No. 19-551

IN THE

Supreme Court of the United States

RONALD CALZONE,
Petitioner,

v.

ERIC T. OLSON,
Respondent.

On Petition for a Writ of Certiorari
To the Eighth Circuit Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Does the Fourth Amendment exception allowing warrantless stops of commercial motor vehicles apply to the heavy commercial vehicle Petitioner uses in support of his commercial enterprise?

(2) Does the Fourth Amendment allow random roadside inspections of commercial motor vehicles?

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INTRODUCTION

Calzone raises two questions arising from the application of well-established legal holdings to the particular facts of this case. These splitless, fact-bound questions do not warrant review.

First, the Eighth Circuit's application of the closely regulated industry exception falls comfortably in line with decisions from other circuits. Six circuit courts have held that heavy commercial vehicles may be subject to warrantless roadside searches under the closely regulated industry exception to the Fourth Amendment. Given their size and weight, heavy commercial vehicles present unique safety concerns that justify pervasive regulation—to ensure the safety of other motorists, to protect public roads and hold infrastructure costs in check, and to regulate what commodities may be safely transported on public thoroughfares. The Eighth Circuit rightly applied this well-established rule to the 54,000-pound commercial dump truck that Calzone uses "in furtherance of his private commercial venture." Pet. App. 2. "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." Pet. App. 8.

Moreover, Calzone's petition shows that this question turns on fact-bound and state-law issues. He insists he did not "choose" to subject himself to pervasive regulation, but the Eighth Circuit disagreed. He suggests his vehicle is just a "farm truck," but the Eighth Circuit found it was a commercial motor vehicle. And he insists that he falls largely outside Missouri's regulatory scheme, but the Eighth Circuit rejected his reading of Missouri law. These questions do not warrant this Court's review.

Second, Calzone's perceived split between the Eighth Circuit and the Fifth and Ninth Circuits over random inspections does not exist. Both of those courts have expressly upheld random warrantless inspections of heavy commercial vehicles just as the Eighth Circuit did here. In fact, the Ninth Circuit has specifically upheld *Missouri's* inspection statute against a similar legal challenge. The cases Calzone cites in support of the perceived split are from other contexts and cannot carry the weight he puts on them. In both instances, the language Calzone cites is only dicta. That dicta does not say that random inspections are impermissible; it merely says that officer discretion must be cabined in some way. The Eighth Circuit agreed and found that standard met here. Missouri's statute is an adequate substitute for a warrant because it "provide[s] notice" to drivers of commercial vehicles of the possibility of roadside inspections. Far from giving officers "unfettered discretion," the Missouri statute carefully "limit[s]" their discretion by prescribing the acceptable scope of the search. As both the Fifth Circuit and Ninth Circuit have recognized in other cases, these two safeguards are constitutionally sufficient.

In addition, significant vehicle problems weigh against review of this question as well.

The Court should deny review.

STATEMENT

In June 2013, a Missouri State Highway Patrol corporal stopped Petitioner Ronald Calzone while he was driving a heavy dump truck on United States Highway 63. Pet. App. 25. Calzone uses the dump truck "in support of his cattle and horse ranch." Pet. App. 2. The truck doors are marked with the name of that business operation, "Eagle Wings Ranch." *See* Pls. Stat. of Uncontroverted Material Facts at ¶ 38. The dump truck has Missouri plates marking it as a 54,000-pound vehicle for local commercial use, and as a farm vehicle with an "F." Pet. App. 2.

The Highway Patrol corporal asked Calzone if he could inspect the truck. Pet. App. 25. Calzone refused. *Id.* The Highway Patrol corporal explained that Mo. Rev. Stat. § 304.230 expressly authorizes the stop and inspection of commercial vehicles even without probable cause, and noted that the refusal to comply could result in a citation. *Id.* Calzone again refused. *Id.* The corporal issued the citation, which was later dismissed for lack of prosecution. *Id.*

Calzone then filed this 42 U.S.C. § 1983 suit alleging that Mo. Rev. Stat. § 304.230 is unconstitutional on its face and as applied. Pet. App. 26. The district court granted summary judgment to the State on the facial challenge and judgment on the pleadings on the as-applied challenge. Pet. App. 47-48.

