Case No. 16-3650

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONALD CALZONE,

Plaintiff-Appellant,

v.

CHRIS KOSTER, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
(District Court Case 4:15-cv-869)

APPELLANT'S INITIAL BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The three Missouri statutory subsections challenged in this case authorize certain law enforcement officials on roving patrol to stop and inspect drivers and their vehicles, even if the officer has no reason to suspect that the driver or vehicle are in violation of any law. The officers empowered by these subsections may pull over almost any vehicle operated on the state's highways, at any time, and at any place. The Appellant, Ronald Calzone, contends that these provisions violate the Fourth Amendment's prohibition against unreasonable searches and seizures because the U.S. Supreme Court has consistently held that officers on roving patrol may not initiate a traffic stop unless there is at least an articulable suspicion that the driver or the vehicle are in violation of some law. The district court granted summary judgment to the Defendants, concluding that Calzone only had standing to challenge the provision that allows officers to seize and inspect "commercial motor vehicles." The district court upheld the challenged provision, holding that it involves a "closely-regulated industry" and that it satisfies the test the U.S. Supreme Court established in *New York v. Burger*, 482 U.S. 691 (1987).

This case questions the proper scope of the "closely-regulated industry" exception to the Fourth Amendment's protections. Calzone requests 20 minutes of oral argument per side.

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JURISDICTIONAL STATEMENT

Appellant Ronald Calzone ("Calzone") brought this constitutional challenge pursuant to 42 U.S.C. § 1983, 28 U.S.C. §§ 2201 and 2202, and the Fourth and Fourteenth Amendments to the U.S. Constitution. (Appellant's Appendix, (hereafter "App.") 6.) The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. (App. 6.)

The district court entered its final judgment on July 28, 2016. (App. 4, 172.) The Appellant timely filed his notice of appeal on August 25, 2016. (App. 4, 173.) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. A set of Missouri statutory provisions authorize certain law enforcement officers on roving patrol to stop and inspect almost any type of vehicle, at any time, and at any place along the state's highways, even if the officer has no reason to suspect that the vehicle or the driver is in violation of any law. Do these provisions violate the Fourth Amendment?

Delaware v. Prouse, 440 U.S. 648 (1979)

City of Indianapolis v. Edmond, 531 U.S. 32 (2000)

U.S. v. Nicholas, 448 F.2d 622 (8th Cir. 1971)

Mo. Rev. Stat. § 304.230

U.S. CONST. AMEND. IV

U.S. CONST. AMEND. XIV

2. Missouri law gives certain law enforcement officials the discretion to stop and inspect what the state has defined as "commercial motor vehicles," even if those vehicles are not engaged in the business of transporting hazardous materials, people, or freight for hire. Assuming, *arguendo*, that "commercial trucking" is a closely regulated industry, do the expansive seizures and searches authorized by these statutory provisions fit within the "closely regulated industry" exception to the normal protections of the Fourth Amendment?

New York v. Burger, 482 U.S. 691 (1987)

City of Los Angeles v. Patel, 135 S.Ct. 2443 (2015)

U.S. v. Selsar, 996 F.2d 1058 (10th Cir. 1993)

U.S. v. Herrera, 444 F.3d 1238 (10th Cir. 2006)

U.S. CONST. AMEND. IV

U.S. CONST. AMEND. XIV

3. Ron Calzone's driver license authorizes him to operate both "commercial" and non-commercial vehicles on Missouri highways, but he is not engaged in the business of professional commercial trucking. Calzone was driving a farm vehicle that state law defines as a "commercial motor vehicle" to gather gravel for his daughter's chicken coop when a highway patrol officer on roving patrol subjected him to a suspicionless stop. Does Calzone have standing to challenge the

constitutionality of statutory provisions that allow random, suspicionless stops of non-commercial vehicles as well as the provision that allows random, suspicionless stops of "commercial" vehicles?

Keller v. City of Fremont, 719 F.3d 931 (8th Cir. 2013)

Hollingsworth v. Perry, 133 S.Ct. 2652 (2013)

STATEMENT OF THE CASE

Ron Calzone owns and occasionally operates a dump truck he uses in support of his horse and cattle ranch. (App. 74.) The truck has Missouri-issued 54,000 lb. local license plates, which mean that the truck may only be operated within fifty miles of Calzone's ranch; he does not have – nor is he required to have – a U.S. Department of Transportation number on his truck. (App. 103.) The truck is also subject to twice-annual inspections that must be made at inspection stations authorized by the Missouri State Highway Patrol. (App. 81-82, 85.) Calzone does not use the truck outside the State of Missouri, nor does he act as a common carrier or otherwise use the truck for hire. (App. 81.)

On the morning of June 3, 2013, Calzone took his truck for its regular Missouri Motor Vehicle Inspection, which was performed at Walt's Sale and Service, an inspection station authorized by the Missouri State Highway Patrol. (App. 81-82, 85.) The inspection began at 10:00 a.m. and concluded at 10:30 a.m.; the truck passed the inspection. *Id.* About two hours later, Calzone took his truck to gather some gravel for use in his daughter's chicken coop. (App. 82.) The bed of the truck was empty, the truck was well within the applicable height, weight, length, and width restrictions for the roads on which he was travelling, and Calzone was being careful to obey all traffic laws. (App. 81-82.)

As Calzone was driving along U.S. Highway 63 in Phelps County, Corporal J.L. Keathley of the Missouri State Highway Patrol pulled behind Calzone and signaled for him to pull over. (App. 82.) When Keathley approached Calzone's window, Calzone asked if he had been speeding or if he had violated any other state law. *Id.* Keathley responded that he had not observed any violation of state law, but that he had pulled Calzone over because Keathley "did not recognize the truck or the markings displayed on the vehicle." (App. 82, 95.)

