United States Court of Appeals
For the Eighth Circuit

No. 18-1674

Ronald Calzone,

Plaintiff-Appellant,

v.

Eric T. Olson, in his official capacity as Superintendent of the Missouri State Highway Patrol,

Defendant-Appellee.[1]

Appeal from United States District Court
for the Eastern District of Missouri – St. Louis

Submitted: January 16, 2019
Filed: July 26, 2019

Before SMITH, Chief Judge, COLLOTON and ERICKSON, Circuit Judges.

COLLOTON, Circuit Judge.

Ronald Calzone seeks a ruling that the Missouri State Highway Patrol is forbidden to stop and inspect

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[1] Eric T. Olson is automatically substituted for his predecessor under Federal Rule of Appellate Procedure 43(c)(2).

his 54,000-pound dump truck, used in furtherance of his private commercial venture, without probable cause. The district court[2] denied his request for declaratory and injunctive relief. We likewise conclude that Calzone is a member of the closely regulated commercial trucking industry, and that the patrol's random stops and inspections of his truck would comport with the Fourth and Fourteenth Amendments. We therefore affirm the judgment.

Calzone operates a dump truck in support of his horse and cattle ranch, Eagle Wings Ranch. He holds a Missouri-issued commercial driver's license, and his truck has Missouri-licensed plates marking it as a 54,000-pound vehicle for "local" commercial use. A "local commercial motor vehicle" includes "a commercial motor vehicle whose property-carrying operations are confined solely to the transportation of property owned by any person who is the owner or operator of such vehicle to or from a farm owned by such person . . . ; provided that any such property transported to any such farm is for use in the operation of such farm." Mo. Rev. Stat. § 301.010(27). The license plate on Calzone's truck is marked with the letter "F," designating it as a vehicle used for farm or farming transportation operations. *See id.* § 301.030(3).

A Missouri state trooper stopped Calzone in June 2013 to inspect his dump truck under a Missouri statute that authorizes random roadside inspections of

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[2] The Honorable Stephen N. Limbaugh, Jr., United States District Judge for the Eastern District of Missouri.

commercial motor vehicles. *See id.* § 304.230. Calzone objected to the stop and refused to allow the inspection. He later filed this action under 42 U.S.C. § 1983, seeking, among other things, to enjoin the superintendent of the highway patrol from authorizing and directing patrol officers to stop and inspect his dump truck without individualized suspicion that he failed to comply with state law. After an earlier decision of this court, *Calzone v. Hawley*, 866 F.3d 866 (8th Cir. 2017), and a remand for further proceedings, the only claim remaining on this appeal is one for declaratory and injunctive relief against the superintendent.

The Fourth and Fourteenth Amendments forbid the State to conduct unreasonable searches and seizures. The traditional standard of reasonableness in the context of a criminal investigation requires a warrant and probable cause to believe that a search will discover evidence of unlawful activity. *See Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53 (1995). But in the case of commercial property that is involved in a "closely regulated" industry whose operation "poses a clear and significant risk to the public welfare," *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2454 (2015), the property owner has a reduced expectation of privacy, and a warrantless seizure and inspection may be reasonable without an individualized showing of probable cause. *New York v. Burger*, 482 U.S. 691, 699-700 (1987).

To invoke this authority based on a state scheme governing a closely regulated industry, the State must satisfy three criteria: (1) the regulatory scheme

advances a substantial government interest; (2) warrantless inspections are necessary to further the regulatory scheme; and (3) the rules governing the inspections are a constitutionally adequate substitute for a warrant, *i.e.*, the rules must provide notice that the property may be searched for a specific purpose and must limit the discretion of the inspecting officers. *Calzone*, 866 F.3d at 871. Missouri law authorizes the state patrol to conduct "random roadside examinations or inspections" of commercial motor vehicles. Mo. Rev. Stat. § 304.230.1. We have held that commercial trucking is a "closely regulated" industry, *United States v. Ruiz*, 569 F.3d 355, 356-57 (8th Cir. 2009); *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004), and that Missouri's regulatory scheme for the inspection of commercial vehicles is constitutional on its face:

> Missouri has a substantial interest in ensuring the safety of the motorists on its highways and in minimizing damage to the highways from overweight vehicles. *Ruiz*, 569 F.3d at 357 (citing cases); *State v. Rodriguez*, 877 S.W.2d 106, 109 (Mo. 1994). Given the transitory nature of commercial trucks, *United States v. Fort*, 248 F.3d 475, 481 (5th Cir. 2001), and the difficulty of detecting violations of the regulatory scheme by routine observation, effective enforcement would be nearly impossible without impromptu, warrantless searches. *United States v. Maldonado*, 356 F.3d 130, 136 (1st Cir. 2004). The challenged subsections are also a permissible substitute for a warrant. They provide notice

> to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer, and they limit the scope of the officer's inspections to an examination solely for regulatory compliance. *See Ruiz*, 569 F.3d at 357.

Calzone, 866 F.3d at 871.

The Missouri regime regulates commercial motor vehicles operating on state highways. Any "motor vehicle designed or regularly used for carrying freight and merchandise" must be registered as a commercial motor vehicle, and the owner must pay an annual fee based on the vehicle's weight. Mo. Rev. Stat. §§ 301.010(9); *see id.* § 301.030.3, 301.058.1. A commercial motor vehicle may not be operated on certain streets, *see id.* § 300.550, is subject to height, weight, and length restrictions, *see id.* §§ 304.170-304.230, and must undergo biennial safety inspections. *See id.* § 307.350.1. Missouri also has incorporated a subset of the Federal Motor Carrier Safety Regulations into its statutory scheme for any vehicle that is defined as a "commercial motor vehicle" under federal law. *See id.* § 307.400.1. The applicable regulations govern licensing, safety, required parts and accessories, and transportation of hazardous materials. *See* 49 C.F.R. §§ 391-397. Missouri patrol officers have authority to conduct random roadside examinations or inspections to determine compliance with the governing rules. *See* Mo. Rev. Stat. § 304.230.1, .2, .7.

Calzone asserts that he is exempt from the lion's share of these regulations, so he is not part of the "closely regulated" industry, and the Missouri

inspection scheme is therefore unconstitutional as applied to him. He contends that his truck is exempt from all of the federal regulations, because he operates his truck only within Missouri, while the federal definition of "commercial motor vehicle" is a vehicle over 10,000 pounds that is "used on a highway *in interstate commerce.*" 49 C.F.R. § 390.5 (emphasis added). The Missouri statute, however, makes it unlawful to operate any "commercial motor vehicle," unless the vehicle complies with the federal regulations, "whether *intrastate transportation or* interstate transportation." Mo. Rev. Stat. § 307.400.1 (emphasis added). The state statute thus expands the federal definition of "commercial motor vehicle" to encompass vehicles that are engaged only in "intrastate transportation" and thus only in intrastate commerce. Calzone's proposed interpretation cannot be squared with the structure of the state statute. Section 307.400.5 creates an exception to application of the federal regulations for certain commercial motor vehicles that are "operated in intrastate commerce to transport property" and weigh 26,000 pounds or less. If Calzone were correct that § 307.400.1 already excepted *all* vehicles that are operated in intrastate commerce, then the narrower exception of § 307.400.5 would be unnecessary.

