PIZZA DI JOEY, LLC, *et al.*	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MAYOR AND CITY COUNCIL OF BALTIMORE	*	BALTIMORE CITY
	*	CASE NO.: 24-C-16-002852
Defendant.	*	

* * * * * * * * * * * * * *

THE MAYOR AND CITY COUNCIL OF BALTIMORE'S
MOTION TO DISMISS AND REQUEST FOR HEARING

The Mayor and City Council of Baltimore (the "City"), by its attorneys, Mark J. Dimenna, Assistant Solicitor, and Glen K. Allen, Assistant Solicitor, and pursuant to Md. Rules 2-311 and 2-322, respectfully requests that this Honorable Court dismiss the Complaint, with prejudice and without leave to amend. The grounds for this request are:

1. The Complaint fails to state a claim upon which relief can be granted.

2. The 300-foot rule is a local economic regulation that is subject to rational basis review.

3. Under rational basis review, a challenged regulation satisfies equal protection and due process requirements if the regulation is rationally related to a legitimate government interest.

4. Advancing the general welfare of the city is a legitimate government interest.

5. The 300-foot rule is rationally related to furthering that legitimate government interest.

6. The Complaint fails to identify a Constitutionally fundamental right of which Plaintiffs were allegedly deprived.

7. There are no material facts in dispute that would preclude judgment, and therefore, the City is entitled to judgment as a matter of law.

8. These reasons are further set forth in the accompanying memorandum of law incorporated herein by reference.

WHEREFORE, the City requests that this Honorable Court dismiss the Complaint, with prejudice and without leave to amend.

Respectfully Submitted,

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REQUEST FOR HEARING

The Mayor and City Council of Baltimore hereby requests a hearing on its Motion to Dismiss Plaintiffs' Complaint.

MARK J. DIMENNA

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of July, 2016, copies of ***The Mayor and City Council of Baltimore's Motion to Dismiss and Request for Hearing***, ***Memorandum of Law in Support of the Mayor and City Council of Baltimore's Motion to Dismiss*** and proposed ***Order*** were mailed first class, postage prepaid to:

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* * * * * * * * * * * * * *

ORDER

Upon the foregoing Motion to Dismiss, Memorandum of Law in Support of the Motion, any opposition thereto, and any oral argument thereon, it is this _____ day of _____, 2016, by the Circuit Court for Baltimore City,

ORDERED that the Motion of Defendant Mayor and City Council of Baltimore to dismiss Plaintiffs' Complaint be and is hereby **GRANTED**; and

IT IS FURTHER ORDERED that judgment be entered in favor of Defendant Mayor and City Council of Baltimore in the above captioned matter. Costs to be paid by the Plaintiff.

_____

JUDGE, Circuit Court for Baltimore City

PIZZA DI JOEY, LLC, *et al.*	*	IN THE
Plaintiffs,	*	CIRCUIT COURT
v.	*	FOR
MAYOR AND CITY COUNCIL OF BALTIMORE	*	BALTIMORE CITY
	*	CASE NO.: 24-C-16-002852
Defendant.	*	

* * * * * * * * * * * * * *

MEMORANDUM OF LAW IN SUPPORT OF THE MAYOR AND CITY COUNCIL OF BALTIMORE'S MOTION TO DISMISS

The Mayor and City Council of Baltimore (the "City"), by undersigned counsel, submits this memorandum of law in support of its motion to dismiss.

INTRODUCTORY STATEMENT

Freedom, opportunity, hard work and prosperity are aspects of the entrepreneurial spirit and ethos unique to this country. The right to earn a living is essential to the American Dream, but the role government plays in protecting this dream for everyone has been debated since the signing of the Declaration of Independence. While some may wish to live in a society where egalitarian principles prevail without the need of governmental restriction, the reality is that it is necessary for government to protect the general welfare of society.

The concept of the general welfare is as broad as the ethos that defines our nation. "The values it represents are spiritual as well as physical, aesthetic as well as monetary," and "[i]t is within the power of the [government] to determine that the community should be beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully protected." *See Berman v. Parker*, 348 U.S. 26, 33 (1954) (citations omitted). The case at bar is a perfect illustration of a legislature using its discretion to pass a law designed to promote the general welfare of an entire

community, while not arbitrarily restricting private interests that also provide a benefit to the public.

