivers. OOIDA is located in Grain Valley, Missouri. OOIDA currently has approximately 157,000 members. OOIDA has over 15,300 members who reside in or operate their trucking business in either Illinois or Indiana. OOIDA's members are professional drivers and small-business men and women located in all 50 states and Canada who collectively own and operate more than 240,000 individual heavy-duty trucks. OOIDA members individually spend an average of 200 nights away from home each year, while engaged in providing transportation services in commercial motor vehicles.

3. OOIDA has participated in proceedings before the Federal Motor Carrier Safety Administration in connection with every phase of the agency's consideration of regulations relating to hours of service, and programs related to the use of electronic logging devices (ELD's). OOIDA filed comments with FMCSA specifically addressing issues relating to that agency's response to

directives from Congress set forth in 49 U.S.C. § 31137(2015). OOIDA and its members' substantive contribution to the discussion of these issues is well known to the agency through the extensive comments submitted in connection with the Final Rule at issue here and related matters including:

ANPRM, Hours of Service of Drivers,
61 Fed.Reg. 57252 (November 5, 1996).

NPRM, Hours of Service of Drivers,
65 Fed.Reg. 25540 (May 2, 2000).

Final Rule, Hours of Service of Drivers,
68 Fed.Reg. 22456 (April 28, 2003).

Final Rule, Hours of Service of Drivers,
70 Fed.Reg. 49979 (August 25, 2005).

ANPRM, Electronic On-Board Recorders for Hours
of Service Compliance, 69 Fed.Reg. 53386 (September 16, 2004).

NPRM, Electronic On-Board Recorders for Hours
of Service Compliance, 72 Fed.Reg. 2340 (January 18, 2007).

Final Rule, Electronic On-Board Recorders for Hours
of Service Compliance, 75 Fed.Reg. 17208 (April 5, 2010).

NPRM, Electronic On-Board Recorders and Hours
of Service Supporting Documents, 76 Fed.Reg. 5537 (February 1, 2011).

SNPRM, Electronic On-Board Recorders and Hours
of Service Supporting Documents, 79 Fed.Reg. 17656 (March 28, 2014).

NPRM, Electronic Logging Devices and Hours of Service
Supporting Documents; Research Report on Attitudes of
Truck Drivers and Carriers on the Use of Electronic Logging
Devices and Driver Harassment, 79 Fed.Reg. 67541 (November 13, 2014).

Final Rule, Electronic On-Board Recorders and Hours of Service Supporting Documents, 80 Fed.Reg. 78292 (December 16, 2015).

4. Petitioners Mark Elrod and Richard Pingel are members of OOIDA. Each filed comments in connection with the Final Rule at issue here:

Comment ID: FMCSA-2010-0167-2117 (Mark Elrod)

Comment ID: FMCA-2010-0167-1776 (Richard Pingel)

5. Commercial motor vehicle drivers, including OOIDA members, are directly impacted by the mandatory use of ELDs because it is the drivers who will be required to install ELDs in their trucks, and whose activities are subject to monitoring by the devices.

I declare under penalty of perjury that the foregoing is true and correct.

James Johnston
President and CEO of OOIDA

Dated: March 29, 2016