On appeal, the Eighth Circuit affirmed on the facial challenge, but remanded the as-applied challenge for a decision on the merits. Pet. App. 33-34. The court ruled that Missouri closely regulates commercial trucking, so it may lawfully conduct warrantless inspections of commercial trucks even without probable cause. Pet. App. 31-32. The court

also explained that the statute was an adequate substitute for a warrant because it gave drivers notice that random inspections could occur, and appropriately prescribed the scope of such a search. *Id*. Calzone did not appeal this ruling.

On remand, the district court granted summary judgment to the State on the merits of Calzone's as-applied challenge. Pet. App. 22-23. First, the court held that Calzone is subject to Missouri's commercial motor vehicle regulations: he has a commercial driver's license, his truck is registered for local commercial use, and the truck meets Missouri's statutory definition of a commercial motor vehicle. Pet App. 14-16. Second, the court held that the commercial trucking industry is closely regulated even as applied to Calzone, despite some statutory and regulatory exemptions for farm vehicles. Pet. App. 16-21. Third, the court held that Mo. Rev. Stat. § 304.230, as applied in this case, is an adequate substitute for a warrant. Pet. App. 21.

The Eighth Circuit affirmed. Pet. App. 9. Calzone had argued that he was "exempt from the lion's share" of Missouri's regulations aimed at commercial trucking. Pet. App. 5. But the Eighth Circuit disagreed, holding that Calzone's "proposed interpretation cannot be squared with the structure of the state statute." Pet. App. 6, 7-8. Moreover, the court noted that just because 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." Pet. App. 8. He still operates a heavy commercial vehicle "in support of a commercial enterprise." *Id.* "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." *Id.* The court also rejected Calzone's arguments about officer discretion, noting it had already rejected "these same arguments" when considering the facial challenge. Pet. App. 9.

Calzone's petition to this Court followed.

REASONS FOR DENYING THE PETITION

I. The Eighth Circuit's opinion falls squarely in line with many other cases upholding warrantless searches of heavy commercial vehicles.

Calzone asserts that the Eighth Circuit's opinion is a "dramatic and dangerous expansion" of the closely-regulated industry exception. Pet. 10-12. But a closer look shows the Eighth Circuit's opinion closely aligns with this Court's cases and the relevant decisions of other circuits regarding closely-regulated industries. Indeed, Calzone cites no split on this point, and there is none.

A. The lower courts all agree that warrantless searches of heavy commercial vehicles are constitutional.

Six different circuit courts unanimously agree that regulatory schemes providing for the warrantless inspection of heavy commercial vehicles are constitutional under the closely-regulated industry exception. *United States v. Ruiz*, 569 F.3d 355, 357 (8th Cir. 2009); *United States v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008); *United States v. Maldonado*, 356 F.3d 130, 135–36 (1st Cir. 2004); *United States v. Fort*, 248 F.3d 475, 481 (5th Cir. 2001); *United States v. Vasquez–Castillo*, 258 F.3d 1207, 1211 (10th Cir. 2001); *United States v. Dominguez–Prieto*, 923 F.2d 464, 468–69 (6th Cir. 1991).

This well-established principle follows from this Court's cases governing closely regulated industries. Administrative searches of closely regulated industries are an "exception to the warrant requirement." *City of Los Angeles, Cal. v. Patel*, 135 S. Ct. 2443, 2452 (2015). This exception recognizes that some activities present such "a clear and significant risk to the public welfare" as to justify pervasive regulation. *Id.* at 2454. Pervasive regulation, in turn, means that "'no reasonable expectation of privacy . . . could exist'" for those engaged in such activities. *Id.* (citation omitted). This Court has noted three factors to measure the reasonableness of such regulatory schemes: (1) a substantial governmental interest must motivate the regulatory scheme; (2) warrantless inspections must be "necessary to further the regulatory scheme"; and (3) the statute's inspection program must provide "a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 702–703 (1987) (citations and quotation marks omitted).