The food truck industry exhibits an entrepreneurial spirit that is a welcome addition to the City's local economy. Those that follow this industry know that the culinary creations coming from food trucks are often diverse and delectable. The City has made efforts, such as issuing loans, similar to the $20,000 loan issued to Mr. Vanoni, to foster the entrepreneurial spirit that animates the food truck industry. Food trucks are lively temporary additions to the locales where they post on any given day. Yet, by their very nature, food trucks are mobile and simply cannot provide the same benefits to a community as permanently fixed restaurants.

In order to protect the general welfare of the *entire* community, the City passed food truck legislation that includes an aptly named 300-foot rule. The City's 300-foot rule is a narrow limitation placed on mobile vendors that does not unduly restrict their ability to earn a living. Ignoring a more balanced and comprehensive view, one may come to the narrow conclusion, just as the Plaintiffs have done, that the 300-foot rule is naked "economic protectionism" designed to transfer wealth from the consumer to favored private interests. But invoking that term in this case is mere wordsmithing designed to demonize the City. Rather, the 300-foot rule is rationally related to legitimate government interests and does not deprive the Plaintiffs of equal protection and due process guaranteed by Article 24 of the Maryland Constitution's Declaration of Rights.

SUMMARY OF THE COMPLAINT

In Baltimore "[a] mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor." Baltimore City Code, Art. 15, §

17-33. When it rewrote much of the City's mobile vending laws in 2014, the legislature opted to keep this 300-foot rule that was originally enacted in 1966.

Pizza di Joey, LLC ("Pizza di Joey"), owned and operated by Joseph Salek-Nejad ("Mr. Vanoni"), is a food truck primarily engaged in selling pizza. *See* Complaint ¶¶ 4-6. Pizza di Joey is licensed to operate in Baltimore, but Mr. Vanoni alleges that due to the 300-foot rule, there are many locations in the City that are off-limits to his food truck. *See* Complaint ¶¶ 74, 82-83. Madame, BBQ, LLC ("Madame BBQ"), owned and operated by Nicole McGowan ("Ms. McGowan"), is a food truck primarily engaged in selling barbeque. *See* Complaint ¶¶ 8-12. Madame BBQ is currently not licensed to regularly operate in Baltimore.[1] *See* Complaint ¶ 11. Ms. McGowan contends that but for the 300-foot rule, she would regularly operate in Baltimore. *See* Complaint ¶ 44.

The Plaintiffs allege that the 300-foot rule creates "thousands of 'no-vending' zones" throughout Baltimore. *See* Complaint ¶ 68. Additionally, the Plaintiffs allege that the 300-foot rule requires them to operate "in less desirable locations" and away from "those locations best for attracting potential customers."[2] *See* Complaint ¶¶ 84 and 89. In other words, the best locations

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[1] Madame BBQ applied for a license to operate in Baltimore one day prior to the filing of the Complaint.

[2] Specifically, the Complaint alleges that due to existing pizzerias, Pizza di Joey is prohibited from operating at 818 N. Calvert St., the corner of S. Broadway and Aliceanna Street ("Fells Point") and 1110 S. Charles Street ("Mad River Bar and Grill"). *See* Complaint ¶¶ 74, 82-83. But, the Complaint does not acknowledge that a food truck cannot operate in a residential area, such as the 800 block of N. Calvert Street. *See* Baltimore City Code Art. 15, § 17-35. Additionally, without even addressing that Mad River Bar and Grill is not primarily engaged in selling pizza, no food truck can operate at the Fells Point and Mad River Bar and Grill locations since both are within two blocks of a City market. *See* Baltimore City Code Art. 15, § 17-37. As to Madame BBQ, due to existing barbeque restaurants, it allegedly cannot operate at 1125 S. Charles St. or 146 S. Charles Street. *See* Complaint ¶ 75. Just like the Mad River Bar and Grill location, 1125 S. Charles St. is within two blocks of a City market and no food truck can operate at this location. *See* Baltimore City Code Art. 15, § 17-37. 146 S. Charles St. is not an address registered with the State Department of Assessments and Taxation. The Bank of America building, located at 100 S. Charles St., is the closest address, and there are no barbeque restaurants located there. In any event, the 100 block of S. Charles St. is within two block of the mobile vending zone located at N. Charles St. and E. Fayette St. making it unavailable to all food trucks. *See* Baltimore City Code Art., § 17-32.

for Pizza di Joey are within 300 feet of existing pizzerias, and the best locations for Madame BBQ are within 300 feet of existing barbeque restaurants.