Keathley asked to inspect the truck, but Calzone responded that he was a "hard-headed constitutionalist" and that he believed such a search would violate the Fourth Amendment. (App. 82, 95.) Keathley stated that Mo. Rev. Stat. § 304.230, authorizes Missouri State Highway Patrol officers to stop and inspect vehicles even if the officer does not have probable cause to believe that the driver was violating any state law, warning Calzone that Keathley would issue him a citation if he did not submit to the inspection. (App. 97.) Calzone refused the inspection. Based only Calzone's statement that he was a "hard-headed constitutionalist," Keathley sought and received approval to conduct a motor fuel tax evasion check to see if Calzone was using illegal dyed motor fuel; the test showed that Calzone was not using illegal fuel. (App. 96.) Keathley issued Calzone a citation for refusing to submit to a commercial vehicle inspection. (App. 87, 97.) Calzone was permitted to resume driving at 1:56 p.m., one hour and nine minutes after Keathley had initiated the

roving stop. (App. 97.) An inspection of the sort Keathley intended to conduct would ordinarily be expected to take from twenty minutes to more than an hour to complete. *Id.* The Phelps County prosecutor initially pursued a conviction against Calzone for refusing to submit to the commercial vehicle inspection, but the prosecution ultimately was terminated by *nolle prosequi* on April 4, 2014. (App. 161.)

Calzone filed his complaint in the United States District Court for the Eastern District of Missouri on June 3, 2015, contending that Mo. Rev. Stat. §§ 304.230.1, 304.230.2, and 304.230.7 (collectively, "the Challenged Subsections") violate the Fourth Amendment because they authorize roving, suspicionless stops of people driving on Missouri's highways and interstates. (App. 5-18.) The Defendants are Missouri's Attorney General, Missouri's Governor, and the Superintendent of the Missouri State Highway Patrol (collectively, "the Government"), each of whom is sued in his official capacity for declaratory judgement and injunctive relief. (App. 6-7.) The parties filed cross-motions for summary judgment in April 2016. (App. 2-3.) On July 28, 2016, the district court denied Calzone's motion for summary judgment and granted defendants' motion for summary judgment on all claims. (App. 4.) Calzone timely filed his notice of appeal on August 25, 2016, seeking review of the district court's memorandum and order (dated July 28, 2016), which granted summary judgment to the Appellees and denied Appellant's motion for summary judgment, and also the district court judgment (dated July 28, 2016). *Id.*

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *See, e.g., Acton v. City of Columbia*, 436 F.3d 969, 975 (8th Cir. 2006). The district court's interpretations of state and federal law are also reviewed *de novo*. *See, e.g., Salve Regina College v. Russell*, 499 U.S. 225, 239-240 (1991) ("The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts de novo."); *In re Derailment Cases*, 416 F.3d 787, 795 (8th Cir. 2005) (same); *Jessep v. Jacobson Transp. Co., Inc.*, 350 F.3d 739, 741 (8th Cir. 2003) (interpretation of federal statute is reviewed de novo).

The Fourth Amendment requires that searches and seizures of citizens must be reasonable, and such a search or seizure "is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). In the absence of any articulable and reasonable suspicion that a vehicle or its occupant[s] are subject to seizure for violation of a law, it is presumptively unreasonable for a law enforcement official on roving patrol to stop the vehicle and detain the driver. *See Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Where the Government conducts searches or seizures in the absence of a warrant, the Government must bear the burden of proving that those searches or seizures are justified. *U.S. v. Herrera*, 444 F.3d 1238 (10th Cir. 2006).

SUMMARY OF ARGUMENT

The U.S. Supreme Court has held that the Fourth Amendment does not permit law enforcement officers on roving patrol to seize citizens without at least an articulable and reasonable suspicion of wrongdoing. *See, e.g., Brendlin v. California*, 551 U.S. 249, 263 (2007). By his own admission, the officer on roving patrol that seized Calzone and his truck did so without any articulable suspicion that the driver or vehicle were in violation of any law. (App. 95.) The Government claims that the Challenged Subsections are the only justification a Missouri highway patrol officer on roving patrol needs to initiate a seizure of a driver and almost any kind of vehicle travelling on a Missouri Highway. Because the Challenged Subsections explicitly authorize seizures and searches of Missouri citizens even without any articulable suspicion that the driver or vehicle are in violation of any law, binding U.S. Supreme Court precedent requires the Challenged Subsections to be struck down as unconstitutional.

Even assuming, *arguendo,* that the strictures of the Fourth Amendment might be loosened in regard to persons and vehicles that are part of the professional commercial trucking industry,[1] the Challenged Subsections allow for the suspicionless seizure and search of citizens – such as the Appellant – who ***are not*** part of that industry. The Government argued to the district court that merely holding

[1] Calzone does not concede this point.

a commercial driver license or driving a vehicle that state law defines as a "commercial motor vehicle" means that a person has voluntarily relinquished Fourth Amendment protections by participating in the "commercial trucking industry." (App. 122-23.) But six decades ago Missouri courts determined that even an ordinary half-ton pickup truck that is not used to haul freight or merchandise meets the definition of a "commercial motor vehicle" under Missouri law. *State v. Lasswell*, 311 S.W.2d 356 (Mo. App. 1958). This means that, according to the Government, Mo. Rev. Stat. § 304.230.7 authorizes certain law enforcement officers to seize and search anyone (including Calzone) who drives a pickup truck on a Missouri highway. Although the U.S. Supreme Court has held that under certain limited circumstances government officials may engage in warrantless searches of businesses in closely-regulated industries, it has never held that law enforcement officers on roving patrol may initiate suspicionless searches anywhere and at any time, without carefully limiting the officers' discretion. To the contrary, the third prong of the test established in *New York v. Burger*, 482 U.S. 691 (1987), states that even in the context of a closely-regulated industry the discretion of inspectors must be carefully limited in time, place, and scope. Because the Challenged Subsections authorize certain officials to seize and search Missouri citizens and their vehicles at any time and place of the official's choosing, without establishing any standard to determine which drivers and vehicles will be seized and searched, the Challenged

Subsections cannot satisfy the third prong of the *Burger* test and, therefore, violate the Fourth Amendment.