Calzone also argues that he is exempt from complying with the federal regulations because he is not a "motor carrier" within the meaning of the regulations. Citing a definition from an inapplicable federal statute, he contends that the meaning of "motor carrier" is limited to persons who provide transportation for

compensation, *see* 49 U.S.C. § 13102(14), and does not extend to one who transports his own commercial property. But the definition of "motor carrier," for purposes of the federal safety regulations that are incorporated by the Missouri statute, is "a for-hire motor carrier *or* a private motor carrier." 49 C.F.R. § 390.5 (emphasis added); *see* 49 U.S.C. §§ 13102(15), 31502(b). A "private motor carrier" includes a person like Calzone who provides transportation of property by commercial motor vehicle and is not a for-hire motor carrier. *Id.*

It is true that Calzone is not subject to the *full* panoply of regulations that govern commercial motor vehicles in Missouri. Because Calzone normally uses his dump truck in association with his ranch and has license plates marked with a farm vehicle designation, he is exempt from some of the rules that apply to operators of other commercial motor vehicles. He is not required to acquire a commercial driver's license to operate his truck unless he uses it to transport hazardous materials. *See* Mo. Rev. Stat. §§ 302.700.2(23), 302.700.2(29), 302.775(1). He is a "private carrier" under Missouri law, so he is not subject to the state regulations that govern operators who are "motor carriers" under Missouri law. *See id.* §§ 390.020(23), 390.030.3. And his truck qualifies as a "covered farm vehicle" under the federal regulations, which exempts him from Missouri's application of some of the federal standards: he is exempt from all driver qualification regulations, *see* 49 C.F.R. §§ 391.2(c)-(d), and he is excepted from regulations governing hours for drivers, *see id.* § 395.1(s), and those imposing a duty on motor carriers

to inspect, repair, and maintain commercial motor vehicles within their control. *See id.* § 396.1(c).

But unlike the vehicles at issue in *United States v. Herrera*, 444 F.3d 1238, 1245 (10th Cir. 2006), and *United States v. Seslar*, 996 F.2d 1058, 1063 (10th Cir. 1993), Calzone's truck is subject to regulation under the applicable state regulatory scheme. That Missouri tailors its system to fit different types of commercial motor vehicles does not mean that Calzone is outside of the "closely regulated" industry of commercial trucking. He operates a 54,000-pound dump truck on Missouri highways in support of a commercial enterprise—his horse and cattle ranch. Although Calzone does not operate his commercial vehicle for hire, he is still subject to a broad range of regulations that include height, weight, and length restrictions, licensing standards, state-conducted inspection requirements, and safety standards. *See* Mo. Rev. Stat. §§ 300.550, 301.030.3, 301.058.1, 304.170-.230, 307.400; 49 C.F.R. §§ 390, 392-93.

By choosing to operate a heavy truck in furtherance of a commercial venture, Calzone subjects himself to a pervasive regulatory scheme and has a reduced expectation of privacy. Missouri maintains a "substantial interest in ensuring the safety of the motorists on its highways and in minimizing damage to the highways from overweight vehicles," *Calzone*, 866 F.3d at 871, and that interest does not dissipate simply because Calzone's commercial activity is on behalf of his own ranch rather than for hire. We therefore conclude that Missouri's regulatory scheme advances a

substantial government interest as applied to Calzone, and that warrantless inspections are necessary to further the regulatory scheme.

Calzone argues that even if he is a member of the closely regulated commercial trucking industry, the statute authorizing random inspections is an impermissible substitute for a warrant. He complains that § 304.230 does not properly define the scope of the authorized searches, adequately notify citizens that they could be subject to warrantless stops, or appropriately limit the discretion of the investigating officer. But we rejected these same arguments in considering Calzone's facial challenge, and nothing about the nature of his as-applied challenge changes the answer. The disputed subsections of the Missouri statutes are a permissible substitute for a warrant, because "[t]hey provide notice to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer, and they limit the scope of the officer's inspections to an examination solely for regulatory compliance." *Id.*

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

RONALD CALZONE,	)	
Plaintiff,	)	
	)	**Case No.**
vs.	)	**4:15-CV-869-SNLJ**
SANDRA KARSTEN[1]	)	
Defendant.	)	

MEMORANDUM and ORDER

(Filed Mar. 9, 2018)

This matter is before the Court on remand from the Eighth Circuit. Plaintiff Ronald Calzone claims RSMo. § 304.230 is unconstitutional as applied to him —a farmer who occasionally operates his 56,000[sic]-pound dump truck only in the State of Missouri— because he is not a member of the closely regulated commercial trucking industry. The parties have renewed their motions for summary judgment. Because the Court finds Calzone is a member of the closely regulated commercial trucking industry, his motion for summary judgment (#14) is denied and the state's motion for summary judgment (#10) is granted.

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[1] Superintendent Karsten is automatically substituted for her predecessor under Federal Rule of Civil Procedure 25(d).

I. Factual and Procedural Background

Calzone is a Missouri farmer who occasionally operates his dump truck no more than fifty miles from his farm. The dump truck is licensed with a Missouri 54,000-pound local license plate that is marked with the letter F, which designates the dump truck as a farm truck. The truck does not have a U.S. Department of Transportation number on it. Calzone is not a professional truck driver, and he uses the dump truck only when transporting agricultural products or supplies to and from his farm.

In June 2013, a Missouri State Highway Patrol corporal stopped Calzone while he was driving his dump truck on the highway. The corporal told Calzone that he pulled him over because he "did not recognize the truck or the markings displayed on the vehicle" and asked to inspect it. Calzone refused, and the corporal then explained that RSMo. § 304.230 authorized him to stop commercial vehicles and inspect them whether or not he had probable cause. The corporal warned Calzone if he did not submit to an inspection, he would issue Calzone a citation. Calzone still refused, so the corporal issued him a citation for failing to submit to a commercial vehicle inspection. The Phelps County prosecutor later abandoned the action against Calzone.

Calzone then sued the governor of Missouri, the Missouri attorney general, and the superintendent of the Missouri State Highway Patrol under 42 U.S.C. § 1983. He sought a declaratory judgment that

§ 304.230.1, .2, and .7 are unconstitutional on their face and as applied to him. He asked for a permanent injunction against the enforcement of these provisions, one dollar in nominal damages, and costs and attorney's fees. Although the Fourth Amendment prohibits unreasonable searches and searches, not all warrantless seizures are unreasonable. In fact, warrantless inspections involving closely regulated industries are constitutional when certain conditions are met. *New York v. Burger*, 482 U.S. 691, 702–03 (1987). As such, this Court held the challenged provisions were not facially unconstitutional, because they could be applied constitutionally to participants in the closely regulated commercial trucking industry. This Court also held Calzone's as-applied challenge must fail because he named as parties the governor, attorney general, and superintendent, instead of the corporal who pulled him over.