Neither of the Plaintiffs allege that they have ever received a citation in violation of the 300-foot rule, but Mr. Vanoni does allege that on one occasion an interaction concerning this regulation occurred between him and the Baltimore Police Department.[3] *See* Complaint ¶ 62. Furthermore, neither of the Plaintiffs personally knows of anyone that has received a citation in violation of the 300-foot rule.

The Plaintiffs view the 300-foot rule as an arbitrary and irrational law that interferes with their right to earn a living. The allegations go on to state that the rule does not "advance any public health or safety purpose, or any other legitimate government interest," but merely serves the sole purpose of protecting "brick-and-mortar businesses from competition by mobile vendors." *See* Complaint ¶¶ 79-80. For those reasons, Plaintiffs contend that the 300-foot rule violates their rights to equal protection and due process guaranteed by Article 24 of the Maryland Constitution's Declaration of Rights.

Plaintiffs' contentions notwithstanding, as a matter of fact and law, the 300 foot-rule *is* rationally related to legitimate government interests. Accordingly, the 300-foot rule does not infringe upon the equal protection and due process rights guaranteed to Plaintiffs, and their Complaint fails to state a claim upon which relief can be granted.

STANDARD OF REVIEW

"In order to withstand a motion to dismiss for failure to state a [claim], the plaintiff must allege facts that, if proved, would entitle him or her to relief." *Pittway Corp v. Collins*, 409 Md.

[3] Interestingly, the Baltimore Police Department is not the agency that enforces the City's food truck rules or regulations.

218, 238-239 (2009). Further, "the facts comprising the cause of action must be pleaded with sufficient specificity. Bald assertions and conclusory statements by the pleader will not suffice." *Ruffin Hotel Corp. of Md. v. Gasper*, 418 M. 594, 614 (2011), *quoting Adamson v. Corr. Med. Servs.*, 359 Md. 238, 246 (2000). Although a Court must "assume the truth of all well-pleaded facts and allegations in the complaint," dismissal is proper "if the allegations and permissible inferences, if true, would not afford relief to the plaintiff." *Pittway*, 409 Md. at 239.

ARGUMENT

I. Equal Protection and Due Process Under Article 24.

Article 24 of the Maryland Declaration of Rights states "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." Md. Decl. of Rts., Art. 24. The Due Process clause in Article 24 ensures that a regulation affects persons equally, and no one will be deprived of fundamental rights and liberty. *Washington v. Glucksberg*, 521 U.S. 702, 719-720 (1997). While Article 24 does not contain an express Equal Protection clause, it is well-settled in Maryland that the concept of equal protection is embedded in the due process requirement of Article 24. *See Tyler v. City of College Park*, 415 Md. 475, 499 (2010); *see Attorney General v. Waldron*, 289 Md. 683, 704 (1981); *see Verzi v. Baltimore Co.*, 333 Md. 411, 417 (1994) (citations omitted). Equal protection guarantees that those who are similarly situated will be treated equally, with "its central purpose [being] the prevention of official conduct discriminating on the basis of race [or other suspect classifications]." *Washington v. Davis*, 426 U.S. 229, 239 (1976). Article 24 is interpreted *in pari materia* with the Fourteenth Amendment to the United States Constitution, and as such, pertinent decisions of the

United States Supreme Court are highly persuasive authorities. *Tyler*, 415 Md. at 475; *Waldron*, 289 Md. at 704; *Verzi*, 333 Md. at 417.

II. A Local Economic Regulation Satisfies Due Process and Equal Protection Requirements if It Is Rationally Related to a Legitimate Government Interest.