The trial court erred in determining that Calzone lacked standing to challenge Mo. Rev. Stat. §§ 304.230.1 and 304.230.2. Due to the way these subsections are written, Calzone will be subject to suspicionless seizures and searches by law enforcement officers on roving patrol whether or not he is driving a "commercial motor vehicle." He would also remain subject to this kind of a suspicionless seizure and search even if this Court strikes down Mo. Rev. Stat. § 304.230.7, as unconstitutional. Calzone's concerns about the potential enforcement of these laws against him are not speculative—the facts of this case show that he was not only forced to endure a suspicionless seizure, but the Government actually sought to prosecute him for his refusal to consent to a search. Even if Calzone is driving his pickup truck instead of his farm vehicle, Missouri law would still authorize certain law enforcement officers to pull him over and force him to submit to an inspection, even if he had done absolutely nothing wrong. Consequently, Calzone has standing to dispute the validity of each of the Challenged Subsections, not merely the subsection that specifically addresses "commercial vehicles."

ARGUMENT

I. The Challenged Subsections Violate the Fourth Amendment Because They Give Law Enforcement Officers Authority to Conduct Random, Roving, Suspicionless Seizures and Searches of Almost Any Kind of Vehicle.

> "When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment violations… we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver." *Delaware v. Prouse*, 440 U.S. 648, 661 (1979).

Mo. Rev. Stat. § 304.230.1, 304.230.2, and 304.230.7, ("the Challenged Subsections") authorize certain Missouri law enforcement officials on roving patrol to seize and search drivers and vehicles even if there is no reasonable suspicion that the drivers or the vehicles are in violation of any law. The Appellant, Ron Calzone, was subjected to just such a stop one day while he was driving to pick up some gravel for his daughter's chicken coop. When he refused to allow the Missouri Highway Patrol trooper to subject his truck to its second inspection of the day (Calzone had just gotten the truck inspected that morning), the trooper issued Calzone a citation. Calzone contends that the Challenged Subsections are invalid, facially and as-applied, because the U.S. Supreme Court has consistently and unambiguously held that the Fourth Amendment forbids officers on roving patrol to seize a driver and

vehicle unless there is some articulable suspicion that the driver or vehicle is in violation of some law.

In arguments presented to the trial court, the Government responded that because several circuit courts – including this Court – have previously deemed the "commercial trucking industry" (which the Government did not define) to be closely-regulated, the Government may authorize law enforcement officials on roving patrol to pull over and inspect almost any vehicle on a Missouri highway, regardless of whether the officer suspects any wrongdoing. In particular, the Government took the position that a person driving a vehicle that falls within Missouri's incredibly broad definition of "commercial motor vehicle," they are participating in the "commercial trucking" industry. The trial court agreed, ruling that the random, roving, suspicionless seizures and searches of "commercial motor vehicles" authorized by Mo. Rev. Stat. § 304.230.7 is justifiable on the basis that "commercial trucking" might be a closely-regulated industry.

A. Almost Any Vehicle in Missouri Could be Classified as a "Commercial Motor Vehicle."

To fully grasp the scope of the power being claimed by the Government (and endorsed by the district court below), it is important to note that Missouri's definition of "commercial motor vehicle" includes any "motor vehicle designed or regularly used for carrying freight and merchandise[.]" Mo. Rev. Stat. § 301.010(7). Nearly six decades ago, Missouri courts held that even a common, half-ton pickup truck

with an empty bed that is not regularly used to transport freight or merchandise would indeed be considered a "commercial motor vehicle" under this definition. *State v. Lasswell*, 311 S.W.2d 356 (Mo. App. 1958). In that same case the Missouri Court of Appeals also explained that the word "'merchandise' is a broad and comprehensive term, embracing all tangible articles of commerce—whatever is usually bought or sold in trade." *Id.* at 358-59. The consequence of this long-standing statutory interpretation is that any person might find themselves using a compact or economy car to carry "merchandise," such as food, flowers, or balloons, just to name a few common items delivered in small cars. If they do so "regularly," then even tiny, ordinary passenger vehicles would fall within Missouri's definition of "commercial motor vehicles." Given the prevalence of pickup trucks in this state, as well as the commonality with which delivery persons carry "merchandise" in their vehicles, it should be apparent that a great many people are driving vehicles that plausibly could fall within Missouri's expansive definition of "commercial vehicle" – and they would likely be completely ignorant of the fact that the Government would consider them part of the "commercial trucking industry."

B. Missouri Statutes and Regulations Do Not Adequately Inform Citizens Regarding the Scope of the Power the Government Claims to Seize and Search Drivers and Vehicles.