The Eighth Circuit affirmed this Court's conclusion that the challenged provisions are not facially unconstitutional. *Calzone v. Hawley*, 866 F.3d 866, 871 (8th Cir. 2017). It also affirmed this Court's conclusion that the governor and attorney general were improper parties for Calzone's as-applied challenge. *Id.* at 872. But the Eighth Circuit held "Calzone can sue the superintendent in her official capacity for declaratory and injunctive relief[.]" *Id.* It remanded so this Court could address the merits of Calzone's as-applied challenge. The Eighth Circuit listed two questions this Court may need to consider to resolve the as-applied challenge: (1) "whether Missouri's incorporation of the

federal regulations also incorporates the exceptions for farm vehicles that are contained within those federal regulations, or whether Missouri's own exceptions at § 307.400.1(2) and .5 are exclusive" and (2) "whether a partial exemption from the federal regulations removes an operator from the realm of the closely regulated commercial trucking industry." *Id.*

II. Summary Judgment Standard

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962). This Court must construe the facts in the light most favorable to the nonmoving party, but it need not accept a version of the events that "is blatantly contradicted by the record, so that no reasonable jury could believe it." *Marksmeier v. Davie*, 622 F.3d 896, 900 (8th Cir. 2010) (*quoting Scott v. Harris*, 550 U.S. 372, 380 (2007)).

III. Discussion

Calzone makes three arguments for why the challenged subsections of § 304.230 are unconstitutional as applied to him. The Court will address each separately.

A. Even Though Calzone Is Not Engaged in a Business Tied to the Professional Commercial Trucking Industry, He Is Still Subject to the Commercial Motor Vehicle Regulations

First, Calzone claims he is not subject to the Fourth Amendment's closely regulated industry exception because he is not engaged in any business tied to the commercial trucking industry. The Eighth Circuit has made clear the commercial trucking, itself, is a closely regulated industry. *Calzone*, 866 F.3d at 871. But Calzone argues he is not a professional truck driver, so he hasn't voluntarily given up Fourth Amendment rights like those who choose a career in professional truck driving.

The Court rejected this argument when first ruling on summary judgment: "Although [Calzone] was not a long-haul common carrier . . . , the fact that [he] was driving his dump trunk (and not a tractor-trailer filled with goods for sale) is not relevant to the statute or to the officers who enforce it." (#27 at 8.) This Court also observed Calzone held a "commercial" driver's license and his truck was registered for "local commercial" use. Finally, § 302.010 defines "commercial motor vehicle" as "a motor vehicle designed or regularly used for carrying freight and merchandise[.]" This Court concluded "regardless of to what use [Calzone] put the dump truck, the dump truck was 'designed' for carrying freight and was in fact registered as a 'commercial' vehicle. [Calzone] was therefore on notice that he could be randomly stopped and inspected, just as any other

commercial driver would be." (#27 at 8.) Neither the Eighth Circuit's opinion nor Calzone's supplemental briefing casts doubt on this holding.

Calzone relies on *United States v. Seslar*, 996 F.2d 1058 (10th Cir. 1993), for the proposition that the closely regulated industry exception does not justify the warrantless seizure of someone who was not engaged in a regulated industry. In *Seslar*, defendants were not part of the regulated class of "motor carriers," because they fell outside the statutory definition of "motor carriers." *Seslar*, 996 F.2d at 1062. Thus, the Tenth Circuit held "the closely regulated industry line of cases does not justify the warrantless search of *un*-regulated persons" and reasoned that Seslar did not have the reduced expectation of privacy of persons engaged in a closely regulated industry. *Id.* at 1063.

This case does not help Calzone for at least two reasons. First, his dump truck is part of the regulated class of "commercial motor vehicles," and Calzone does not argue his truck falls outside the statutory definition. Thus, he was on notice that he could randomly be stopped and inspected, which reduced his expectation of privacy. Second, *Seslar* does not support Calzone's claim that a person must be engaged in a business tied to the closely regulated industry to actually be a part of it. Seslar simply fell outside the statutory definition of the regulated class.

Calzone's reliance on *United States v. Herrera*, 444 F.3d 1238 (10th Cir. 2006) is similarly misplaced. In *Herrera*, a police officer pulled over Herrera to inspect

his pickup truck. *Herrera*, 444 F.3d at 1240. "[U]nder Kansas law, 'commercial vehicles can be stopped at any time to check for compliance with . . . safety regulations.'" *Id.* at 1241 (alteration in original) (*quoting* Kan. Stat. § 74–2108(b)). The government relied on this law to justify the officer's stop, but Herrera's truck did not fall within the statutory definition of "commercial vehicle," "because it weighed 10,000 pounds, one pound short of the definition of a commercial vehicle under Kansas law." *Id.* As such, the Court held "Herrera was not engaging in a closely regulated industry and, thus, would not have had any reason to know that his truck could be subject to a random inspection." *Id.* at 1245.

Again, Calzone's truck does fall within the statutory definition of commercial motor vehicle, so *Herrera* is unpersuasive. This Court reaffirms its prior conclusion that Calzone is subject to the commercial trucking industry regulations.

B. Even Though Calzone is Exempt from Some Regulations, He Is Still Part of an Industry That Is Closely Regulated

Second, Calzone seems to argue his dump truck is exempt from so many regulations that the commercial trucking industry—as it applies to him—is not "closely" regulated. He claims the state "has failed to identify even one significant set of business regulations unique to the professional commercial trucking industry to which [he] and his farm truck are subject."

(#43 at 6–7.) This argument gets to the heart of the questions the Eighth Circuit noted this Court might need to consider to resolve Calzone's as-applied challenge.

The commercial trucking industry is regulated under both federal law and Missouri law.

1. Federal Regulation of Commercial Motor Vehicles

"Commercial trucking is subject to extensive federal regulation." *United States v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008); *see*, *e.g.*, 49 U.S.C. § 31142 (inspection of commercial motor vehicles); 49 C.F.R. § 391.11 (commercial motor vehicle driver qualifications); § 391.15 (disqualification of commercial motor vehicle drivers); § 395.3 (driving time for property-carrying commercial motor vehicles); § 395.8 (driver's records).

The parties agree Calzone's dump truck is also a "covered farm vehicle," 49 C.F.R. § 390.5, and the federal regulations except covered farm vehicles from certain federal and state requirements. *Id.* § 390.39. As relevant here, covered farm vehicles are exempt from any requirement relating to commercial driver's licenses; controlled substances and alcohol use testing; physical qualifications and examinations; drivers' hours of service; and inspection, repair, and maintenance. *Id.* § 390.39(a).

The parties dispute whether Calzone is exempt from federal requirements other than those listed in 49 C.F.R. § 390.39.