The 300-foot rule is a wholly local economic regulation that does not interfere with a fundamental right, nor does it implicate a suspect classification. *Attorney General*, 289 Md. at 713 (1981) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). Fundamental rights are those that are specifically identified by the federal constitution, and a suspect class is a category of people that have historically been subjected to discrimination. *See Attorney General*, 289 Md. at 706 (citations omitted). Furthermore, the 300-foot rule does not impact a vital personal interest, such as flatly denying "one the right to engage in the practice of the profession from which he is otherwise qualified." *Id.* at 717. Accordingly, a local economic regulation that does not interfere with a fundamental right, implicate a suspect classification, or implicate a vital personal interest, satisfies the due process and equal protection requirement of Article 24 if there is a legitimate government interest and the ordinance in question is rationally related to that interest. *See Tyler*, 415 Md. at 500 (citing *Rios v. Montgomery Co.*, 386 Md. 104, 121 (2005) (explaining that absent the implication of fundamental rights, suspect classification or important rights, rational basis review is appropriate under due process or equal protection analysis)); *see also Supermarkets General Corp. v. State*, 286 Md. 611, 618 (1979) ("Thus, the companion contentions of equal protection and due process mesh. There is no practical distinction between the grounds on which the two contentions are argued, and determination of one will resolve the other.").

Under rational basis review, the challenged regulation is presumed to be constitutional. *Tyler* at 502; *see also Edgewood Nursing Home v. Maxwell*, 282 Md. 422, 427 (1978) ("[a] statute

enacted under the police power carries with it a strong presumption of constitutionality") (citations omitted); *see also Dukes*, 427 U.S. at 303-304 ("it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth [Amendment]"). The court is required to seek out conceivable reasons for validating the regulation, and it is required to uphold the statute if such a reason exists. *See Edgewood*, 282 Md. at 427 ("In other words, the legislature is presumed to have acted within constitutional limits so that if any state of facts can reasonably be conceived that would sustain the constitutionality of the statute, the existence of that state of facts as a basis for the passage of the law must be assumed."); *see also Tyler*, 415 Md. at 502 ("Where there are plausible reasons for the legislative action, the court's inquiry is at an end."); *see also Nordlinger v. Hahn*, 505 U.S. 1, 11 ("In general, the [Fourteenth Amendment] is satisfied so long as there is a plausible policy reason for the classification."). It is not the court's role to substitute its judgment for that of the legislature. *See Dukes*, 427 U.S. at 303 ("The judiciary may not sit as a super legislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines..."); *see also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) ("[Fourteenth Amendment] analysis is not a license for courts to judge the wisdom, fairness, or logic of legislative choices."). Finally, the party challenging the regulation carries the burden of invalidating every set of conceivable facts that supports passage of the law. *See, e.g., Frey v. Comptroller of the Treasury*, 422 Md. 111, 163 (2011) ("[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it"), *quoting Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)); *Edgewood*, 282 Md. at 427; *Supermarkets*, 286 Md. at 623.

III. The 300-Foot Rule Is Linked to the Legitimate Interest of Advancing the General Welfare of the City.

Brick-and-mortar restaurants (simply referred to as "restaurants") are essential to the local economy. Unlike food trucks, restaurants are permanent fixtures in a local community. A restaurant can serve as an anchor business in a commercial district that attracts other complimentary businesses. The immobility of a restaurant forces it to be accountable to the local community that it serves. The investment demands it, and the community benefits from it. In the unfortunate situations when a restaurant fails, the surrounding community is harmed. A vacancy in the commercial district makes the area as a whole less appealing for other entrepreneurs.

Recent history in Baltimore makes it clear that the local legislature has an obligation to the public to promote the general welfare of the City and to encourage stability through reasonable local economic regulations that encourage permanent development. It is well-settled that the City has within its police power the ability to impose burdens on private rights that are necessary to further public health, safety and general welfare. *Edgewood*, 282 Md. at 426. This police power extends to regulating business when such regulation is required for the protection of the general welfare. *Dasch v. Jackson*, 170 Md. 251, 264 (1936). The 300-foot rule is a regulation that furthers the City's general welfare by promoting economic stability.