Even assuming that every person who might drive a vehicle that Missouri law defines as a "commercial motor vehicle" is familiar with the statutes and regulations

governing commercial motor vehicles, the State of Missouri has not adopted any statute or regulation notifying drivers of commercial vehicles that they are subject to "North American Standard Inspections" or explaining the scope of such inspections. Although a few Missouri statutes make vague reference to a "Commercial Vehicle Safety Alliance," Missouri statutes and regulations explain to drivers neither what that non-governmental organization is nor the scope of authority that Missouri law enforcement officials might intend to exert as a result of training or guidance provided by that non-governmental organization. Because no Missouri law or regulation offers drivers any notice as to what the "Commercial Vehicle Safety Alliance" or a "North American Standard Inspection" is, much less any insight into the scope of authority that Missouri law enforcement officers might intend to exercise when conducting a "North American Standard Inspection," courts cannot impute to Missouri drivers this sort of knowledge. Citizens may indeed be presumed to be aware of a state's statutes and regulations, but they cannot be charged with knowing and understanding matters that ***are not*** included in those statutes and regulations.

C. This Court's Precedents Regarding Professional Commercial Truck Drivers are Distinguishable From the Instant Case.

In cases dealing with professional commercial truck drivers carrying goods in interstate commerce, this Court has previously deemed references to the Commercial Vehicle Safety Association and the North American Standard Inspection sufficient

to put those professional drivers on notice regarding the potential for and the scope of random, roving, suspicionless seizures and searches by law enforcement officials. *See, e.g.*, *U.S. v. Parker*, 587 F.3d 871, 878-79 (8th Cir. 2009); *U.S. v. Knight*, 306 F.3d 534, 535 (8th Cir. 2002). Federal regulations regarding the commercial trucking industry apply only to those operating commercial vehicles "in interstate commerce." 49 CFR § 390.5. The Appellant expresses no opinion as to whether this conclusion might be justified for those drivers who are subject to federal commercial trucking regulations, but he maintains that Missouri citizens who are not professional commercial truck drivers carrying goods in interstate commerce have not knowingly or willingly subjected themselves to federal commercial trucking regulations and, thus, cannot be presumed to be aware of or to have consented to random, roving, suspicionless seizures and searches by law enforcement officials.

D. Mo. Rev. Stat. §§ 304.230.1 and 304.230.2, Expressly Authorize Random, Roving, Suspicionless Seizures and Searches of Non-Commercial Vehicles.

Mo. Rev. Stat. § 304.230, contains seven subsections, three of which are at issue in this case. Mo. Rev. Stat. § 304.230.1, authorizes specified law enforcement officials—including members of the Missouri State Highway Patrol—to enforce Mo. Rev. Stat. §§ 304.170 to 304.230, which limit the width, height, length, and weight of vehicles operated on Missouri highways. That subsection authorizes these officials "to conduct random roadside examinations or inspections" and "***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, operator, owner, lessee, or bailee, to stop, drive, or otherwise move to a location to determine compliance with sections 304.170 to 304.230." Mo. Rev. Stat. § 304.230.1. (emphasis added). The statute expressly distinguishes the seizures thus authorized from stops based on observation of "a visible external safety defect… that could cause immediate harm to the travelling public" and the stoppage of a commercial vehicle where the stopping officer "has probable cause to believe that the commercial motor vehicle is being used to conduct illegal or criminal activities unrelated to violations of sections 304.170 to 304.230." *Id*. Section 304.230.2 goes a step further, clarifying that Missouri Highway Patrol officers and "[a]ny peace officer approved under section 304.232" are empowered "to stop any such conveyance or vehicle as described [in section 304.230.1] ***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." § 304.230.2 (emphasis added).

In short, these two subsections anticipate that the authorized officers will be making seizures on roving patrols, not just at permanent weigh stations or temporary checkpoints. These subsections anticipate that these roving seizures will generally focus on whether the seized vehicles and drivers comply with Missouri's restrictions on vehicular width, height, length, and weight, and they authorize officers to proceed

with these seizures even if the officer lacks any reason to suspect that a violation might be found. Importantly, these subsections do not limit officers to stopping commercial vehicles. Although sections 304.170 to 304.230 include exceptions for a few specified types of vehicles,[2] the width, height, length, and weight limitations imposed therein generally apply to ***all*** vehicles, commercial and non-commercial alike. *See* Mo. Rev. Stat. § 304.170. Furthermore, these sections do not limit the discretion of the approved officers as to the time or place of these permitted stops, they do not limit the distance an officer may order a driver to go in order to submit to the required search, and they do not limit the amount of time that an officer may prevent a driver from continuing on their journey. It is a criminal offense for a driver either to refuse to stop when signaled or otherwise to refuse orders given by the stopping officer. Mo. Rev. Stat. § 43.170.

E. The Scope of Mo. Rev. Stat. § 340.230.7, is Not Limited to Drivers or Vehicles Engaged in the Professional Commercial Trucking Industry.

Mo. Rev. Stat. § 340.230.7 is simultaneously narrower in focus and more burdensome for drivers. This subsection allows a select few members of the

[2] For example, Mo. Rev. Stat. § 304.172, exempts fire-fighting equipment, while Mo. Rev. Stat. § 304.174, exempts wreckers and tow trucks. Buses get their own specified limits in Mo. Rev. Stat. § 304.181.

Missouri State Highway Patrol to engage in the same sort of roving, suspicionless stops as authorized in the first two Challenged Subsections, but with an explicit focus on what Missouri defines as "commercial motor vehicles." Instead of merely allowing officers to check the dimensions and weight of the seized vehicle, this subsection requires the drivers to submit to inspections to determine compliance with unspecified "commercial vehicle laws, rules, and regulations." Contrary to the first two Challenged Subsections, this subsection ***does not*** explicitly authorize the relevant officers to conduct these stops "with or without probable cause" to believe that the vehicle or driver are violating the "commercial vehicle laws, rules, and regulations." Thus, separated from § 340.230.1, § 340.230.7 does not authorize officers acting pursuant to this subsection to initiate a roving stop without reasonable suspicion.