2. Missouri Regulation of Commercial Motor Vehicles

Missouri law incorporates the federal regulations for commercial motor vehicles:

> Subject to any exceptions which are applicable under section 307.400, the officers and commercial motor vehicle inspectors of the state highway patrol, the enforcement personnel of the division of motor carrier and railroad safety, and other authorized peace officers of this state and any civil subdivision of this state may enforce any of the provisions of Parts 350 through 399 of Title 49, Code of Federal Regulations, as those regulations have been and may periodically be amended, as they apply to motor vehicles and drivers operating in interstate or intrastate commerce within this state[.]

RSMo. § 390.201. The parties agree Missouri's incorporation of the federal regulations includes the exceptions for covered farm vehicles. Missouri law also explicitly makes it

> unlawful for any person to operate any commercial motor vehicle as defined in Title 49, Code of Federal Regulations, Part 390.5, . . . unless such vehicles are equipped and operated as required by Parts 390 through 397,

> Title 49, Code of Federal Regulations, as such regulations have been and may periodically be amended, *whether intrastate transportation or interstate transportation.*

Id. § 307.400.1 (emphasis added). The federal regulations define "commercial motor vehicle" as "any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle . . . [h]as a gross vehicle weight rating or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg (10,001 pounds) or more, whichever is greater[.]" 49 C.F.R. § 390.5. Calzone's dump truck does not qualify for any of RSMo. § 307.400's exceptions, but he is exempt from the Missouri commercial driver's license requirement. RSMo. §§ 302.700; 302.775(1).

Finally, "[t]he challenged subsections of . . . [RSMo.] § 304.230 authorize certain law enforcement officers to stop and inspect commercial motor vehicles for certain delineated purposes." *Calzone*, 866 F.3d at 870-71. Subsection 304.230.1 allows certain officers to stop and inspect commercial motor vehicles to determine whether they comply with the size and weight requirements as provided in RSMo. §§ 304.170 to 304.230. "Subsection 304.230.2 authorizes 'any highway patrol officer . . . to stop any [commercial motor vehicle] upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230.'" *Calzone*, 866 F.3d at 871 (alterations in original) (*quoting* RSMo. § 304.230.2). Subsection 304.230.7 allows

certain officers "to conduct commercial motor vehicle and driver inspections . . . to determine compliance with commercial vehicle laws, rules, and regulations."

3. Despite the Various Exemptions, Calzone and His Dump Truck Are Still Closely Regulated

Now, the Court must decide whether Calzone and his dump truck are still "closely regulated" such that he has a lowered expectation of privacy. Without deciding exactly where the dividing line is, this Court finds Calzone's dump truck is on the closely regulated side of it.

Calzone claims the state "has failed to identify even one significant set of business regulations unique to the professional commercial trucking industry to which [he] and his farm truck are subject." (#43 at 6–7.) This Court disagrees.

While Calzone is not subject to the regulations that exempt covered farm vehicles, he is still subject to all other federal commercial vehicle regulations. Again, Missouri law incorporates the federal commercial vehicle regulations, "as they apply to motor vehicles and drivers operating in *interstate or intrastate commerce* within this state[.]" RSMo. § 390.201 (emphasis added). The Missouri General Assembly did not limit the purview of the statute to interstate commerce. Instead, it extended the federal regulations to cover commercial motor vehicles operating in both interstate and intrastate commerce. This is clear from

the text. For some reason, Calzone totally ignores the plain language that extends the federal regulations.

Similarly, RSMo. § 307.400 also applies to Calzone and his dump truck. He argues it does not because the statute adopts 49 C.F.R. § 390.5's definition—which includes the interstate commerce jurisdictional hook—definition of commercial motor vehicle. Because he does not use his dump truck in interstate commerce, Calzone argues this statute does not apply to him. But Calzone does not read far enough. Section 307.400 applies to commercial motor vehicles, "*whether intrastate transportation or interstate transportation.*" RSMo. § 307.400 (emphasis added). Again, the Missouri General Assembly did not limit the purview of the statute to interstate commerce. *See also Mo. Highways & Transp. Comm'n v. Wilsons Trucking, LLC*, Mo. Admin. 11-0742 MC, at *3 (Dec. 13, 2011) (concluding respondent violated RSMo. § 307.400, even though respondent only used the truck at issue in intrastate commerce). Calzone ignores this language and extension as well.

Finally, Calzone is still subject to suspicionless stops and inspections under RSMo. § 304.230, because his dump truck falls under Missouri's definition of commercial motor vehicle.

In light of all this, the Court finds that Calzone and his dump truck are not removed "from the realm of the closely regulated commercial trucking industry." *Calzone*, 866 F.3d at 872.

C. Section 304.230 Properly Limits the Discretion of Inspecting Officers

Third, Calzone argues inspecting officers act with "unbridled discretion" in deciding which vehicles to stop, because the Missouri State Highway Patrol "had established no standards, no guidelines, no policies that would dictate which vehicles [inspecting officers] would subject to roving, suspicionless stops[.]" (#40 at 12.) The Eighth Circuit held the challenged subsections of § 304.230 are a permissible substitute for a warrant, because "[t]hey provide notice to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer[ ] and . . . limit the scope of the officer's inspections to an examination solely for regulatory compliance." *Calzone*, 866 F.3d at 871; *see also Delgado*, 545 F.3d at 1202-03. Thus, this argument fails.

IV. Conclusion

Because Calzone is a member of the closely regulated commercial trucking industry, his motion for summary judgment (#14) is denied and the state's motion for summary judgment (#10) is granted.

Accordingly,

IT IS HEREBY ORDERED that plaintiff Ronald Calzone's motion for summary judgment (#14) is **DENIED**.

IT IS FURTHER ORDERED that defendant Sandra Karsten's motion for summary judgment (#10) is **GRANTED**.

Dated this 9th day of March 2018.

/s/ Stephen N. Limbaugh, Jr.
STEPHEN N. LIMBAUGH, JR.
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Eighth Circuit

No. 16-3650

Ronald Calzone,

Plaintiff-Appellant,

v.

Josh HAWLEY, in his official capacity as Attorney General for the State of Missouri; Sandra K. Karsten, in her official capacity as Superintendent of the Missouri State Highway Patrol; Eric Greitens, in his official capacity as Governor of the State of Missouri,[1]

Defendants-Appellees.

Appeal from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: April 6, 2017.
Filed: August 7, 2017.

Before COLLOTON and BENTON, Circuit Judges, and GERRARD,[2] District Judge.

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[1] Attorney General Hawley, Superintendent Karsten, and Governor Greitens are automatically substituted for their predecessors under Federal Rule of Appellate Procedure 43(c)(2).

[2] The Honorable John M. Gerrard, United States District Judge for the District of Nebraska, sitting by designation.

COLLOTON, Circuit Judge.

