

No. 19-551

In The
Supreme Court of the United States

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RONALD CALZONE,

Petitioner,

v.

ERIC T. OLSON, in his official capacity as
Superintendent of the Missouri State Highway Patrol,

Respondent.

—◆—

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—

REPLY BRIEF FOR PETITIONER

—◆—

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. The Government’s brief confirmed that the Eighth Circuit has dramatically expanded the “closely regulated industry” exception to the Fourth Amendment	1
II. Calzone does not contest the Eighth Circuit’s conclusions regarding which state and federal regulations apply to his farm vehicle and which do not.....	4
III. The Government’s brief misconstrued the second question Calzone presented for review	8
IV. The circuits are split on the question of whether the Fourth Amendment allows executive or administrative officers in the field to exercise unfettered discretion as to whom they will subject to warrantless searches and seizures	10
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Marshall v. Barlow’s, Inc.</i> , 436 U.S. 307 (1978)	2
<i>New York v. Burger</i> , 482 U.S. 691 (1987)	10
<i>Tarabochia v. Adkins</i> , 766 F.3d 1115 (9th Cir. 2014).....	11
<i>U.S. v. Delgado</i> , 545 F.3d 1195 (9th Cir. 2008).....	3
<i>U.S. v. Dominguez-Prieto</i> , 923 F.2d 464 (6th Cir. 1991).....	2
<i>U.S. v. Fort</i> , 248 F.3d 475 (5th Cir. 2001).....	2, 3, 10
<i>U.S. v. Maldonado</i> , 356 F.3d 130 (1st Cir. 2004)	3
<i>U.S. v. Ruiz</i> , 539 F.3d 355 (8th Cir. 2009).....	3
<i>U.S. v. Vasquez-Castillo</i> , 258 F.3d 1207 (10th Cir. 2001).....	3
<i>Zadeh v. Robinson</i> , 928 F.3d 457 (5th Cir. 2019).....	10, 11
STATUTES AND REGULATIONS	
49 C.F.R. §§ 390.1-7	5
49 C.F.R. §§ 391.2(c)-(d)	7
49 C.F.R. §§ 392.1-9	5

TABLE OF AUTHORITIES – Continued

	Page
49 C.F.R. § 393	5
49 C.F.R. § 395.1(s)	7
49 C.F.R. § 396.1(c)	7
Mo. Rev. Stat. § 300.550.....	5
Mo. Rev. Stat. § 301.030.3.....	5, 7
Mo. Rev. Stat. § 301.058.1.....	6
Mo. Rev. Stat. § 302.700.2(23)	6
Mo. Rev. Stat. § 302.700.2(29)	6
Mo. Rev. Stat. § 302.775(1)	6
Mo. Rev. Stat. §§ 304.170-.230.....	6
Mo. Rev. Stat. § 307.400.1(1)	6
Mo. Rev. Stat. § 307.400.1(2)	6
Mo. Rev. Stat. § 390.020(23)	6, 7
Mo. Rev. Stat. § 390.030.3.....	7
 CONSTITUTIONAL PROVISIONS	
Fourth Amendment to the U.S. Constitution	<i>passim</i>

ARGUMENT

Calzone’s Petition for a Writ of Certiorari identified two important, squarely-presented questions about the proper application of the Fourth Amendment’s protections against unreasonable searches and seizures. The answers to these questions will impact a vast number of people nationwide who are uncertain of the extent to which they can rely on the Fourth Amendment to protect them against suspicionless “administrative” searches and seizures. The Government’s Brief in Opposition confirms the confusion among the lower courts as to the two questions Calzone has presented. Consequently, this Court should grant Calzone’s Petition.

I. The Government’s brief confirmed that the Eighth Circuit has dramatically expanded the “closely regulated industry” exception to the Fourth Amendment.

Calzone emphasized in his Petition that he is a *farmer*, not a professional commercial trucker, and that the lower courts conceded that he is not engaged in a business tied to the professional commercial trucking industry. Pet. at 7, 10-11, 18; App. 14. In its Brief in Opposition the Government made no effort to rebut these points, nor did it address this Court’s precedents indicating that the “closely regulated industry” exception to the Fourth Amendment depends on the idea that a person voluntarily waives their right against unreasonable searches and seizures by going into business in an industry that historically has been subject

to pervasive regulation. Pet. 10-12. Without trying to harmonize the Eighth Circuit’s ruling with those precedents, the Government implied that the relevant question is whether one possesses or uses *an object* that is subject to regulation (in this case, a commercial motor vehicle), rather than whether one is doing business in *an industry* whose *participants* are subject to pervasive regulation (in this case, the professional commercial trucking industry).¹ Opp. Br. 5-9.