In short, sections 304.230.1, 304.230.2, and 304.230.7 collectively allow any authorized law enforcement officer on roving patrol to stop any driver, in almost any vehicle, at any time and at any place in the state, and to force that driver, on pain of criminal prosecution, to drive an unlimited distance and to otherwise delay their trip for an indeterminate amount of time—all without the officer having ***any*** reason to believe that either the seized driver or their vehicle has violated any law. The question for this Court is, are these powers compatible with the Fourth Amendment?

II. The Fourth Amendment Prohibits Roving Law Enforcement Officers From Seizing Drivers Without at Least a Reasonable Suspicion of Wrongdoing.

The Fourth Amendment to the U.S. Constitution declares that citizens have the right to be secure against unreasonable government seizures. The protections of the Fourth Amendment are made applicable against state governments through the Fourteenth Amendment to the U.S. Constitution. *Mapp v. Ohio*, 367 U.S. 643 (1961). The basic purpose of the Fourth Amendment is to safeguard the liberty, privacy and security of individuals against arbitrary and oppressive invasions by government officials. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *U.S. v. Ortiz*, 422 U.S. 891, 895 (1975).

A law enforcement officer's stoppage of a vehicle and detention of the vehicle's occupant(s) constitutes a seizure within the meaning of the Fourth and Fourteenth Amendments, even if the purpose of the stop is limited and the resulting detention is "quite brief." *Brendlin*, 551 U.S. at 255; *Prouse*, 440 U.S. at 653. A person is "seized" within the meaning of the Fourth Amendment as soon as a law enforcement officer signals for the person to pull their vehicle to the side of the road. *U.S. v. Nicholas*, 448 F.2d 622, 624 (8th Cir. 1971).

A. Legal Standard for Evaluating the Constitutionality of Vehicle Stops.

A traffic stop constitutes a "seizure" of the vehicle's occupants and therefore must be conducted in accordance with the Fourth Amendment. *Heien v. North*

Carolina, 135 S.Ct. 530, 536 (2014). Even if the purpose of a traffic stop is limited and the resulting detention quite brief, a traffic stop constitutes a "seizure" within the meaning of the Fourth Amendment and therefore must be reasonable if it is to survive constitutional scrutiny. *Prouse*, 440 U.S. at 653; *U.S. v. Martinez*, 358 F.3d 1005 (8th Cir. 2004). "[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51 (1979). The U.S. Supreme Court has made clear that even when citizens are driving vehicles, the Fourth Amendment generally requires individualized suspicion of wrongdoing before a law enforcement officer may conduct a search or seizure. *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000).

Traffic stops are measured by the standard of "objective reasonableness." *U.S. v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995). The objective standard requires a critical inquiry into "what the stopping officer observed *before* pulling over a motorist," and if it was not objectively reasonable for the officer to believe that a violation was occurring at the time the officer initiated the stop, the officer lacked reasonable suspicion sufficient to justify seizing the motorist. *U.S. v. $45,000 in U.S. Currency*, 749 F.3d 709, 715 (8th Cir. 2014) (emphasis in original). "The government bears the

burden of establishing that [reasonable suspicion] existed." *Id.* at 716. Although the U.S. Supreme Court has established a quite low bar for the evidence necessary to establish the reasonable suspicion necessary to satisfy the Fourth Amendment's requirements, the court has also found that there must be *some* evidence upon which to base "a particularized and objective basis for suspecting the particular person stopped of breaking the law." *Heien*, 135 S.Ct. at 536. Furthermore, in those rare circumstances in which a balance of interests precludes insistence on "some quantum of individualized suspicion," the U.S. Supreme Court has nonetheless demanded that there remain some safeguards in place to protect citizens' constitutional rights. *Prouse*, 440 U.S. at 655.

B. Suspicionless, Roving Seizures of Drivers and Vehicles Are Unconstitutional.

For more than forty years the U.S. Supreme Court has consistently struck down statutes and policies under which law enforcement officials subjected citizens to roving vehicle stops, even when the investigation the officials wished to conduct was brief and relatively limited. "A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Edmond*, 531 U.S. at 37. Indeed, Calzone has not identified any U.S. Supreme Court case that has found suspicionless, roving vehicle stops to be consistent with the Fourth Amendment. To the contrary, in every case of which the Appellant is aware involving roving, suspicionless seizures of drivers and their vehicles, the Supreme Court has ruled that

the Fourth Amendment requires, at a minimum, reasonable suspicion that the driver or the vehicle are in violation of some law before a law enforcement officer may constitutionally decide to pull them over.

In *Almeida-Sanchez v. U.S.*, 413 U.S. 266 (1973), the Supreme Court ruled unconstitutional a roving Border Patrol seizure of a motorist that was supported neither by probable cause nor reasonable suspicion, stating that the very predictability of tension between the needs of law enforcement and the Constitution's protections "counsels a resolute loyalty to constitutional safeguards." *Id.* at 273. The majority added that those "entitled to use the public highways[] have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.* at 274-75 (citing *Carroll v. U.S.*, 267 U.S. 132, 153-54 (1925). The government litigant in *Almeida-Sanchez* specifically relied upon "closely-regulated industry" cases (*Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970), and *U.S. v. Biswell*, 406 U.S. 311 (1972)) in its effort to justify the roving, suspicionless stops at issue in that case. The majority roundly rejected these arguments, emphasizing that "in *Colonnade* and *Biswell* the officers knew with certainty that the premises searched were in fact used for the sale of liquor or guns[, whereas in the case of roving, suspicionless vehicle seizures] there was no such assurance that the individual searched was within the proper scope of

official scrutiny." *Almeida-Sanchez* at 271. Likewise, in the instant case, the broad scope of Missouri's definition of "commercial motor vehicle" means that there is no assurance that a person driving such a vehicle will actually be part of the professional commercial trucking industry.

