No. _____

In the
Supreme Court of the United States

HIEU MINH LE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 23, 2023

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QUESTIONS PRESENTED FOR REVIEW

Whether the Eighth Circuit erred in holding a North American Standard Inspection Level II inspection is an adequate substitute for the warrant requirement and a constitutional administrative search?

Whether the United States District Court For The Southern District Of Iowa erred in denying Petitioner Le's motion to suppress evidence when it was obtained beyond the scope of an administrative search?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this court are as follows:

Hieu Minh Le,

United States of America.

LIST OF PROCEEDINGS

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA
Trial Court Case No. 1:19CR0004
UNITED STATES OF AMERICA v. SANH BIN TRAN, TU ANH NGUYEN, AND HIEU MINH LE
Motion for a new trial DENIED 6/8/2021. District Court's Opinion is Reported at 2021 WL 1325797 and reproduced in the attached Appendix.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
Case No. 21-2994
UNITED STATES OF AMERICA v. HIEU MINH LE
Judgment Dated 2/8/2023 judgment of the district court AFFIRMED. Court of Appeals Order is reported at 59 F.4th 958 and is reproduced in the attached Appendix.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review the United States District Court For The Southern District of Iowa's denial of a motion to suppress, which was affirmed by the United States Court Of Appeals For The Eighth Circuit.

OPINIONS BELOW

The January 23, 2020, order denying Petitioners' motion to suppress statement and evidence. The order from the United States District Court For The Southern District of Iowa is reproduced in the Appendix ("Pet. App. 41-49"). This order is not reported.

The February 8, 2023, order from the United States Court Of Appeals For The Eighth Circuit is reproduced in the Appendix ("Pet. App. 1-12") and is reported at 59 F.4th 958.

BASIS FOR JURISDICTION IN THIS COURT

The United States Court Of Appeals For The Eighth Circuit entered judgment on February 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

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

U.S. Const. amend. IV.

REGULATIONS INVOLVED

49 C.F.R. § 350.105 provides:

> Unless specifically defined in this section, terms used in this part are subject to the definitions in 49 CFR part 390. As used in this part:
>
> Administrative takedown funds means funds FMCSA deducts each fiscal year from the amounts made available for MCSAP and the High Priority Program for expenses incurred by FMCSA for training State and local government employees and for the administration of the programs.

Administrator means the administrator of FMCSA.

Border State means a State that shares a land border with Canada or Mexico.

Commercial motor vehicle (CMV) means a motor vehicle that has any of the following characteristics:

(1) A gross vehicle weight (GVW), gross vehicle weight rating (GVWR), gross combination weight (GCW), or gross combination weight rating (GCWR) of 4,537 kilograms (10,001 pounds) or more.

(2) Regardless of weight, is designed or used to transport 16 or more passengers, including the driver.

(3) Regardless of weight, is used in the transportation of hazardous materials and is required to be placarded pursuant to 49 CFR part 172, subpart F.

Commercial vehicle safety plan (CVSP) means a State's CMV safety objectives, strategies, activities, and performance measures that cover a 3–year period, including the submission of the CVSP for the first year and annual updates thereto for the second and third years.

Compatible or compatibility means State laws, regulations, standards, and orders on CMV safety that:

(1) As applicable to interstate commerce not involving the movement of hazardous materials:

(i) Are identical to or have the same effect as the FMCSRs; or

(ii) If in addition to or more stringent than the FMCSRs, have a safety benefit, do not unreasonably frustrate the Federal goal of uniformity, and do not cause an unreasonable burden on interstate commerce when enforced;

(2) As applicable to intrastate commerce not involving the movement of hazardous materials:

(i) Are identical to or have the same effect as the FMCSRs; or

(ii) Fall within the limited variances from the FMCSRs allowed under § 350.305 or § 350.307; and

(3) As applicable to interstate and intrastate commerce involving the movement of hazardous materials, are identical to the HMRs.

FMCSA means the Federal Motor Carrier Safety Administration of the United States Department of Transportation.

FMCSRs means:

(1) The Federal Motor Carrier Safety Regulations under parts 390, 391, 392, 393, 395, 396, and 397 of this subchapter; and

(2) Applicable standards and orders issued under these provisions.