Ronald Calzone sued three state officials to challenge provisions of Missouri law that authorize roving stops of certain vehicles for inspection without suspicion. The district court held that the statutes were not unconstitutional on their face. The court also ruled that Calzone's as-applied challenge was not adequately pleaded, because the defendants could not be sued in their official capacities under 42 U.S.C. § 1983. We affirm the court's conclusion that the statutes are not facially unconstitutional, but we conclude that the as-applied challenge against the superintendent should have been considered on the merits, so we remand for further proceedings.

I.

In June 2013, Missouri state highway patrol corporal J.L. Keathley stopped Calzone while he was driving his dump truck on United States Highway 63 in Phelps County, Missouri. Keathley asked Calzone if he could inspect the truck, but Calzone refused. Keathley then explained that Mo. Rev. Stat. § 304.230 authorized him to stop commercial vehicles and inspect them whether or not he had probable cause. Keathley warned Calzone that if he did not submit to an inspection, then Keathley would issue him a citation. Calzone still refused, so Keathley issued him a citation for failure to submit to a commercial vehicle inspection. The Phelps County prosecutor later abandoned the action against Calzone.

Calzone then sued the governor of Missouri, the Missouri attorney general, and the superintendent of the Missouri state highway patrol under 42 U.S.C. § 1983. He sought a declaratory judgment that Mo. Rev. Stat. § 304.230.1, .2, and .7 are unconstitutional on their face and as applied to him. He asked for a permanent injunction against the enforcement of these provisions, for one dollar in nominal damages, and for costs and attorney's fees.

The district court granted summary judgment for the officials on Calzone's facial challenge and granted judgment on the pleadings for the officials on the as-applied challenge. The court concluded that the challenged provisions were not facially unconstitutional, because they could be applied constitutionally to participants in the closely regulated commercial trucking industry. The court concluded that Calzone's as-applied challenge failed because he could not sue the governor, the attorney general, or the superintendent under § 1983. The court reasoned that state officials acting in their official capacities are not "persons" subject to suit under the statute. We review the district court's rulings *de novo*.

II.

A threshold question is whether there is jurisdiction over Calzone's action against each of the defendants – the governor, the attorney general, and the superintendent. Calzone adequately alleges that he

was injured by a seizure and is likely to be injured in the future. But Article III standing to sue each defendant also requires a showing that each defendant caused his injury and that an order of the court against each defendant could redress the injury. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

Because the defendants are state officials, Calzone also must show that the action is not barred by state sovereign immunity arising from the Eleventh Amendment. A suit for injunctive or declaratory relief avoids this immunity if the official has some connection to the enforcement of the challenged laws. *See Ex parte Young*, 209 U.S. 123, 157 (1908). In a case like this one, the two inquiries are similar: "[W]hen a plaintiff brings a pre-enforcement challenge to the constitutionality of a particular statutory provision, the causation element of standing requires the named defendants to possess authority to enforce the complained-of provision." *Dig. Recognition Network v. Hutchinson*, 803 F.3d 952, 957-58 (8th Cir. 2015) (alteration in original) (quotation omitted).

Calzone plainly has standing to sue the superintendent. For purposes of the Eleventh Amendment and *Ex parte Young*, a state official's requisite connection with the enforcement of a statute may arise out of "the general law" or be "specially created by the act itself." 209 U.S. at 157. Section 304.230.1 specifically authorizes the superintendent to "promulgate rules and regulations relating to the implementation of the provisions" of § 304.230, so she is subject to suit on claims for injunctive and declaratory relief. Her directions that

patrol officers should implement the statute by conducting vehicle inspections cause Calzone's injury, and an order directing her to cease and desist would redress the injury.

Calzone's claims against the governor, on the other hand, do not present a case or controversy. No provision in Chapter 304 or the statutes defining his executive authority specifically authorizes the governor to enforce the vehicle inspection statutes. *See* Mo. Rev. Stat. § 26.010-.225. The Missouri Constitution confers upon the governor the duty to "take care that the laws are distributed and faithfully executed," Mo. Const. art. IV, § 2, but such a general executive responsibility is an insufficient connection to the enforcement of a statute to avoid the Eleventh Amendment. *See Fitts v. McGhee*, 172 U.S. 516, 530 (1899). For similar reasons, the governor has not caused any injury to Calzone, and there is no Article III case or controversy between Calzone and the governor.

The third defendant, the attorney general, has certain law enforcement authority, but his relationship to vehicle inspections is also tangential. The attorney general is authorized to aid prosecutors in the discharge of their duties when so directed by the governor and to sign indictments when so directed by a trial court. Mo. Rev. Stat. § 27.030. Calzone has pointed to no authority, however, suggesting that the attorney general has any role in causing vehicle inspections by the highway patrol. Calzone seeks to enjoin state officials from seizing him and his vehicle for inspection

pursuant to Chapter 304 of the Revised Statutes. If the superintendent is enjoined from implementing rules that cause patrol officers to conduct the disputed seizures, then the seizures will end, and Calzone's injury will be redressed. Calzone does not seek to enjoin a statute that subjects him to imminent prosecution by the attorney general, *see Ex parte Young*, 209 U.S. at 155-56, but rather to prevent imminent inspections by officers of the highway patrol at the superintendent's direction. There is thus no case or controversy between Calzone and the attorney general.

For these reasons, Calzone has standing to sue the superintendent, and his claims against her for injunctive and declaratory relief are not barred by the Eleventh Amendment. The claims against the governor and the attorney general were properly dismissed, because there is no case or controversy between Calzone and those officials.

III.

On the merits, Calzone argues that Mo. Rev. Stat. § 304.230.1, .2, and .7 are facially unconstitutional, because they authorize roving stops of vehicles even if the stops are not supported by probable cause. To establish that these statutes are unconstitutional on their face, Calzone must show that there is no set of circumstances under which the laws would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987).

The challenged subsections of Mo. Rev. Stat. § 304.230 authorize certain law enforcement officers

to stop and inspect commercial motor vehicles for certain delineated purposes. Subsection 304.230.1 provides that members of the Missouri state highway patrol "shall have the authority, with or without probable cause to believe that the size or weight is in excess of that permitted by sections 304.170 to 304.230, to require the driver . . . to stop, drive, or otherwise move to a location to determine compliance with [those] sections." Subsection 304.230.2 authorizes "any highway patrol officer . . . to stop any [commercial motor vehicle] upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230." Subsection 304.230.7 gives the superintendent of the Missouri state highway patrol the power to "appoint members of the patrol who are certified under the commercial vehicle safety alliance with the power" to stop operators in order "to conduct commercial motor vehicle and driver inspections . . . to determine compliance with commercial vehicle laws, rules, and regulations." As relevant, Missouri defines a commercial motor vehicle as "a motor vehicle designed or regularly used for carrying freight and merchandise." Mo. Rev. Stat. § 301.010(7).

In *New York v. Burger*, 482 U.S. 691 (1987), the Supreme Court held that a warrantless search of property in certain "closely regulated industries" is constitutional if three criteria are met: (1) the regulatory scheme advances a substantial government interest; (2) warrantless inspections are necessary to further the regulatory scheme; and (3) the rules governing the

inspections must be a constitutionally adequate substitute for a warrant, *i.e.* the rules must provide notice that property may be searched for a specific purpose and must limit the discretion of the inspecting officers. *Id.* at 702-03.