In *U.S. v. Brignoni-Price*, 422 U.S. 873 (1975), the Supreme Court confirmed that even where Congress had authorized roving patrol stops of vehicles in the vicinity of the Mexican border, and even when those roving patrol stops lasted "no more than a minute," and even when the law enforcement officials limited their inspections to "those parts of the vehicle that can be seen by anyone standing alongside," a roving patrol stop could only be justified under the Fourth Amendment if the officers conducting the stop had a "reasonable suspicion" that the vehicle was engaged in illegality. *Id*. at 881-82. The *Brignoni-Price* majority specifically warned that allowing roving patrols to engage in suspicionless seizures of vehicles would allow officers to "stop motorists at random for questioning, day or night, anywhere within 100 air miles of the… border, on a city street, a busy highway, or a desert road, without reason to suspect that they have violated the law." *Id*. at 883.

The U.S. Supreme Court returned to the question of random, roving vehicle stops in *Delaware v. Prouse*, 440 U.S. 648 (1979). In that case a police officer made a "routine" stop of a vehicle even though "prior to stopping the vehicle he had observed neither traffic nor equipment violations nor any suspicious activity," *Id.* at

650. The officer said he made the stop in order to check the driver's license and registration, and the state argued that these sorts of stops were constitutionally permissible ways of "promoting public safety upon its roads." *Id.* at 658. The Supreme Court acknowledged the importance of this governmental interest, but determined that there was insufficient evidence that this sort of roving traffic stop actually increased the public safety sufficiently to justify the intrusion into citizens' Fourth Amendment rights. *Id.* at 659. The *Prouse* court then directly addressed the contention that roving traffic stops might uncover mechanical problems that could endanger the public. The majority first noted that "[m]any violations of minimum vehicle-safety requirements are observable," in which case an officer could establish facts that might justify a roving traffic stop. *Id*. at 660. But the court also noted that Delaware law (and the laws of other states as well) already provided for regular safety inspections as part of vehicle registration requirements, meaning that "there is no basis for concluding that stopping even out-of-state cars for document checks substantially promotes the State's interest." *Id*. at 661. The court then put the final dagger in the State's argument:

> "To insist neither upon an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion would invite intrusions upon constitutionally guaranteed rights based on

> nothing more than inarticulate hunches. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations—or other articulable basis amounting to reasonable suspicion [of some regulatory violation]—***we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver.***" *Id.* (citations and quotes omitted) (emphasis added).

Because the State of Delaware had not shown sufficient evidence to support its contentions about the relationship between these sort of roving stops and the public safety rationale it claimed for them, the majority held "that except in those situations where there is at least articulable and reasonable suspicion that a motorist is [engaged in a regulatory violation], or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, stopping an automobile and detaining the driver… are unreasonable under the Fourth Amendment." *Id*. at 663.

Even this Court, addressing a suspicionless seizure of a vehicle and its driver, has also previously stressed that law enforcement officers may not justify such a seizure in the absence of probable cause to believe the driver had broken any laws.

In *U.S. v. Nicholas*, 448 F.2d 622 (8th Cir. 1971), police officers on patrol in St. Louis seized a driver simply because his vehicle had Nevada license plates and they wanted to know why he was in a part of the city "known for its high incidence of narcotics traffic." *Id*. at 623. For guidance the *Nicholas* court looked to the U.S. Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), which stated:

> "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences drawn from those facts, reasonably warrant that intrusion. …And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?"
>
> *Terry* at 21.

The *Nicholas* court determined that because the police in their case were not investigating any crime, had no information about the car or its occupants, and had been given no special information that would give rise to suspicions of criminal activity prior to seizing the plaintiff, the seizure violated the Fourth Amendment. *See Nicholas*, 448 F.2d at 624. Specifically, the court noted that merely invoking the words "routine police procedure" could not render police activity "exempt from the restrictions imposed by the Fourth Amendment." *Id*. at 625.

The Fourth Amendment cannot be satisfied merely by passing a law that explicitly authorizes law enforcement officials to conduct random, suspicionless, roving seizures of Missouri drivers, not even if the government claims that the law is intended to secure safe roadways. The Supreme Court squarely addressed and disposed of this issue in *Prouse*. Instead, the consistent drumbeat of the Supreme Court's precedent regarding roving vehicle stops is that they ***must*** be supported by some "particularized and objective basis for suspecting the person stopped of breaking the law." *Heien*, 135 S.Ct. at 536. Because the Challenged Subsections on their face purport to allow designated Missouri law enforcement officials to conduct roving traffic stops that ***are not*** supported by any "particularized and objective basis for suspecting the person stopped of breaking the law," this Court must find the Challenged Subsections to be facially unconstitutional under the Fourth Amendment.

III. Even Assuming That Professional Commercial Trucking Is a Closely-Regulated Industry, the Fourth Amendment Still Limits the Scope of Warrantless Searches Related to that Industry.

The U.S. Supreme Court's decision in *New York v. Burger* made clear that although the Fourth Amendment's restrictions are relaxed in the context of a closely-regulated industry, they do not go away entirely. In this case, the Government has made the fatal error of assuming that every person who might drive a vehicle that falls within Missouri's broad definition of "commercial vehicle" may be considered

a participant the "commercial trucking industry." This proposition not only defies the very idea of a discrete "industry" subject to regulation, it also ignores the reasons courts have given for concluding that certain inspection schemes related to the "commercial trucking industry" satisfy the *Burger* test.