HMRs means:

(1) The Federal Hazardous Materials Regulations under subparts F and G of part 107, and parts 171, 172, 173, 177, 178, and 180 of this title; and

(2) Applicable standards and orders issued under these provisions.

High Priority Program funds means total funds available for the High Priority Program, less the administrative takedown funds.

Investigation means an examination of motor carrier operations and records, such as drivers' hours of service, maintenance and inspection, driver qualification, commercial driver's license requirements, financial responsibility, crashes, hazardous materials, and other safety and transportation records, to determine whether a motor carrier meets safety standards, including the safety fitness standard under § 385.5 of this subchapter, or, for intrastate motor carrier operations, the applicable State standard.

Lead state agency means the State CMV safety agency responsible for administering the CVSP throughout a State.

Maintenance of effort (MOE) means the level of a State's financial expenditures, other than the required match, the Lead State Agency is required to expend each fiscal year in accordance with § 350.225.

Motor carrier means a for-hire motor carrier or private motor carrier. The term includes a motor carrier's agents, officers, and representatives, as well as employees responsible for hiring, supervising, training, assigning, or dispatching a driver or an employee concerned with the installation, inspection, and maintenance of motor vehicle equipment or accessories.

Motor Carrier Safety Assistance Program (MCSAP) funds means total formula grant funds available for MCSAP, less the administrative takedown funds.

New entrant safety audit means the safety audit of an interstate motor carrier that is required as a condition of MCSAP eligibility under § 350.207(a)(26), and, at the State's discretion, an intrastate new entrant motor carrier under 49 U.S.C. 31144(g) that is conducted in accordance with subpart D of part 385 of this subchapter.

North American Standard Inspection means the methodology used by State CMV safety inspectors to conduct safety inspections of CMVs. This consists of various levels of inspection of the vehicle or driver or both. The inspection criteria are developed by FMCSA in conjunction with the Commercial Vehicle Safety Alliance (CVSA), which is an association of States, Canadian Provinces, and Mexico whose members agree to adopt these standards for inspecting CMVs in their jurisdiction.

State means a State of the United States, the District of Columbia, American Samoa, the Commonwealth of the Northern Mariana Islands, the Commonwealth of Puerto Rico, Guam, and the Virgin Islands, unless otherwise specified in this part.

Traffic enforcement means the stopping of vehicles operating on highways for moving violations of State, Tribal, or local motor vehicle or traffic laws by State, Tribal, or local officials.

STATEMENT OF THE CASE

A. Concise Statement of Facts Pertinent to the Questions Presented.

The Incident In Question

On December 21, 2018, Mr. Tran and Mr. Nguyen were pulled over by Iowa State Trooper Ken Haas while pulling an enclosed trailer. ("Pet. App. 29"). Though not present at the stop, Mr. Le owned the vehicle driven by Mr. Tran. ("Pet. App. 41-42"). The trailer was pulled by a fifth wheel connection. ("Pet. App. 42"). Trooper Haas's basis for the stop was that the vehicle exhibited a California Department of Motor Vehicles' sticker, a Federal Department of Transportation ("DOT") sticker was not displayed and the windows on the truck were tinted. ("Pet. App. 42").

Mr. Tran told Trooper Haas that he was hauling a commercial load. ("Pet. App. 42"). Thus, Trooper Haas, who is certified to conduct Level II and Level III commercial vehicle inspections, determined the vehicle was subject to a commercial vehicle inspection and began a Level II inspection of the vehicle. ("Pet. App. 42"). Prompted by Trooper Haas, Mr. Tran provided bills of lading, but no log book as required by the DOT. ("Pet. App. 43"). Trooper Haas noted inconsistences and unexpected vagueness in the bills of lading provided by Mr. Tran. ("Pet. App. 43"). Trooper Haas then inspected the exterior of the trailer and noticed a brake system was not connected properly and noticed the smell of bleach. ("Pet. App. 43"). Mr. Tran indicated he was not transporting bleach. ("Pet. App. 43"). Trooper Haas then inspected the interior of the trailer and

noticed cargo was improperly secured, including vases the bill of lading indicated were expensive. ("Pet. App. 43-44"). To Trooper Haas, Mr. Tran's answers to his questions about the logistics of Mr. Tran's travel did not make sense. ("Pet. App. 44").