The Government’s brief cited six cases in support of the idea that one waives their Fourth Amendment protections simply by owning or operating what the law defines as a “commercial motor vehicle.” Each of these cases, however, involved *professional commercial truckers*—persons who were (or at least claimed to be) engaged in the business of driving trucks for hire.

- *U.S. v. Dominguez-Prieto*, 923 F.2d 464 (6th Cir. 1991), involved a professional commercial trucker who was driving a refrigerated tractor-trailer from Houston, Texas, to New York City when he was stopped at a truck inspection station. *Id.* at 466.
- *U.S. v. Fort*, 248 F.3d 475 (5th Cir. 2001), involved a professional commercial trucker who was driving a tractor-trailer with markings on the side that said “Bama Trucking” when he

¹ Calzone concedes for the purposes of this Petition that those who have chosen to participate in businesses tied to the professional commercial trucking industry might be said to have “voluntarily chosen to submit [themselves] to a full arsenal of government regulation.” *See Marshall v. Barlow’s Inc.*, 436 U.S. 307, 313 (1978).

was stopped by an officer on roving patrol. See *U.S. v. Fort*, 81 F.Supp.2d 694, 696 n.3 (N.D. Tex. 2000).

- *U.S. v. Vasquez-Castillo*, 258 F.3d 1207 (10th Cir. 2001), involved a professional commercial carrier who was transporting cargo across state lines when his vehicle stopped at a permanent point of entry inspection station in New Mexico. *Id.* at 1209.
- *U.S. v. Maldonado*, 356 F.3d 130 (1st Cir. 2004), involved a professional motor carrier who was transporting cargo across state lines using an “Allied Van Lines” truck when he was stopped by a roving patrol officer for speeding. *Id.* at 132-33.
- *U.S. v. Delgado*, 545 F.3d 1195 (9th Cir. 2008), involved a professional motor carrier who claimed to be carrying cargo across state lines when he was subjected to a suspicionless roving stop. *Id.* at 1198-1200.
- *U.S. v. Ruiz*, 569 F.3d 355 (8th Cir. 2009), involved a professional motor carrier whose vehicle stopped at a weigh station and was searched pursuant to the Arkansas Motor Carrier Act. *Id.* at 356-57.

Because these cases all involved persons actually doing business in the professional commercial trucking industry, they are quite distinct from the Eighth Circuit’s conclusion that the “closely regulated industry” exception applies to someone who *has not* chosen to engage in a business tied to that industry.

The Government's brief illustrates precisely the problem Calzone identified in his Petition. To the best of Calzone's knowledge, neither this Court nor any of the other federal circuit courts of appeals have ever suggested that the closely regulated industry exception might strip a person of their Fourth Amendment protections even though they have not chosen to participate in a business related to a closely regulated industry. The Eighth Circuit's ruling disregards this Court's precedents emphasizing the carefully limited nature of the "closely regulated industry" exception and its focus on those who have chosen to do business in such an industry. This significantly diminishes the Fourth Amendment as a useful safeguard for citizens against unreasonable searches and seizures. The Court should grant this Petition in order to provide lower courts much-needed guidance regarding the proper scope of the Fourth Amendment's protections.

II. Calzone does not contest the Eighth Circuit's conclusions regarding which state and federal regulations apply to his farm vehicle and which do not.