As *Patel* notes, safety concerns are often the motivating factor behind pervasive regulatory schemes. *Patel*, 135 S. Ct. at 2454. This court has upheld warrantless inspections in four such areas: liquor sales, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970); firearms dealing, *United States v. Biswell*, 406 U.S. 311, 315 (1972) (noting the statutory scheme was "of central important to federal efforts to prevent violent crime"); mining, *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (describing the mining industry as "among the most hazardous in the country"); and running an automobile junkyard, *Burger*, 482 U.S. at 709 (noting such junkyards "provide the major market for stolen vehicles and vehicle parts"). The circuit courts have added several more, including child day care

providers, pawnbrokers, pharmacies, securities traders, horse racing, and (as here) heavy commercial vehicles. *See* 79 Corpus Juris Secundum, *Searches* § 138 (Dec. 2019).

Significant safety concerns motivate the pervasive regulation of heavy commercial vehicles. Missouri, like other states, "has a substantial interest in ensuring the safety of the motorists on its highways and in minimizing damage to the highways from overweight vehicles." Pet. App. 31. Regulating commercial trucking is important "to ensure traveler safety," hold infrastructure "costs in check," and "restrict what commodities may be transported" on public roads. *Maldonado*, 356 F.3d at 135; *Fort*, 248 F.3d at 480 ("[T]he state has a substantial interest in traveler safety and in reducing taxpayer costs that stem from personal injuries and property damage caused by commercial motor carriers."); *United States v. Vasquez-Castillo*, 258 F.3d at 1211 ("'The state clearly has a substantial interest in regulating commercial carriers to protect public safety on the highways.'") (internal brackets and citations omitted); *Dominguez-Prieto*, 923 F.2d at 468 ("[T]he safe operation of large commercial vehicles is critical to the welfare of the motoring public."). Although particular uses or particular cargo may present additional dangers, these safety concerns arise from the heavy commercial vehicle itself.

B. A warrantless search of Calzone's heavy commercial vehicle falls comfortably in line with the decisions of other courts.

The Eighth Circuit's decision fits comfortably within this line of cases. Calzone voluntarily chose to use a heavy 27-ton dump truck on public roads and in support of a commercial enterprise. Pet. App. 8. That decision implicated the State's regulatory scheme and

public safety interests, and reduced Calzone's expectation of privacy. *Id.*

Contrary to his assertions, Calzone's vehicle is no ordinary "farm truck." Pet. 10. His heavy dump truck has a gross vehicle weight rating of 54,000 pounds, Pet. App. 2—several times the weight rating of the heaviest pickup trucks. This weight rating easily meets the definition of a "commercial motor vehicle" under both state and federal law. Mo. Rev. Stat. § 301.010(9); 49 C.F.R. § 390.5 (including all vehicles over 10,000 pounds). Calzone owns a horse and cattle ranching operation. Pet App. 2. He uses the heavy dump truck "in support of" this "commercial venture." *Id.* The name of the business even appears on the side of the truck. Pl. SUMF at ¶ 38.

The same safety concerns that justify closely regulating other heavy commercial vehicles also justify regulating Calzone's vehicle. Again, "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." Pet. App. 31; *State v. Rodriguez*, 877 S.W.2d 106, 109 (Mo. banc 1994) ("[Missouri's] interest in stopping, weighing and inspecting vehicles is the product of concern for the safety of those travelling a state's highways and the necessity of minimizing the destructive impact of overweight vehicles on those highways."). Those safety interests apply regardless of whether Calzone is driving a heavy dump truck or a tractor-trailer. The act of driving the commercial vehicle creates the safety concerns that justify close regulation. If anything, commercial vehicles not owned by an established motor carrier may be more likely to be out of compliance with state safety requirements. *See Delgado*, 545 F.3d at 1198 (citing testimony to this effect).