About twenty-five (25) minutes into the inspection, a certified K-9 police officer arrived with his drug-sniffing dog. ("Pet. App. 44"). The officer and dog did one pass around the trailer and the dog did not alert. ("Pet. App. 44"). On the second pass, with direction, the dog alerted. ("Pet. App. 44"). On a third pass around the trailer, the dog alerted to controlled substances inside the trailer. ("Pet. App. 44"). At this point, a search on the containers was performed which resulted in the seizure of marijuana and other THC products. ("Pet. App. 44").

B. Procedural History

Mr. Tran and Nguyen were indicted for charges related to a conspiracy to distribute marijuana over the period spanning from November 2, 2018, until at least March 1, 2019, by Grand Jury in the U.S. District Court of Southern Iowa. ("Pet. App. 29-30"). On April 23, 2019, Petitioner Le was added to the indictment. ("Pet. App. 29"). On December 2, 2019, Petitioner and his co-defendants filed a Motion to Suppress evidence found at the Iowa traffic stop. ("Pet. App. 41"). The motion to suppress was denied on January 23, 2020. ("Pet. App. 49"). A jury trial began on March 29, 2021, and Mr. Le was convicted of Conspiracy to Distribute 100 Kilograms or More of Marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. ("Pet. App. 2"). Mr. Le's co-defendants were also convicted. ("Pet.

App. 2"). Mr. Le's Motion for Judgment of Acquittal pursuant to Rule 29 of the Federal Rules of Criminal Proceedings was presented orally at trial, but the District Court denied to motion at the end of the proceedings. ("Pet. App. 39-40"). Mr. Le was sentenced to 120 months incarceration. ("Pet. App. 8").

On February 8, 2023, the United States Court of Appeals for the Eighth Circuit affirmed the district court's decision to deny the Motion to Suppress and the Motion for Judgment as a Matter of Acquittal. ("Pet. App. 12").

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. THE DISTRICT COURT AND EIGHTH CIRCUIT ERRED WHEN BOTH FOUND THAT FMCSA'S REGULATORY SCHEME IS A CONSTITUTIONAL ADMINISTRATIVE SEARCH.

The Fourth Amendment of the United States Constitution prohibits unreasonable searches and seizures. U.S. CONST. AMEND. IV. Searches conducted without a warrant are unreasonable under the Fourth Amendment. *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Only warrantless searches that are within the established and well-delineated exceptions can overcome the presumption of unreasonableness. *Id.*

The Fourth Amendment is applicable to both private and commercial property. *See v. City of Seattle*, 387 U.S. 541, 543, 546 (1967). This means business owners have an expectation of privacy at home and in their commercial properties. *New York v. Burger*, 482 U.S. 691, 699–700 (1987) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). On the other hand, this Court has also held that the expectation of privacy afforded to commercial property is lesser than the expectation of privacy afforded to an individual's home. *United States v. Biswell*, 406 U.S. 311, 316 (1972). This lowered expectation of privacy is especially apparent to highly regulated industries due to a long history of being "subject[ed] to close supervision and inspection." *Colonnade Corp. v. United States*, 397 U.S. 72, 77 (1970).

Thus, an exception to the warrant requirement was created for certain administrative searches of "closely or pervasively regulated industries." *Burger*, 482 U.S. at 707–08. Nevertheless, the administrative search exception to the warrant requirement does not alleviate the Fourth Amendment requirement of reasonableness. *Id.* at 691. *See also Donovan v. Dewey*, 452 U.S. 594, 598–99 (1981) (citing *Biswell*, 406 U.S. at 316) ("The greater latitude to conduct warrantless inspections of commercial property reflects the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections.").