The Government argued in its brief that the Court should decline review of this case because it would require a "blow-by-blow analysis of Missouri's regulatory scheme as applied to Calzone." Opp. Br. 11. Not at all. For the purposes of this Court's review, Calzone presumes that the Eighth Circuit reached the correct conclusion regarding which regulations apply to him and

his farm vehicle and which do not.² Thus, in reviewing this case, the Court should presume that the Eighth Circuit was correct in holding that even though Calzone is not engaged in a business tied to the professional commercial trucking industry, the following laws apply to him and his farm vehicle:

- Federal rules describing to whom Federal Motor Carrier Safety Regulations apply, defining terms used in those regulations, and establishing rules of construction for those regulations. 49 C.F.R. §§ 390.1-7. App. 8.
- Federal rules regarding the safe operation of commercial motor vehicles. 49 C.F.R. § 392.1-.9. App. 8.
- Federal rules identifying parts and accessories required for safe operation of commercial motor vehicles. 49 C.F.R. § 393. App. 8.
- A Missouri statute allowing cities to deny commercial vehicles the use of certain streets. Mo. Rev. Stat. § 300.550. App. 8.
- A Missouri statute requiring commercial vehicles to be registered with the state. Mo. Rev. Stat. § 301.030.3. App. 8.

² The Government's brief repeatedly implied that "farm truck" and "commercial motor vehicle" are mutually exclusive categories. Opp. Br. 1, 8, 10. As the courts below acknowledged, both state and federal statutes (1) recognize "farm vehicle" as a sub-category of commercial motor vehicle and (2) exempt those vehicles and their operators from certain regulatory requirements. App. 7-8, 17.

- A Missouri statute requiring commercial vehicle owners to pay an annual registration fee. Mo. Rev. Stat. § 301.058.1. App. 8.
- Missouri statutes making all vehicles (not just commercial vehicles) subject to height, weight, and length restrictions. Mo. Rev. Stat. §§ 304.170-.230. App. 8.
- A Missouri statute requiring “[e]very commercial motor vehicle and trailer and all parts thereof [to] be maintained in a safe condition at all times[.]” Mo. Rev. Stat. § 307.400.1(1). App. 8.
- A Missouri statute requiring “[a]ccidents arising from or in connection with the operation of commercial motor vehicles and trailers [to] be reported to the department of public safety in such detail and in such manner as the director may require.” Mo. Rev. Stat. § 307.400.1(2). App. 8.

Likewise, this Court should also presume that the Eighth Circuit was correct in holding that Calzone and his farm vehicle are exempt from certain regulations that apply to professional commercial truckers, including:

- Missouri’s Uniform Commercial Driver’s License Act.³ Mo. Rev. Stat. §§ 302.700.2(23), 302.775(1). App. 7.

³ Unless he is transporting hazardous materials as defined by Mo. Rev. Stat. § 302.700.2(29).

- Missouri Revised Statutes Chapter 390, which governs operators who are defined as “motor carriers” under Missouri law.⁴ Mo. Rev. Stat. § 390.030.3. App. 7.
- Federal regulations establishing minimum qualifications for persons who drive commercial motor vehicles as, for, or on behalf of motor carriers. 49 C.F.R. §§ 391.2(c)-(d). App. 7.
- Federal regulations limiting hours for drivers and requiring the maintenance of records regarding a driver’s hours. 49 C.F.R. § 395.1(s). App. 7.
- Federal regulations governing the inspection, repair, and maintenance of commercial vehicles. 49 C.F.R. § 396.1(c). App. 7-8.

Calzone’s first question presented focuses solely on the circuit court’s conclusion that Calzone voluntarily surrendered his Fourth Amendment protections by acceding to the limited set of regulations the Eighth Circuit identified, even though that list is nothing like the “full arsenal of government regulation” that would have applied if Calzone had chosen to do business transporting people or property for hire. The Court can and should answer Calzone’s first question presented without re-litigating which regulations apply to Calzone and his farm vehicle and which do not.

⁴ Calzone is a “private carrier” as defined by Mo. Rev. Stat. § 390.020(23). App. 7.

III. The Government's brief misconstrued the second question Calzone presented for review.

The Government suggested that Calzone's second question is whether the Fourth Amendment "allow[s] random roadside inspections of commercial motor vehicles." Opp. Br. at i. This is untrue. Calzone is asking this Court to determine whether the Fourth Amendment allows executive or administrative officers in the field to exercise unlimited discretion as to whom the officers will subject to a warrantless search or seizure. This question has been part of Calzone's case from the outset. His Complaint emphasized that the "seizure of Calzone and his vehicle was conducted solely at [the officer's] own discretion" and that "no statute, regulation, or policy limits the discretion that [the relevant statute] grants to a highway patrol officer who wishes to pull over a commercial vehicle and to demand that its driver submit to an inspection[.]" Complaint, ¶¶ 17, 74. The record establishes that, as Calzone alleged, the Government did not limit the officer's discretion to stop any commercial vehicle he saw fit. Rather than using its brief to dispute this point, the Government affirmed its position that the Fourth Amendment allows an executive or administrative officer to have unfettered discretion in selecting targets for suspicionless stops, so long as some law or policy limits the scope of the search once a target has been selected. Opp. Br. 2, 11-12, 14. This is, in fact, the precise question on which lower courts are divided.