Calzone should have known that using his heavy truck on public roads subjected him to a range of safety regulations—including warrantless safety inspections. Calzone admits that his dump truck is a commercial vehicle and that he registered the vehicle for local commercial use and paid a fee based on the vehicle's weight rating. Pet. App. 2, 5. Calzone also took his heavy truck in for safety inspections, which are required for all commercial vehicles registered at over 24,000 pounds. Mo. Rev. Stat. § 307.350.1(4). And the Eighth Circuit noted that Calzone's vehicle is subject to a wide range of safety regulations. Pet. App. 5-7. Missouri law gives drivers notice that such vehicles also may be subject to warrantless roadside safety inspections given their size. Mo. Rev. Stat. § 304.230. Contrary to Calzone's Petition, then, driving a heavy commercial vehicle on public roads *does* require "governmental permission." Pet. 10. And it should: heavy vehicles are dangerous whether used by motor carriers, big box stores, gas stations, construction companies, landscape businesses, or farming operations.

Thus, when Calzone chose to drive his 54,000 pound dump truck on Missouri roads, he acquiesced to warrantless safety inspections. Calzone made a decision to engage in a closely regulated activity. Pet. App. 2, 5. That decision changed his expectation of privacy under the Fourth Amendment. Pet. App. 8. "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." *Id*. Calzone could not "'help but be aware'" that his heavy truck was a commercial vehicle "'subject to periodic inspections undertaken for specific purposes.'" *Burger*, 482 U.S. at 703 (citation omitted).

C. Calzone's arguments turn on fact-bound and state-law issues.

Calzone tries to position himself outside the commercial trucking industry, Pet. 10–11, but this attempt simply confirms that his case is a poor vehicle to address any broader legal questions.

First, Calzone's perceived "dramatic[] expan[sion]" of precedent is not about legal standards at all, but the application of established principles to the undisputed facts. He insists that he has "not chosen to do business as a professional commercial trucker," Pet. 10, but the Eighth Circuit noted that he drove his heavy dump truck for commercial purposes as part of his profession. Pet. App. 2. Calzone did in fact make a "choice to pursue a certain kind of business opportunity" that subjected him to close regulation. Pet. 11. He also insists that his vehicle is just a harmless "farm truck." Pet. 10. But the Eighth Circuit disagreed, finding that it was a commercial motor vehicle in every sense of the term. Pet. App. 8-9. This Court does not grant certiorari to reweigh these kind of fact-bound questions alleging the "misapplication of a properly stated rule of law." Sup. Ct. Rule 10.

Second, Calzone's perception that he falls outside Missouri's regulatory scheme (or at least on its periphery) turns largely on his reading of Missouri law. The Eighth Circuit dedicated most of its opinion to rejecting Calzone's claim that he was "not part of the 'closely regulated' industry" because he was "exempt from the lion's share" of Missouri's regulations. Pet. App. 5-8. Indeed, much of Calzone's briefing before the Eighth Circuit involved exhaustive analysis of each Missouri statute to determine whether Calzone's vehicle primarily fell *within* or *without* Missouri's regulatory scheme. The first issue

raised by Calzone's petition would, at least on his theory of the case, turn on a similar blow-by-blow analysis of Missouri's regulatory scheme as applied to Calzone. This Court typically does not grant certiorari to resolve such state-law-bound issues. Sup. Ct. Rule 10.

II. The Fifth and Ninth Circuits agree that random inspections are constitutional in the commercial-vehicle context.

Nor does Missouri's statute give officers "unlimited discretion," Pet. 13-19. Missouri's law carefully prescribes the parameters of the search. Calzone's second argument only addresses the decision to conduct *random* roadside inspections. *Id*. (seeking review of "whether . . . officers . . . exercise unlimited discretion when deciding whom" to search).

On that narrow point, Calzone asserts that the Eighth Circuit's opinion "deepened a jurisdictional split" with the Fifth Circuit and Ninth Circuit about whether officers may conduct random inspections in closely-regulated industries. *Id*. But those very courts have upheld random inspections in the commercial-motor-vehicle context. Any more generalized split is both illusory and not implicated here. Significant vehicle problems also weigh heavily against granting review.