In other words, being a closely regulated industry alone is not an exception to the warrant requirement, rather, the regulatory scheme allowing searches must satisfy specific reasonableness conditions. *Burger*, 482 U.S. at 702–03. "First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection was made." *Id.* at 702 (internal quotations omitted). The *Burger* Court identified substantial government interests in "improving the health and safety conditions in the Nation's underground and surface mines[,]" "regulation of firearms[,]" and "in protecting the revenue against various types of fraud[.]" *Id.* at 702 (internal citations omitted). In fact, "[o]ver the past 45 years, the Court has identified only four industries that 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[.]" *City of Los Angeles v. Patel*, 576 U.S. 409, 424 (2015) (internal quotations omitted). "Moreover, the clear import of [this Court's] cases is that the closely regulated industry is the exception." *Id.*

"Second, the warrantless inspections must be necessary to further the regulatory scheme." *Burger*, 582 U.S. at 702–03. Lastly, "the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant" by "perform[ing] the two basic functions of a warrant[.]" *Id.* at 703 (internal quotations and brackets omitted). These functions include providing notice to the owners and operators of a commercial business that they are subject to the inspection and that the regulatory scheme "limit[s] the discretion of the inspecting officers." *Id.* Notice requires the regulatory scheme to "inform[] the operator of a…business that inspections will be made on a regular basis." *Id.* at 711. The scheme must also put the operator on notice by "set[ing] forth the scope of the inspection and, accordingly, place the operator on notice as to how to comply with the statute." *Id.*

Looking at the entirety of the regulatory scheme, inspections that are adequate substitutes for a warrant have "time, place, and scope" restrictions on the officers conducting the search. *Id.* An appropriately tailored regulatory scheme could demand that searches only be conducted "during the regular and usual business hours." *Id.* Absent such requirements, other time and place limitations should be considered, such as limitations on the number of searches on a

particular business during a period. *Id.* at 711, n.22. However, a scheme has adequately limited officer discretion "so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers." *Id.* Thus, if the parameters of when a search can be made are wide, reasonableness will depend on whether the scope is narrow in other ways, like which industries and properties are subject to inspection, and how narrowly the inspection is defined. *Id.* at 711–12.

A. THE EIGHTH CIRCUIT ERRED BY HOLDING FMCSA'S REGULATORY SCHEME IS AN ADEQUATE SUBSTITUTE FOR THE WARRANT REQUIREMENT.

At issue in Mr. Le's case is whether regulations allowing for inspections of commercial vehicles satisfies this Court's conditions in *Burger*. Specifically, the Federal Motor Carrier Safety Administration of the United States Department of Transportation (hereinafter "FMCSA") promulgated a methodology, the North American Standard Inspection (hereinafter "NASI"), used by "safety inspectors to conduct safety inspections" of commercial motor vehicles. 49 C.F.R. § 350.105. That methodology is not described in the regulation itself, rather the regulation incorporates "[t]he inspection criteria are developed by FMCSA in conjunction with the Commercial Vehicle Safety Alliance (CVSA), which is an association of States, Canadian Provinces, and Mexico whose members agree to adopt these standards for inspecting CMVs in their jurisdiction." *Id.* The CVSA has several levels of inspections, but at issue in this case is a NASI Level II search. Commercial Vehicle Safety Alliance, *All*

Inspection Levels, https://www.cvsa.org/inspections/all-inspection-levels/ (2019). The CVSA describes a NASI Level II inspection as follows:

> An examination that includes each of the items specified under the North American Standard Level II Walk-Around Driver/Vehicle Inspection Procedure. As a minimum, Level II Inspections must include examination of: driver's license; Medical Examiner's Certificate and Skill Performance Evaluation (SPE) Certificate (if applicable); alcohol and drugs; driver's record of duty status as required; hours of service; seat belt; vehicle inspection report(s) (if applicable); brake systems; cargo securement; coupling devices; driveline/driveshaft; exhaust systems; frames; fuel systems; lighting devices (headlamps, tail lamps, stop lamps, turn signals and lamps/flags on projecting loads); steering mechanisms; suspensions; tires; van and open-top trailer bodies; wheels, rims and hubs; windshield wipers; buses, motorcoaches, passenger vans or other passenger-carrying vehicles – emergency exits, electrical cables and systems in engine and battery compartments, seating, and HM/DG requirements, as applicable. HM/DG required inspection items will only be inspected by certified HM/DG and cargo tank inspectors, as applicable. It is contemplated that the walk-around driver/vehicle inspection will include only those items that can be inspected without physically getting under the vehicle.