In light of the Government’s attempted reformulation of this question, it is also important to note that *the Government has never claimed that the officer’s seizure of Calzone and his vehicle was random*. To the contrary, the record shows that the officer stopped Calzone for a specific, non-random reason—the officer “did not recognize the truck or the markings displayed on the vehicle.” App. 11, 35-36. The non-random nature of the stop at issue in this case squarely presents the question of whether the Fourth Amendment allows executive or administrative officers in the field to exercise such unfettered discretion in choosing whom the officers will subject to a warrantless search or seizure.⁵ The Court should grant certiorari as to this question because its answer will provide important, needed guidance to citizens and to law enforcement entities nationwide.

⁵ The Government tries to obscure the circuit split as to Calzone’s second question presented by citing cases that do not address that question. The Government’s discussion of random stops of commercial vehicles has no bearing on Calzone’s Petition because the Government has always acknowledged that the officer’s stop of Calzone was *not* random.

IV. The circuits are split on the question of whether the Fourth Amendment allows executive or administrative officers in the field to exercise unfettered discretion as to whom they will subject to warrantless searches and seizures.

The Government’s brief claimed that in *U.S. v. Fort* the Fifth Circuit “upheld officers’ ‘unfettered discretion in deciding to make [a] stop in order to perform [an] inspection.’” Opp. Br. 14. But the part of the case the Government cited is limited to addressing whether warrantless stops and inspections might be “necessary” to promote the state’s regulation of the professional commercial trucking industry. See *Fort*, 248 F.3d at 481-82. Indeed, when the Fifth Circuit turned to address the third prong of the *New York v. Burger*, 482 U.S. 691 (1987) test, it *avoided* the question of whether the Fourth Amendment allows unfettered discretion as to whom a law enforcement officer in the field would subject to a suspicionless stop, instead relying on “background testimony” to conclude that the officer who conducted the stop was justified in believing that the vehicle he was stopping had a flat tire. *Id.* at 482; see also *id.* at 484 (Jolly, J., dissenting). Because the majority in *Fort* determined that the officer in that case had a specific reason to make the stop, the Fifth Circuit had no need to “overrule” that case when it decided *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019), which *did* directly address Calzone’s second question presented. In *Zadeh*, the Fifth Circuit held that although the state had adopted statutes that granted

certain officials authority to subpoena records and inspect facilities related to a closely regulated industry (pain management clinics), and although the statutes imposed significant restrictions regarding these administrative searches, they still violated the Fourth Amendment because they did not limit the administrative officers' discretion as to which records or clinics they would seize or search. *Id.* at 467-68.

Upon further consideration, although the Ninth Circuit in *Tarabochia v. Adkins*, 766 F.3d 115 (9th Cir. 2014), did state (1) that the suspicionless vehicle stop of participants in a closely regulated industry violated the Fourth Amendment and (2) that the claimed statutory authorization for such a search would be unconstitutional for failure to provide "any standards to guide inspectors either in their selection of automobiles to be searched or in the exercise of their authority to search," the latter part of the court's analysis was not necessary to the resolution of the case. *Tarabochia* remains useful because the reasoning of the panel in that case clearly did not align with the way the Sixth, Eighth, and Eleventh Circuits have addressed the same issue, but Calzone no longer relies on that case as evidence of a definitive split among those circuits.

That said, Calzone has nonetheless identified a clear split between the Sixth, Eighth, and Eleventh Circuits and the *Fifth* Circuit as to the question of whether the Fourth Amendment allows executive or administrative officials in the field to exercise unlimited discretion as to whom they will subject to warrantless searches and seizures. In light of that circuit split and

the general importance of this constitutional question, as explained in pages 13 to 18 of the Petition, the Court should grant Calzone's Petition and resolve the brewing confusion among the lower courts.



CONCLUSION

The Court should grant Calzone's Petition.

Respectfully submitted,

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