The first and most important reason this Court and other federal circuit courts have found some inspection schemes compliant with the Fourth Amendment is that the inspections were focused on persons and vehicles actually engaged in the business of professional commercial trucking. The Missouri scheme challenged in the instant case is not so limited. But even if the challenged provisions limited their scope to persons and vehicles engaged in the business of professional commercial trucking, they would still be unconstitutional because they do not adequately limit the "time, place, or scope" of the inspections, nor do they significantly limit the inspecting officers' discretion in choosing which vehicles to subject to roving, suspicionless stops.

A. Federal Circuit Court Decisions Relating to Commercial Trucking as a Closely-Regulated Industry Have Dealt with Persons and Vehicles Transporting Cargo for Hire or Hazardous Materials.

Most of the cases in other federal circuits that have addressed the question of whether "commercial trucking" constitutes a closely-regulated industry clearly involved persons and vehicles that were either involved in the business of transporting commercial cargo for hire or transporting hazardous materials subject

to federal regulations. *See, e.g.*, *U.S. v. Hernandez*, 901 F.2d 1217, 1221 (5th Cir. 1990); *U.S. v. Domingo-Prieto*, 923 F.2d 464, 468-69 (6th Cir. 1991); *V-1 Oil Co. v. Means*, 94 F.3d 1420, 1423 (10th Cir. 1996); *U.S. v. Fort*, 248 F.3d 475, 481 (5th Cir. 2001); *U.S. v. Maldonado*, 356 F.3d 130, 135-36 (1st Cir. 2004); *U.S. v. Delgado*, 545 F.3d 1195, 1202 (9th Cir. 2008). The "commercial trucking" cases decided by this Court have also clearly involved persons and vehicles that were engaged in the business of transporting commercial cargo and subject to federal regulations. *See U.S. v. Knight*, 306 F.3d 534 (8th Cir. 2002); *U.S. v. Mendoza-Gonzalez*, 363 F.3d 788 (8th Cir. 2004); *U.S. v. Ruiz*, 569 F.3d 355 (8th Cir. 2009); *U.S. v. Parker*, 587 F.3d 871 (8th Cir. 2009). None of the above cases, however, suggest that law enforcement officers may treat as part of a closely-regulated "commercial trucking industry" a citizen or vehicle that is neither engaged in the business of transporting commercial cargo nor subject to federal trucking regulations. Thus, assuming solely for the sake of argument that all of the above cases were correctly decided, those cases do not stand for the proposition that the Fourth Amendment allows Missouri to treat anyone who drives a pickup truck as if they were subject to the same regulations that govern professional commercial truckers who make a living transporting cargo across state lines.

B. The Tenth Circuit Has Provided the Proper Framework for Assessing a Case Such as This, in Which Driver and Vehicle are Not Engaged in the Business of Transporting Cargo for Hire or Hazardous Materials.

The Tenth Circuit has provided the appropriate analytical framework for considering this question. In *U.S. v. Seslar*, 996 F.2d 1058 (10th Cir. 1993), a Kansas Highway Patrol trooper pulled over a citizen who was driving a Ryder rental truck. Although the officer had no reason to believe the driver or vehicle were violating any law, he seized the vehicle and driver "to determine whether [the truck] was hauling a commercial load" and whether the driver had the permits required by Kansas law. *Id*. at 1060. Although the statute at issue in *Seslar* generally focused on commercial motor carriers, it also expressly permitted highway patrol officers to stop "trucks" for the purpose of ensuring that they complied with applicable state laws. *Id*. at 1061-62. The government in *Seslar* did not argue that the persons driving the Ryder truck were part of "the regulated class of motor carriers," but instead attempted to justify the suspicionless seizure by referring to the authority the statute granted "to stop any truck, whether operated by a motor carrier or not, to first determine whether it is carrying a commercial load." *Id.* at 1062. The Tenth Circuit concluded that because the drivers in *Seslar* were not, in fact, persons transporting people or cargo for compensation, they "did ***not*** have the reduced expectation of privacy of persons in a closely regulated industry." *Id*. at 1063 (emphasis in original).

Having determined that the "closely regulated industry" exemption did not apply, the panel relied upon *Delaware v. Prouse*, 440 U.S. 648 (1979), and rejected the idea that a state government could authorize law enforcement officers "to stop ***any*** vehicle at ***any*** time." The Court held the trooper had violated the Fourth Amendment because the trooper had initiated his suspicionless stop without following "any meaningful standards or guidelines" to determine which vehicles to stop. *Id*.

Several years later, the Tenth Circuit came to a similar conclusion in *U.S. v. Herrera*, 444 F.3d 1238 (10th Cir. 2006). In *Herrera*, a Kansas state trooper had pulled over a truck driver "pursuant to a Kansas regulatory scheme that permits random inspections of certain commercial vehicles." *Id.* at 1240. The trooper mistakenly believed that the driver was acting as a "private motor carrier of property," but the Court concluded that "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 (emphasis in original). Relying on its conclusion in *Seslar*, the Tenth Circuit concluded that the "pervasively regulated business" exception to the Fourth Amendment's protections cannot apply where an individual has not knowingly and voluntarily decided to engage in such a pervasively regulated business. *See id*. at 1246.

C. Calzone and a Great Many Others Who Drive Vehicles Defined as "Commercial Motor Vehicles" are Not Engaged in the Business of Transporting Hazardous Materials or Commercial Cargo for Hire.

Calzone only uses his truck on occasion, and when he does it is for the purpose of hauling animal feed or other harmless materials associated with the operation of his small ranch. He does not hire himself or his truck out to others for driving purposes, nor has the Government even suggested that he does so. Calzone does not use the truck to carry cargo across state lines. He is only authorized to operate his truck within a fifty-mile radius of his home. He is not in any way engaged in the business of commercial trucking nor does he use his truck in interstate commerce.