Commercial Vehicle Safety Alliance, *All Inspection Levels, Level II Inspection: Walk-Around Driver/Vehicle Inspection,* https://www.cvsa.org/inspections/all-inspection-levels/ (2019).

In short, a Level II inspection allows an inspector or officer to view all paperwork and safety equipment, load securement, and anything else that can be observed without physically going beneath the vehicle.

Operating commercial vehicles is likely a closely or pervasively regulated industry for the purpose of applying and evaluating the reasonableness of the scheme under *Burger*. In fact, all circuits that have addressed the question have held that interstate commercial transportation is a "closely and pervasively regulated industry" under *Burger*. *See, e.g., United States v. Maldonado*, 356 F.3d 130, 135 (1st Cir. 2004); *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); *Owner-Operator Independent Drivers Ass., Inc. v. United States*, 840 F.3d 879, 893 (7th Cir. 2016); *United States v. Parker*, 587 F.3d 871, 878–79 (8th Cir. 2009); *United States v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008); *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1210 (10th Cir. 2001).

Second, warrantless inspections are likely necessary to further the regulatory scheme of the FMSCA. The Eighth Circuit's holding is in line with other circuits on this issue. *See United States v. Maldonado*, 356 F.3d 130, 136 (1st Cir. 2004) ("Fairly measured, the interests justifying warrantless searches in the interstate trucking industry are even greater than those present in *Burger* (which involved the regulation

of junkyards) because of the speed with which commercial vehicles move from place to place."); *Fort*, 248 F.3d at 481; *Dominguez-Prieto*, 923 F.2d at 469; *Delgado*, 545 F.3d at 1202; *Vasquez-Castillo*, 258 F.3d at 1207.[1]

Instead, the Eighth Circuit has erred by holding that FMCSA's regulatory scheme satisfies the third *Burger* factor. As written, the FMCSA regulation and incorporated CVSA search parameters is not an adequate substitute for the warrant requirement because the notice is insufficient, and the scope of the inspection goes beyond what is reasonable.

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[1] There is disagreement within the circuits of whether *suspicionless* searches are necessary to further the regulatory scheme. *Compare United States v. Feliciana*, 974 F.3d 519, 526–27 (2020) (holding that an FMCSA inspection performed after conducting a baseless stop is outside the scope of a regulatory search) *with Fort*, 348 F.3d at 481 (holding that random, warrantless searches were necessary to further the regulatory purpose because "Texas must be able to conduct driver and vehicle safety inspections for problems that may not be apparent to officers of patrol."). However, Mr. Le does not argue that the Iowa stop was suspicionless. In addition to a dark tint, Trooper Haas testified that he stopped Mr. Le's vehicle in part because it lacked a United States Department of Transportation sticker. ("Pet. App. 42").

a. FMCSA'S REGULATORY SCHEME DOES NOT PROVIDE ADEQUATE NOTICE TO OWNERS OF COMMERCIAL VEHICLES THAT THEY WOULD BE SUBJECT TO UNLIMITED INSPECTIONS.

The Eighth Circuit is an outlier in its determination that the FMCSA regulations alone give adequate notice to owners of commercial vehicles that they are subject to random inspection. *United States v. Knight*, 306 F.3d 534, 535 (8th Cir. 2002) ("We agree with the district court's conclusion that the North American Standard Inspection Program, see 49 C.F.R. § 350.105, which was in force in Iowa, and pursuant to which the inspection here was commenced, provides notice to truck drivers of the possibility of a roadside inspection….").