A. The Fifth and Ninth Circuits have upheld random inspections of heavy commercial vehicles.

Calzone asserts that the Eighth Circuit's decision below conflicts with opinions from the Fifth and Ninth Circuits. Pet. 13-19. But the Fifth and Ninth Circuits have specifically upheld randomized, warrantless searches of commercial motor vehicles—in complete agreement with the Eighth Circuit's opinion here and

the opinions of every court to address the question. *See Delgado*, 545 F.3d at 1202–03 (9th Cir.) (rejecting argument that Missouri's statute gives officers "unfettered discretion"); *Fort*, 248 F.3d at 481 (5th Cir.) (upholding "random, suspicionless stops and inspections of commercial trucks"). At least in this specific context, these circuits are in complete agreement.

Calzone's contrary position "imports into the *Burger* analysis a requirement that *Burger* does not mandate." *Delgado*, 545 F.3d at 1202-03. *Burger* says that a regulatory scheme must provide "'a constitutionally adequate substitute for a warrant.'" *Burger*, 482 U.S. at 703 (citation omitted). This means the statute must give notice to regulated parties and must cabin the discretion of the inspecting officers to a "properly defined scope." *Id.* A regulatory scheme can constitutionally allow randomized searches and still "limit the discretion of the inspecting officers" as to the things or places to be searched. *Burger*, 482 U.S. at 703. Indeed, this Court upheld a mining statute providing that "no advance notice of an inspection shall be provided to any person." *Donovan*, 452 U.S. at 603 (citation omitted). It has also upheld a statute providing for inspections at any time during regular business hours. *Burger*, 482 U.S. at 711.

In the commercial-vehicle context in particular, "effective enforcement would be nearly impossible without impromptu, warrantless searches." Pet. App. 31. Commercial vehicles are inherently transitory—making warrants infeasible and scheduled stops impractical. *Id.* Commercial vehicles also operate around the clock. So cabining officer discretion to specific times would "render the entire inspection scheme unworkable and meaningless." *Dominguez–*

Prieto, 923 F.2d at 470 ("Trucks operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time."). Moreover, regulatory violations are "difficult[]" to detect "by routine observation." Pet. App. 31; *Maldonado,* 356 F.3d at 136 ("[B]ecause violations of the regulatory scheme often are not apparent to a patrolling officer, inspections are sometimes the only way in which violations can be discovered."). Whether a truck's load is properly secured, its brakes are up-to-date, or it is carrying the proper safety equipment may be hard to determine without a stop. And scheduled stops are not as effective as random stops. *See V-1 Oil Co. v. Means*, 94 F.3d 1420, 1426 (10th Cir. 1996) ("Trucks can easily avoid fixed checkpoints and, by use of citizens' band radios, can avoid temporary checkpoints."). Many courts have held that these factors make such stops even "more compelling" here than "in *Burger*." *Dominguez–Prieto,* 923 F.2d at 469 (6th Cir. 1991) ("Like the stolen cars and automobile parts which pass quickly through an automobile junkyard, trucks pass quickly through states and out of the jurisdictions of the enforcement agencies"); *Maldonado,* 356 F.3d at 136 (1st Cir. 2004) (holding that "effective enforcement of the regulatory regime would be impossible in the absence of impromptu inspections"); *Means*, 94 F.3d at 1426 (10th Cir. 1996) (holding that "it could reasonably be concluded that random truck safety inspections are necessary" to further the State's interest in "public safety on the highways").

Such searches are an adequate substitute for a warrant because the statutory scheme provides many other safeguards. The statute "provide[s] notice" to drivers of commercial vehicles "of the possibility of roadside inspection by a designated law enforcement

officer." Pet. App. 32. And far from giving officers "unfettered discretion," the statute specifically and carefully "limit[s] the scope of the officer's inspections." Pet. App. 32. This is exactly what *Burger* requires. *See Delgado*, 545 F.3d at 1203.