In this case the Defendants have not made any effort to dispute the fact that Calzone does not act as a common carrier or otherwise use his truck for hire. As was the situation in *Seslar*, the Challenged Subsections authorize law enforcement officials to stop almost any vehicle, even if there is no reason to believe that the driver or vehicle are in violation of any laws. The Defendants have not identified any meaningful standards or guidelines to limit the discretion of the roving patrol officers in deciding which vehicles to seize, and the trooper who seized Calzone and his truck had no individualized, reasonable suspicion that Calzone or his truck were in violation of any state laws.

In every federal circuit case on which the Government is likely to rely for the proposition that the commercial trucking industry is closely-regulated, it was

understood and accepted that the party subjected to the suspicionless search was, in fact, a professional commercial trucker. *See, e.g.*, *Ruiz*, 569 F.3d at 356 (professional motor carrier stopped at a permanent weigh station); *Mendoza-Gonzalez*, 363 F.3d at 791 (professional motor carrier stopped at a permanent weigh station); *V-1 Oil Co.*, 94 F.3d at 1422 (professional motor carrier hauling hazardous materials stopped with probable cause by roving patrol officer); *Dominguez-Prieto*, 923 F.2d at 466 (professional motor carrier stopped at permanent weigh station); *Delgado*, 545 F.3d 1195, 1198 (professional motor carrier stopped without probable cause by roving patrol officer); *Maldonado*, 356 F.3d at 132 (professional motor carrier stopped with probable cause by roving patrol officer); *Fort*, 248 F.3d at 478 (professional motor carrier stopped without probable cause by roving patrol officer); *see also State v. Rodriguez*, 877 S.W.2d 106, 107 (Mo. banc 1994) (professional motor carrier stopped at permanent weigh station). What distinguishes *Seslar* and *Herrera* from those cases—and what distinguishes ***this*** case—is that there was not even any suggestion that Calzone acts as a common carrier or uses his truck to transport people or cargo for compensation. This Court should follow *Seslar* and *Herrera*, concluding that the Challenged Subsections are unconstitutional because they authorize law enforcement officials on roving patrol to seize citizens and vehicles that are not part of a "closely-regulated industry" and without establishing any reasonable suspicion that the driver or vehicle are in violation of any law.

IV. Calzone Has Standing to Challenge the Validity of Each of the Challenged Provisions.

A party facing prospective injury has standing to challenge the facial validity of a law where the threatened injury is real, immediate, and direct. *Keller v. City of Fremont*, 719 F.3d 931, 947 (8th Cir. 2013). "To satisfy Article III standing requirements… 'the party must show it has suffered some actual or threatened injury that can be traced back to the allegedly illegal conduct and that it is capable of being redressed.'" *Id.*

Mo. Rev. Stat. § 304.230.1, authorizes certain law enforcement officials on roving patrol to require the driver of almost any "vehicle operated upon" Missouri highways and interstates[3] "to stop, drive, or otherwise move to a location to determine compliance" with Missouri's vehicular size and weight limits, explicitly stating that the officer may make such a stop "with or without probable cause to believe that" the vehicle's size and weight exceeds those limits. Mo. Rev. Stat. § 304.230.2, similarly authorizes specified law enforcement officials "to stop any such conveyance or vehicle as above described upon the public highway" in order to discern if the vehicle is overloaded. Only a handful of vehicle types are exempted from the state's size and weight limitations, see Mo. Rev. Stat. § 304.170.12—all

[3] Mo. Rev. Stat. § 304.170.

other Missouri drivers are subject to a suspicionless seizure and search as authorized in the first two subsections of Mo. Rev. Stat. § 304.230.

The trial court held that Calzone did not have standing to challenge these first two subsections, although it is not clear how or why the trial court arrived at this conclusion. It cited *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), in which the U.S. Supreme Court concluded that opponents of same-sex marriage were not likely to suffer any concrete and particularized injury if the state of California recognized same-sex marriages. Unlike the petitioners in *Hollingsworth*, Calzone has a very concrete stake in whether Missouri will continue to allow law enforcement officers on roving patrol to seize and search vehicles and drivers even if there is no suspicion of any wrongdoing, because Calzone continues to be subject to the exercises of power authorized in Mo. Rev. Stat. §§ 304.230.1 and 304.230.2, in the same way that, unless and until this Court strikes down the Challenged Subsections as unconstitutional, he continues to be subject to the exercises of power authorized in Mo. Rev. Stat. § 304.230.7. Furthermore, even if this Court should rule Mo. Rev. Stat. § 304.230.7 unconstitutional, if the Court fails to address the constitutional invalidity of the first two subsections the Government would still be able to conduct suspicionless stops of almost all persons and vehicles driving on Missouri highways. The only way for the Court to end this threat to Missourians' Fourth Amendment rights is to rule all three of the Challenged Subsections unconstitutional.

CONCLUSION

> "Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. … Were the individual subject to unfettered governmental intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed." *Prouse*, 440 U.S. at 663.

These words are as true now as they were when Justice White wrote them. The Challenged Subsections render almost every driver in Missouri subject to unfettered governmental intrusion every time he or she enters an automobile and gets on a highway or interstate. The district court erred in denying Calzone's motion for summary judgment and in granting summary judgment in favor of the Government; this Court should reverse the district court and enter judgment in favor of Calzone.

Respectfully submitted this 9th day of December, 2016.

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CERTIFICATE OF COMPLIANCE

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I certify that a copy of the forgoing was filed electronically with the Clerk and delivered by operation of the CM/ECF system to the counsel of record on December 9, 2016.