In *United States v. Maldonado*, the First Circuit noted that FMCSA regulations "themselves give ample notice to interstate truckers that inspections will be made on a regular basis[,]" but considered state statutes in conjunction with its analysis. 356 F.3d at 136. Similarly, the Tenth Circuit concluded that state law *and* the FMCSA regulations adequately gave notice of warrantless searches, but failed to consider whether FMCSA regulations alone satisfied the requirements. *Vasquez-Castillo*, 258 F.3d at 1211–12. Other circuits evaluating notice relied on state statutes or regulations. *See, e.g., Fort*, 248 F.3d at 482); *United States v. Castelo*, 415 F.3d 407 (5th Cir. 2005); *Dominguez-Prieto*, 923 F.3d at 469; *Owner-Operator Independent Drivers Ass., Inc.*, 840 F.3d at 895–96;

Delgado, 545 F.3d 1195, 1203; *U.S. v. Steed*, 548 F.3d 961, 968 (11th Cir. 2008).

However, to provide adequate notice themselves, the FMCSA regulations must not only provide notice to business operators that they may be subject to inspection, but also notice of the scope of the inspection. The FMCSA regulations fail to satisfy this requirement because the regulations do not provide notice of when or how often inspections will be made. The failure to specify the time limitations is in contrast to the statute in *Burger*. Similarly, the FMCSA regulations also fail to outline the potential number of searches possible over a discreet period. This failure renders the regulations themselves inadequate in providing notice to operators of commercial vehicles.

b. NASI LEVEL II INSPECTION PARAMETERS DO NOT ADEQUATELY LIMIT OFFICER DISCRETION.

As written, officers and others authorized to conduct the inspections are given total discretion, absent state law interference, of which commercial vehicles to inspect as well as when, where, and how often to inspect them. Instead of addressing this failure, some circuits have written out the time and place requirements of *Burger* entirely. *Vasquez-Castillo*, 258 F.3d at 1212 ("We agree with the Sixth Circuit, however, that '[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.'" (citing *Dominguez-Prieto*, 923 F.2d at 470).

This is an error because the time and place requirements are necessary to a regulatory scheme's reasonableness under *Burger*. In *Burger*, the New York statute at issue clearly established that inspections were to be conducted only during normal business hours and that they would be conducted at the place of business. *Burger*, 482 U.S. at 711–12. Time and place limitations on conducting regulatory searches of commercial vehicles are not impossible to impose, nor would they undermine the purpose of the regulatory scheme. Further, while more thorough time and place limitations or warrant requirements may frustrate the government's purpose, those frustrations are surmountable with a different, more tailored warrant requirement. *See Marshall v. Barlow's Inc.*, 436 U.S. 307, 316–21 (1978) (discussing potential regulatory solutions to further the government's interest of safe workplaces that do not include creating an exception to the warrant requirement).

At minimum, reading out *Burger's* time and place requirements means that NASI's Level II inspection parameters must be narrowly tailored to be considered an adequate substitution for a warrant. At worst, eliminating the time and place limitations does away with a reasonableness requirement and impedes the Fourth Amendment rights of owners of commercial vehicles.

Given the FMCSA regulatory scheme and NASI's silence on time and place limitations of Level II inspections, the inspection itself must be appropriately limited to be constitutionally reasonable. Like the statute at issue in *Burger*, the FMSCA regulations

limit the target of inspections—only allow for the administrative searches of commercial vehicles. 49 C.F.R. § 350.105. However, neither NASI's methodology nor FMCSA's regulation place any limitation on an officer's discretion regarding which commercial vehicles they can inspect or whether any suspicion is required or if random inspections are authorized. *Fort*, 248 F.3d at 482 ("Although the sections [of the statutes] do appear to limit the discretion of an officer *after* the stop, they are subject to criticism for failing to provide specific limitations on the officer's discretion in making the decision to stop.") (internal citations omitted). "[N]o federal appellate court has done so, [but] several state courts have struck down inspection statutes under *Burger's* third prong on these grounds." *Steed*, 548 F.3d at 973–74 (collecting cases). The failure to address any meaningful discretion is a failure that cannot be squared with *Burger's* requirement that the administrative searches are an adequate replacement for the warrant requirement.