Contrary to Calzone's assertions, Pet. 15, the Ninth Circuit agrees with the Eighth Circuit on these points. In fact, the Ninth Circuit upheld *Missouri's* regulatory scheme from a very similar challenge. *Delgado*, 545 F.3d at 1202-03. Like Calzone, Delgado asserted that "the Missouri statute is an inadequate substitute for a warrant because it provides enforcement officers with unfettered discretion." *Id.* at 1202. The Ninth Circuit disagreed, noting that the statute in *Burger* "functioned as a proper warrant substitute" even though it "'was unclear . . . why . . . Burger's junkyard was selected for inspection.'" *Id.* at 1203 (quoting *Burger*, 482 U.S. at 694 n.1). This showed that understanding why a particular stop occurred is not essential to the analysis. *Id.* As in *Burger*, it was enough that Missouri's statute "informs operators of commercial vehicles that they are subject to inspection" and cabins the "permissible scope" of the inspections to "regulatory compliance." *Id.* This remains true today.

Calzone is mistaken about the Fifth Circuit too. Pet. 15-16. The Fifth Circuit has upheld officers' "unfettered discretion in deciding to make the stop in order to perform the inspection." *Fort*, 248 F.3d at 481. *Fort* cited the same two justifications relied on by the Eighth Circuit here. "Because 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*." *Id.* (citations omitted).

Randomized vehicle safety inspections were also necessary to identify "problems that may not be apparent to officers on patrol." *Id.* at 481. Texas's scheme for "random, suspicionless stops and inspections of commercial trucks," therefore, was constitutional. *Id.*

Because the circuit courts agree that random searches of commercial motor vehicles are appropriate, this case does not implicate any more generalized split identified by Calzone. Whatever the Fifth and Ninth Circuits have said in other contexts, they wholly agree with the Eighth Circuit in this context.

B. The more generalized split Calzone identifies is largely illusory and certainly not implicated here.

In addition, a closer look at the more generalized split identified by Calzone shows it is largely illusory. Calzone says that three circuits have upheld random inspections in closely-regulated industries. Pet. 13. But, he asserts, the Ninth Circuit and Fifth Circuit disagree. *Id.* This argument over-reads the recent decisions of those circuits.

The Ninth Circuit case Calzone cites, Pet. 15, ruled on statutory grounds, not constitutional grounds. *See Tarabochia v. Adkins*, 766 F.3d 1115 (9th Cir. 2014). The Ninth Circuit had previously held that the fishing industry is closely regulated and subject to warrantless inspections. *See United States v. Raub*, 637 F.2d 1205, 1209 (9th Cir. 1980). But the "authority to search" in *Raub* applied "only to fishing vessels within conventional waters." *Id.* at 1210. In *Tarabochia*, state officials did not stop a fishing vessel or even inspect the catch at the docks, but instead conducted a suspicionless stop of an ordinary vehicle

driving on public roads. *Tarabochia*, 766 F.3d at 1119. The state argued the searches were authorized by statutes providing for warrantless inspections of those "engaged in fishing" and reasonable inspections of fishers' "premises, containers, fishing equipment, fish . . . and records." *Id.* at 1123-24. The Ninth Circuit held that neither statute applied—dryly noting that one could not be "'engaged in fishing' while driving on a highway." *Id.*

In dicta, the Court went on to say that even *if* the statutes could be read in the unnaturally broad way urged by the state, such a statute would not fall within the closely-regulated industry exception. "[A] commercial fisher is unlikely to be aware that this provision could subject him or her to a stop or search while" driving on the highway because that possibility was not evident from the statutes' plain text. *Id.* at 1123. Moreover, the state's reading lacked any limiting principle: it would "authorize inspection of any automobile possibly containing fish or wildlife at any time, . . . and any location, even if hundreds of miles from the closest fishing grounds." *Id.* at 1123.

Calzone cites this dicta to support the Ninth Circuit's purported split from other circuits. Pet. 15. *Tarabochia*, however, relied on a distinction already made by this Court in *Donovan*, 452 U.S. at 601. A regulatory scheme that does not cabin officer discretion *at all*—"either in their selection of establishments to be searched or in the exercise of their authority to search"—does not provide sufficient notice to the regulated party and is unconstitutional. *Id.* at 601. But a regulatory scheme may be upheld if it makes the regulated party "aware that he 'will be subject to effective inspection'" and cabins the scope of the search. *Id.* at 603 (citation omitted).