This court has held that commercial trucking is a closely regulated industry within the meaning of *Burger*. *United States v. Ruiz*, 569 F.3d 355, 356-57 (8th Cir. 2009); *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004). *Ruiz* applied *Burger* to uphold an Arkansas statute that authorized warrantless inspections of commercial trucks. The court determined that "warrantless inspections of commercial trucks advance a substantial governmental interest and are necessary" to further the regulatory scheme. 569 F.3d at 357. The court also concluded that the statute provides a permissible substitute for a warrant. *Id.*

A similar analysis shows that the Missouri statutes are constitutional on their face. Missouri's definition of "commercial motor vehicle" covers commercial trucks. Missouri has a substantial interest in ensuring the safety of the motorists on its highways and in minimizing damage to the highways from overweight vehicles. *Ruiz*, 569 F.3d at 357 (citing cases); *State v. Rodriguez*, 877 S.W.2d 106, 109 (Mo. 1994). Given the transitory nature of commercial trucks, *United States v. Fort*, 248 F.3d 475, 481 (5th Cir. 2001), and the difficulty of detecting violations of the regulatory scheme by routine observation, effective enforcement would be nearly impossible without impromptu, warrantless searches. *United States v. Maldonado*, 356 F.3d 130,

136 (1st Cir. 2004). The challenged subsections are also a permissible substitute for a warrant. They provide notice to commercial truck drivers of the possibility of roadside inspection by a designated law enforcement officer, and they limit the scope of the officer's inspections to an examination solely for regulatory compliance. *See Ruiz*, 569 F.3d at 357. We therefore conclude that Mo. Rev. Stat. § 304.230.1, .2, and .7 can be applied constitutionally to participants in the commercial trucking industry under *Burger*, and the provisions are not unconstitutional on their face.

Calzone also contends that the challenged subsections are unconstitutional as applied to him, because he is not a member of the commercial trucking industry. The district court concluded that Calzone could not bring an as-applied claim against the superintendent, because this official is not a "person" under § 1983. That conclusion is correct as to Calzone's claim for damages. A suit for damages against a state official in his official capacity is a suit against the State, and the State is not a person under § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). But Calzone can sue the superintendent in her official capacity for declaratory and injunctive relief, because those claims are treated as an action against the official personally and not against the State. *See id.* at 71 n.10; *Ex parte Young*, 209 U.S. at 159-60. Therefore, it was error for the court to dismiss Calzone's as-applied claims against the superintendent for declaratory and injunctive relief based on the meaning of "person" under § 1983.

The merits of Calzone's as-applied challenge were not well developed in the briefs on appeal, and they are best addressed by the district court in the first instance. Calzone contends that he is not subject to all of the Federal Motor Carrier Safety Regulations, 49 C.F.R. pts. 390-97, because his dump truck is a "covered farm vehicle" under federal law. *See* 49 C.F.R. § 390.5. The State, at oral argument, replied that Calzone is indeed involved in the closely regulated commercial trucking industry, because Missouri law incorporates the federal regulations for trucks of a certain weight. *See* Mo. Rev. Stat. § 307.400.1(2), .5. The parties have not addressed, however, whether Missouri's incorporation of the federal regulations also incorporates the exceptions for farm vehicles that are contained within those federal regulations, or whether Missouri's own exceptions at § 307.400.1(2) and .5 are exclusive. Nor have the parties discussed whether a partial exemption from the federal regulations removes an operator from the realm of the closely regulated commercial trucking industry. The district court may need to consider these questions and others to resolve Calzone's as-applied challenge.

* * *

For the foregoing reasons, we affirm the district court's dismissal of Calzone's facial challenge to Mo. Rev. Stat. § 304.230. We affirm the dismissal of Calzone's as-applied claims against the governor and the attorney general and the dismissal of his claim for damages against the superintendent. We reverse the dismissal of Calzone's as-applied claim against the

superintendent for declaratory and injunctive relief and remand for further proceedings.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
SOUTHEASTERN DIVISION

RONALD CALZONE,	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 4:15-cv-869 SNLJ**
CHRIS KOSTER, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM and ORDER

(Filed Jul. 28, 2016)

Plaintiff Ronald Calzone brings this lawsuit against defendants Chris Koster, in his official capacity as Attorney General for the State of Missouri, J. Bret Johnson, in his official capacity as Superintendent of the Missouri State Highway Patrol, and Jeremiah W. Nixon, in his official capacity as Governor of the State of Missouri. Plaintiff claims that § 304.230 RSMo is unconstitutional. The parties have filed cross motions for summary judgment.

I. Factual Background

The facts of this matter are uncontested except where indicated.

Plaintiff Calzone was pulled over by a member of the Missouri State Highway Patrol and detained for more than an hour because the officer did not recognize

the truck or the markings displayed on the vehicle Calzone was driving. At the time, plaintiff was driving a dump truck that he uses to support his cattle and horse ranch. The truck has Missouri-issued 54,000 lb. local commercial vehicle license plates, and plaintiff has a valid Missouri-issued commercial driver's license. Plaintiff's "local" license plates mean that his truck's operations are limited to within fifty miles of his home, and his truck is subject to biannual inspections made at inspection stations authorized by the Missouri State Highway Patrol.

On June 3, 2013, plaintiff took his truck for a successful inspection and also secured his annual registration for the truck, and he also took the truck out to gather gravel for use in his daughter's chicken coop. At 12:45 p.m. that same day, Corporal J.L. Keathley of the Missouri State Highway Patrol saw Calzone driving on U.S. Highway 63 in Phelps County, Missouri, and pulled him over. The bed of plaintiff's truck was empty at that time, and it was well within the applicable height, length, and width restrictions for the road on which he was traveling.

Corporal Keathley told plaintiff that he pulled him over because he "did not recognize the truck or the markings displayed on the vehicle." Keathley asked to inspect the truck, as he intended to perform a Level II inspection under the North American Standard Inspection ("NASI") program, but plaintiff refused and told him he believed the stop was unconstitutional. Keathley then explained that § 304.230 RSMo authorizes the Missouri State Highway Patrol officers to stop

commercial vehicles and inspect them whether or not the officer has probable cause to believe a law is being violated. Plaintiff still refused to consent to inspection. Keathley sought and received approval to conduct a motor fuel tax evasion check to see if plaintiff was using dyed motor fuel based on plaintiff's statement to Keathley that he (plaintiff) was "a hard-headed constitutionalist." The test showed that plaintiff was not using illegal dyed fuel. Plaintiff says he consented to the test only because Keathley told plaintiff that refusing the test would have "serious consequences with the state and the Internal Revenue Service." Keathley issued plaintiff a citation for refusal to submit to a commercial motor vehicle inspection and then allowed plaintiff to resume driving at 1:56 p.m.