Further, the FMCSA regulatory scheme fails to reasonably limit the physical scope of the inspection. A Level II inspection, according to the CVSA, *at a minimum*, allows for the inspection of a lengthy list of regulatory requirements. Commercial Vehicle Safety Alliance, *All Inspection Levels, Level II Inspection: Walk-Around Driver/Vehicle Inspection,* https://www.cvsa.org/inspections/all-inspection-levels/ (2019). As written, the regulation only limits an officer from physically getting underneath the vehicle for the inspection. *Id.* An officer conducting a Level II inspection can not only inspect paperwork and

licensing like in *Burger*, but can also enter into the commercial vehicle, whether it be the cab or the trailer itself, to conduct its search. A Level II inspection also includes conducting an inspection of load securement, which means that an officer can not only enter the trailer of a commercial vehicle, but the officer can inspect the cargo itself. *Id.*

Outside of the Eighth Circuit, the Tenth Circuit is the only circuit to have directly addressed whether the scope of an administrative search under the guise of a Level II inspection reasonably allows an inspector to enter to interior of a commercial vehicle. *Vasquez-Castillo*, 258 F.3d at 1212. The Tenth Circuit concluded that inspectors were "authorized by state and federal regulations to be in the trailer[.]" *Id.* Declining to hold that a Level II search allows for searching cargo, the Tenth Circuit found that an inspector's entrance into the trailer can properly give rise to probable cause allowing for the search of the cargo. *Id.*

However, in *Vasquez-Castillo*, the court evaluated FMCSA's regulations alongside state laws and regulations. *Id.* The state regulations granted more access to the interior of commercial vehicles than CVSA's inspection: "To determine whether the vehicle is safe, those in charge of the port of entry are permitted to inspect the vehicle and its contents to determine whether all laws and all rules and regulations of the departments of New Mexico with respect to public safety, health, welfare and comfort have been fully complied with." *Id.* (internal quotations and brackets omitted). *See also V-1 Oil Co. v. Means*, 94 F.3d 1420, 1426 (10th Cir. 1996) (notice it "could

also reasonably be concluded that … [FMCSA's regulations], as modified by [state] regulations, authorizes highway patrol officers and other transportation department agents and employees 'to enter upon and perform inspections of motor carrier's vehicles in operation.'").

Further, the Tenth and Eighth Circuits erred because the *Burger* Court evaluated the statute itself to determine whether the regulatory search is an adequate replacement for a warrant, not the execution of the search. The broad access a Level II inspection gives inspectors should give this Court pause—especially considering the breadth of the industry of commercial trucking. While some circuits have determined that the FMCSA regulations properly couch the search to safety violations, this is still excessively broad and allows inspectors nearly unfettered access to a commercial vehicle. The failure to properly limit the subject and scope of the inspection may have been reasonable if the regulatory scheme had adequately limited the time and place of the inspection, but the FMCSA and NASI have placed almost no limitations on where, what, and how and officer can search a commercial vehicle. This failure is incompatible with *Burger* and the Fourth Amendment requirement that searches be reasonable.

II. THE DISTRICT COURT AND EIGHTH CIRCUIT ERRED WHEN BOTH FOUND THAT MR. LE'S FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE WAS NOT VIOLATED BY THE IOWA SEARCH.

The Eighth Circuit held that Trooper Haas did not need probable cause to enter into the trailer during the Iowa stop. ("Pet. App. 10"). Based entirely upon the testimony of Trooper Haas that "looking in a trailer for safety equipment or to inspect cargo securement are all proper aspects of a Level II inspection[,]" the Eighth Circuit concluded that the entrance into the trailer was reasonable. ("Pet. App. 11"). Without evaluating whether a Level II inspection is a reasonable search or whether it's an adequate substitute for the warrant requirement, the Eighth Circuit found the evidence found after Trooper Haas's entrance into the trailer should not be suppressed.

However, a Level II search is not an adequate substitution for a warrant, and Trooper Haas's entrance into Mr. Le's trailer without probable cause was a violation of Mr. Le's constitutional right to be free of unreasonable searches and seizures. Thus, Mr. Le's motion to suppress the evidence found as a result of that search should have been granted, and the evidence should have been suppressed.

CONCLUSION

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

Respectfully submitted,

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Dated: June 23, 2023.