This distinction explains the Ninth Circuit's

decisions in both *Tarabochia* and *Delgado*. In *Tarabochia*, the state's overbroad reading of the statute was so facially implausible that it provided no notice or limiting principle. 766 F.3d at 1123. In *Delgado*, Missouri's regulatory scheme properly "inform[ed] operators of commercial vehicles that they are subject to inspection" and limited the "permissible scope" of the inspection to "regulatory compliance." *Delgado*, 545 F.3d at 1203. This case is like *Delgado* since both cases are about Missouri's regulatory scheme. And this case is unlike *Tarabochia*.

As for the Fifth Circuit, Pet. 15-16, the case Calzone relies on simply held that the warrantless search in question did not violate clearly established law. *Zadeh v. Robinson*, 928 F.3d 457, 468-70 (5th Cir. 2019). In dicta, the Court opined that the medical profession was not a closely regulated industry. *Id*. at 466. It also suggested that Texas's regulatory scheme did not provide a proper substitute for a search warrant. *Id*. at 467-68. But this dicta did not overrule *Fort* and could not have done so. *See Matter of Henry*, 941 F.3d 147, 151 (5th Cir. 2019) ("'[A] panel of this court can only overrule a prior panel decision if such ruling is unequivocally directed by controlling Supreme Court precedent'") (citation omitted). To the contrary, *Zadeh* recognized that *Fort* "upheld an administrative search" where "there were not clear limits on an officer's discretion as to whom to stop." *Zadeh*, 928 F.3d at 470. *Fort* upheld the scheme anyway because it placed "limits on the conduct of an officer after" the stop. *Id.* Calzone's case is like *Fort* and unlike *Zadeh*.

Accordingly, neither the Ninth Circuit's decision in *Tarabochia* nor the Fifth Circuit's decision in *Zadeh* created a circuit split. Even if they had, this case does not implicate or contribute to that split because the

more specific decisions in *Delgado* (9th Cir.) and *Fort* (5th Cir.) wholly agree with the Eighth Circuit's holding here.

C. Significant vehicle problems weigh against granting review.

Significant vehicle problems also weigh against review. As Calzone acknowledges, his argument about officer discretion goes to *Burger*'s third factor: whether "the rule governing the inspections" is "a constitutionally adequate substitute for a warrant." Pet. 14 (quoting *Burger*, 482 U.S. at 703).

But *Burger*'s third factor applies to the regulatory scheme as a whole, not to each individual search. That is, Calzone's decision to raise this argument as part of his as-applied challenge "reflects a misunderstanding of Supreme Court doctrine." *Maldonado*, 356 F.3d at 136. In *Maldonado*, the driver asserted that *Burger*'s factors were not met because law enforcement "was trolling for drugs, not for administrative violations." *Id.* The First Circuit explained that "[t]he *Burger* criteria apply to a regulatory scheme generally, not to the particular search at issue." *Id.* Other circuits have adopted this approach as well. *See United States v. Mitchell*, 518 F.3d 740, 751 (10th Cir.) (refusing to apply the *Burger* factors to an as-applied challenge when the statutory scheme was previously upheld); *Contreras v. City of Chicago*, 119 F.3d 1286, 1290 (7th Cir. 1997) (explaining that "*Burger* . . . require[s] only that warrantless searches *in general* must be necessary" and that courts do not have to evaluate "the necessity of each particular aspect of a regulatory scheme").

The same is true here. *Maldonado* shows that Calzone cannot raise an argument about *Burger*'s factors as part of an as-applied challenge. That is the

procedural posture of this case. True, the Eighth Circuit rejected the same argument as part of Calzone's prior appeal of his facial challenge. Pet. App. 9 ("nothing about the nature of his as-applied challenge changes the answer"). But Calzone did not appeal that ruling back in 2017. Pet. App. 32. Thus, the issue is not properly before the Court. *See Maldonado*, 356 F.3d at 136.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

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