The Phelps County prosecutor initially pursued a conviction against plaintiff for refusing to submit to the commercial motor vehicle inspection, but the prosecution was terminated by *nolle prosequi* on April 4, 2014.

Plaintiff filed this lawsuit against defendants on June 3, 2015, bringing two counts:

> **Count I** is for a declaratory judgment that § 304.230 RSMo is unconstitutional under the Fourth Amendment, Fourteenth Amendment, and Mo. Const. Art. I, § 15.
>
> **Count II** is for a declaratory judgment that Corporal Keathley violated plaintiff's rights under the Fourth and Fourteenth Amendments

> by applying § 304.230 RSMo to seize plaintiff on June 3, 2013.

The parties have filed cross-motions for summary judgment. Notably, plaintiff now states that he challenges the constitutionality of only subsections 1, 2, and 7 of § 304.230.

II. Legal Standard

Pursuant to Federal Rule of Civil Procedure 56(a), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. The Challenged Statute and Related Statutes

Section 304.230 is titled "Enforcement of load laws – commercial vehicle inspectors, powers." Plaintiff challenges the constitutionality of §§ 304.230.1, 304.230.2, and 304.230.7 (the "Challenged Subsections").

Section 304.230.1 authorizes members of the Missouri state highway patrol to "conduct random roadside examinations or inspections" and to require a driver to "stop, drive, or otherwise move" a vehicle "to a location to determine compliance with sections 304.170 to 304.230," explicitly stating that this authority exists "with or without probable cause to believe

that the size or weight [of the vehicle] is in excess of that permitted by sections 304.170 to 304.230."[1]

Section 304.230.2 states that "any highway patrol officer is hereby given the power to stop any such conveyance or vehicle as above described upon the public highway for the purpose of determining whether such vehicle is loaded in excess of the provisions of sections 304.170 to 304.230."

Section 304.230.7 states that the

> superintendent may also appoint members of the patrol who are certified under the commercial vehicle safety alliance with the power to conduct commercial motor vehicle and driver inspections and to require the operator of any commercial vehicle to stop and submit to said inspections to determine compliance with commercial vehicle laws, rules, and regulations, compliance with the provisions of sections 303.024 and 303.025, and to submit to a cargo inspection when reasonable grounds exist to cause belief that a vehicle is transporting hazardous materials as defined by Title 49 of the Code of Federal Regulations.

Notably, the Missouri State Highway Patrol participates in the commercial vehicle safety alliance ("CVSA") referred to in Subsection 7 of the statute. The CVSA sets the standards in association with the goal to promote commercial vehicle safety and security through

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[1] Sections 304.170 to 304.230 RSMo relate to size and weight limits imposed on commercial vehicles.

uniformity, compatibility, and reciprocity of commercial vehicle inspections and enforcement throughout North America. The CVSA, along with the Federal Motor Carrier Safety Administration, administers the North American Standard Inspection ("NASI") program. Missouri state troopers performing random searches of commercial vehicles do so in accordance with the procedures stated in the NASI program. Here, Corporal Keathley is a Commercial Vehicle enforcement trooper who is certified to conduct such inspections for the Missouri Highway Patrol. Critically, Subsection 7 is distinguishable from Subsections 1 and 2 because any Missouri Highway Patrol officer may conduct a stop under Subsections 1 and 2, but only certified officers (such as Corporal Keathley) may conduct stops and inspections under Subsection 7.

IV. Discussion

The parties have moved for summary judgment on both Counts I and II.

A. Count I: Constitutionality of §§ 304.230.1, 304.230.2, 304.230.7

Plaintiff's Count I claims that the Challenged Subsections are facially invalid, which requires plaintiff to establish that no set of circumstances exists under which the statute would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, plaintiff contends the statute is invalid because it allows

suspicionless searches and seizures in violation of the Fourth Amendment.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures both in private and commercial contexts, but the business owner's expectation of privacy is "different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987) (citing *Donovan v. Dewey*, 452 U.S. 594, 598-99 (1981)). "This expectation is particularly attenuated in commercial property employed in 'closely regulated' industries." *Id.* Indeed, "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise." *Id.* (quoting *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (internal citation omitted)). Such "closely regulated" industries include liquor sales, firearms dealing, mining, and running an automobile junkyard. *See id.* (automobile junkyards); *Donovan*, 452 U.S. at 606 (mines); *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) (liquor); *United States v. Biswell*, 406 U.S. 311 (1972). In such closely regulated industries, warrantless searches are constitutional if three criteria are met:

> (1) "there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made";
>
> (2) "the warrantless inspections must be necessary to further the regulatory scheme"; and

> (3) "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant . . . In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."

Burger, 482 U.S. at 702-03 (internal quotations and citations omitted).

Defendants contend that commercial trucking is a closely-regulated industry and that the *Burger* three-part test thus applies. Indeed, at least the First, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits have concluded that commercial trucking is a closely- or pervasively-regulated industry. *United States v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004); *United States v. Castelo*, 415 F.3d 407, 410 (5th Cir. 2005); *United States v. Fort*, 248 F.3d 475, 480 (5th Cir. 2001); *United States v. Dominguez–Prieto*, 923 F.2d 464, 468 (6th Cir.1991); *United States v. Mendoza–Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004); *United States v. Delgado*, 545 F.3d 1195, 1201 (9th Cir. 2008); *United States v. Mitchell*, 518 F.3d 740, 751 (10th Cir. 2008).

Those cases, however, predate the United States Supreme Court's pronouncement in *City of Los Angeles v. Patel*, 135 S.Ct. 2443, 2454-55 (2015), that the "closely regulated industry" label is a "narrow exception" and holding that the hotel industry did not constitute

such an industry. The Court emphasized that in 45 years, it "has identified only four industries that have such a history of government oversight that no reasonable expectation of privacy could exist," and that "[s]imply listing these industries refutes petitioner's argument that hotels should be counted among them." *Id.* at 2454 (internal quotation omitted).

Plaintiff suggests that the trucking industry – despite the significant number of Circuit Courts declaring otherwise – is not closely regulated to the extent required by *Burger*. However, the Eighth Circuit has repeatedly held that the commercial trucking industry does constitute a "closely-regulated industry," and this Court is bound by that determination. *See United States v. Ruiz*, 569 F.3d 355, 356-57 (8th Cir. 2009); *United States v. Mendoza-Gonzalez*, 363 F.3d 788, 794 (8th Cir. 2004); *United States v. Knight*, 306 F.3d 534, 535 (8th Cir. 2002); *United States v. Parker*, 587 F.3d 871, 878 (8th Cir. 2009). Notably, unlike the hotel industry addressed in *Patel*, the trucking industry is more closely tied to concerns regarding public safety due to the shared use of roadways between large commercial trucks and smaller private vehicles. The Court will not now deviate from Eighth Circuit precedent.