Sustainable development is a hallmark of a stable community. A well-developed community will have a vibrant economy, full of employment opportunities, with an abundance of resources and services available, and safety and security throughout. Encouraging economic development in the City's commercial districts, which will in turn provide economic stability, is a legitimate exercise of a legislature's police power. *See Donnelly Advertising Corp. v. City of Baltimore*, 279 Md. 660, 670-671 (1977) (holding that banning billboards from an area under redevelopment in order to encourage new shops and businesses to relocate into the affected area was a legitimate exercise of police power). Additionally, in furthering the legitimate purpose of

promoting stability, the legislature is permitted to accommodate a business that it believes provides a benefit to the community. In *City of New Orleans v. Dukes*, the Supreme Court reviewed a local ordinance that prohibited pushcart vendors from operating within the French Quarter. 427 U.S. at 298. Exempted from the ordinance were pushcart vendors that had continuously operated in the French Quarter for at least eight years prior. *Id.* The Supreme Court held that the local legislature may have determined that the newer vendors may have a deleterious effect on the local economy of the city because they were less likely to have built up "reliance interests" and become "part of the distinctive character and charm that distinguishes the Vieux Carre." *Id.* at 305.

Similarly, in *Nordlinger v. Hahn*, the Supreme Court reviewed a controversial California property tax scheme that favored long-term property owners over newer owners. 505 U.S. at 5-6. The Supreme Court held that it is was a legitimate exercise of the legislature's police power to structure its tax scheme in a manner that favored long-term owners over newer owners because there was a "legitimate interest in local neighborhood preservation, continuity, and stability" and to protect the "reliance interests" of existing owners. *Id.* at 12-13. Then once again, in *Fitzgerald v. Racing Association of Central Iowa*, 539 U.S. 103 (2003), the Supreme Court reviewed an Iowa law that placed higher taxes on racetrack slot machine revenue over riverboat slot machine revenues, *id.* at 105, and it held that the legislature "may have wanted to encourage the development of river communities or to promote riverboat history, say, by providing incentives for riverboats to remain in the State, rather than relocate to other States." *Id.* at 109.

The common thread in the Supreme Court jurisprudence is that disparate treatment of a particular intrastate industry is not an illegitimate interest when that disparate treatment advances the general welfare. *See Dukes*, 427 U.S. at 298; *Nordlinger*, 505 U.S. at 12-13; *Fitzgerald*, 539 U.S. at 109. In the case at bar, the 300-foot rule confers an exclusive benefit to restaurants, *i.e.* a

300 foot barrier to direct competition with a food truck that has a similar menu, but it also serves the legitimate purpose of promoting economic stability in the City. This is so for three reasons.

First, the 300-foot rule enhances the economic vitality of the City as a whole. It is within the legislature's discretion to determine what may have a deleterious effect on the local economy. *See Dukes*, 427 U.S. at 305. Moreover, the City has a legitimate interest to protect the vitality of its property tax base. *See One World v. Honolulu*, 76 F. 3d 1009, 1013 (9th Cir. 1996) (finding that protecting local merchants from unfair competition from mobile merchants that did not pay property taxes was legitimate). It is wholly possible that by parking directly in front of a pizzeria or a barbeque restaurant the Plaintiffs could harm local businesses. Such a scenario threatens the community as a whole because it has the potential to weaken the tax base. Going further, if the immobile restaurant was driven out of business by a competitor that is not required to make the same investment in the community, then the city is harmed even more. A vacant property may detract other potential entrepreneurs and businesses from filling voids in the commercial district. Clearly, the legislature determined that direct competition between food trucks and restaurants with similar menus has the potential to harm the general welfare, and it is a legitimate exercise of the legislature's police power to require a mobile business to position itself a reasonable distance away from certain restaurants in order to protect the community from this deleterious effect. *See id*; *see also Nordlinger*, 505 U.S. at 12-13.