It is also relevant that the Eighth Circuit has upheld similar statutes in Arkansas and Iowa. *Ruiz*, 569 F.3d at 356-57; *Mendoza-Gonzalez*, 363 F.3d at 794. Moreover, the Ninth Circuit, interpreting the Missouri statute in a criminal matter, has upheld § 304.230 RSMo as constitutional on its face. *Delgado*, 545 F.3d at 1203.

Before proceeding with the *Burger* test, the Court addresses plaintiff's contention that he is not a participant in the "commercial trucking industry" and therefore is not subject to close regulation or the [sic] any lowered expectation of privacy. Although plaintiff was not a long-haul common carrier as are many of the litigants involved in the above cases, the fact that plaintiff was driving his dump trunk (and not a tractor-trailer filled with goods for sale) is not relevant to the statute or to the officers who enforce it. Plaintiff admits he held a "commercial" driver's license and that his truck was similarly registered for "local commercial" use. Section 302.010 RSMo defines "commercial motor vehicle" as "a motor vehicle designed or regularly used for carrying freight and merchandise. . . ." Regardless of to what use plaintiff put the dump truck, the dump truck was "designed" for carrying freight and was in fact registered as a "commercial" vehicle. Plaintiff was therefore on notice that he could be randomly stopped and inspected, just as any other commercial driver would be.

Plaintiff similarly suggests that because Subsections 1 and 2 apply broadly to any vehicles, and not just commercial vehicles,[2] that they are unconstitutional. Plaintiff, however, is admittedly a commercial driver who was driving a registered commercial vehicle at the time he was stopped by Corporal Keathley. Plaintiff

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[2] For example, plaintiff notes that § 304.170, which is referred to in Subsections 1 and 2, explicitly mentions recreational vehicles, which typically would not constitute a commercial vehicle.

therefore lacks standing to seek redress as though he had not been driving a commercial vehicle. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) ("To have standing, a litigant must seek relief for an injury that affects him in a personal and individual way.").

The Court will analyze each of the *Burger* test's three prongs individually.

1. Does the regulatory scheme advance a substantial governmental interest? Defendants identify Missouri's interest as being in the safety of those traveling on its highways and minimizing the destructive impact of overweight vehicles on those highways. As the Missouri Supreme Court has held, "[t]hese are legitimate governmental concerns that are worthy of significant weight in a Fourth Amendment analysis." *State v. Rodriguez*, 877 S.W.2d 106, 109 (Mo. banc 1994) (upholding permanent vehicle checkpoints and noting that "[a]s we have said, commercial operators of motor vehicles have low expectations of privacy. The state's interest in highway preservation and safety are high."). Indeed, in cases involving similar Arkansas and Iowa statutes, the Eighth Circuit has held that warrantless inspections of commercial trucks advance a substantial governmental interest. *Ruiz*, 569 F.3d at 357.

2. Are the warrantless inspections necessary to further the regulatory scheme? The language used by the *Burger* court contemplates inspections of premises such as a junkyard at issue in that case, but the question necessarily includes (for cases like this) whether suspicion-less stops are necessary to further the

regulatory scheme. Defendants maintain that warrantless stops and inspections are necessary because the industry is mobile and surprise is an important component of an effective inspection regime. Unannounced inspections are essential to deterrence. *See, e.g.*, *Burger*, 482 U.S. at 710. The Fifth Circuit points out that some commercial vehicle problems may not be immediately apparent to an officer, holding that "[b]ecause of the transitory nature of the commercial trucking industry, we conclude that the need for warrantless stops and inspections is even more compelling than the warrantless inspections of automobile junkyards upheld in *Burger*." *Fort*, 248 F.3d at 481. Again, as the Eighth Circuit has already held, warrantless inspections of commercial trucks are necessary. *Ruiz*, 569 F.3d at 357.

3. Are the rules governing inspections constitutionally adequate substitutes for a warrant? A warrant, of course, provides notice of a search, limits the time, place, and scope of the search, and limits discretion of inspecting officers. Defendants argue, and other courts agree,[3] that the statute and its incorporated CVSA and NASI program standards are an adequate substitute for a warrant. Its reach is limited to commercial vehicles, and commercial vehicle operators are on notice of the inspection authority set forth by the statute. The CVSA administers the North American Standard

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[3] *Parker*, 587 F.3d at 878-79 ("we have recognized that the NASIP procedures provide both the adequate notice and limited discretion required under the *Burger* analysis"); *Mendoza–Gonzalez*, 363 F.3d at 794; *Delgado*, 545 F.3d at 1203.

Inspection ("NASI") program, which sets standards for safety and uniformity and specifies what the officers must inspect at each level. As the Eighth Circuit held, the "North American Standard Inspection Program for commercial vehicles . . . adequately limits officer discretion and provides notice to truckers of the possibility of a roadside inspection." *Mendoza-Gonzalez*, 363 F.3d at 794. Although the statute "does not designate specific times during which enforcement officers may conduct inspections, as the Sixth Circuit held, '[s]uch a limitation would, of course, render the entire inspection scheme unworkable and meaningless. Trucks operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time.'" *Ruiz*, 569 F.3d at 357 (quoting *Dominguez-Preito*, 923 F.2d at 470).

The Challenged Subsections therefore withstand plaintiff's constitutional challenge under the *Burger* test.

B. Count II: Application of § 304.230 RSMo to Plaintiff

Plaintiff's complaint clearly states that he seeks a declaratory judgment that Corporal Keathley violated plaintiff's rights under the Fourth and Fourteenth Amendments by applying § 304.230 RSMo to stop plaintiff on June 3, 2013. Plaintiff specifically complains that his seizure – which lasted longer than one hour – is certainly not justified or acceptable even to the extent courts have held that the Fourth

Amendment might permit limited suspicionless seizures of vehicles and/or persons. Plaintiff suggests that although § 304.230 RSMo might be used to justify checkpoints or roadblocks (which result in temporary stops), that statute cannot permit suspicionless seizures performed by roving officers.

Plaintiff seeks to bring this claim under 42 U.S.C. § 1983, which provides that an individual may bring a lawsuit against a "person" who, under color of state law, deprives the individual of federal rights. State officials acting in their official capacities are not "persons" capable of being sued under 42 U.S.C. § 1983. *See Mayorga v. Missouri*, 442 F.3d 1128, 1130 n.2 (8th Cir. 2006). Plaintiff named as defendants the governor, the attorney general, and superintendent of the highway patrol in their official capacities; thus, even accepting all factual allegations as true, plaintiff has not named the proper party (Corporal Keathley) to this action, and defendants' motion for judgment on the pleadings will be granted.

Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment on Count I and judgment on the pleadings in Count II (#10) is GRANTED.

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment (#14) is DENIED.

IT IS FINALLY ORDERED that the parties' joint motion for amendment of the case management order (#26) is DENIED as moot.

Dated this 28th day of July, 2016.

/s/ Stephen N. Limbaugh
STEPHEN N. LIMBAUGH, JR.
UNITED STATES
DISTRICT JUDGE