Secondly, the 300-foot rule confers a benefit to the restaurant in order to protect economic development opportunities. *See Fitzgerald*, 539 U.S. at 105. Again, the City has an interest in preserving its economic vitality and promoting fixed businesses that contribute to the community and the tax base. Giving unrestricted latitude to mobile food trucks may dissuade a restauranteur from making the substantial investment in a restaurant out of concern of competition from another

business that does not require the same hefty investment. The 300-foot rule serves as a barrier to that potentially harmful competition between a food truck and a restaurant, and as a result may encourage an otherwise dissuaded restauranteur to move forward with an investment in a restaurant. As shown in *Fitzgerald*, it is legitimate for the legislature to confer an exclusive benefit on a business in order to encourage development. *See id.*

Lastly, the challenged regulation can serve to boost the local economy. The community is better served by diverse culinary options. That a food truck is mobile gives it a distinct advantage over a restaurant in its ability to select a location. Perhaps by selecting locations near a bakery, ice creamery or even a bar, Plaintiffs would find that consumers are more likely to patronize not only their food trucks, but also neighboring businesses that offer complementary items. Under this scheme, consumer spending increases, which in turn boosts the local economy and further promotes stability.

In sum, the City's 300-foot rule does not eliminate all competition between mobile food trucks and restaurants. Rather, the 300-foot rule is a balancing act that places one narrow, reasonable restriction on food trucks in order to advance the general welfare of the community by promoting stability in the local economy. The 300-foot rule is rationally related to a legitimate government interest, and as such, it does not deny the Plaintiffs their rights to equal protection or due process.

IV. Plaintiffs' Due Process Claim Fails for Additional Reasons.

As explained above, Plaintiffs' Equal Protection and Due Process claims fail for the same reason, *i.e.*, that the 300-foot rule is rationally related to legitimate governmental interests. Analysis more specifically focused on Plaintiffs' Due Process claim provides additional grounds for dismissal of that claim.

Although Plaintiffs do not identify the type of Due Process claim they are alleging, it is manifest that they are invoking substantive, not procedural, due process. The prerequisites for this type of claim are stringent. First, "analysis of an alleged substantive due process violation 'must begin with careful description of the asserted right, for the doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Samuels v. Tschechtelin*, 135 Md. App. 483, 537 (2000), *quoting Reno v. Flores,* 507 U.S. 292, 302 (1993). Second, once a plaintiff has properly identified and characterized, *i.e.*, with concrete particularity and not in the abstract, an alleged right of which it was allegedly deprived, it must establish that this alleged right was "fundamental" for purposes of Constitutional analysis. *Samuels,* 135 Md. App. at 537. Here, "[t]he history of substantive due process 'counsels caution and restraint.'" *Id.* at 534, *quoting Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 229-30 (1985). Plaintiffs' Complaint fails both of these prerequisites.

Plaintiffs have not identified the alleged right on which they base their Due Process claim with the careful precision required by Due Process jurisprudence. In the "Preliminary Statement" portion of their Complaint, Plaintiffs assert that their lawsuit "seeks to vindicate the fundamental right of Plaintiffs . . . to earn an honest living free from irrational and protectionist government restrictions." Paragraph 108 of the Complaint makes a similar statement. But these are precisely the type of emotive and highly abstract characterizations of the alleged right at issue that the relevant cases do not accept. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) ("'we ha[ve] always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.' ... By extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore

'exercise the utmost care whenever we are asked to break new ground in this field' ... lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (internal citations omitted). Thus the Supreme Court in *Glucksberg* reframed the issue in that case away from an abstract formulation to a more concrete one, and on this basis rejected a substantive Due Process claim. *Glucksberg*, 521 U.S. at 722–26, 728 (stating that the asserted liberty interest at issue in the case was framed more properly as the "right to commit suicide with another's assistance" rather than the broadly stated "liberty to choose how to die" or the "right to choose a humane, dignified death," and determining that there existed no fundamental right to assisted suicide even though the right to refuse lifesaving medical treatment was deeply rooted in our nation's history). In this case, the alleged right at issue is not properly characterized broadly as a "right to earn an honest living free from irrational governmental restrictions" but rather as an alleged right to be free from a municipal ordinance – the 300-foot rule – that may restrict but certainly does not prevent Plaintiffs from practicing their trade.

When Plaintiffs' alleged right is thus carefully and properly characterized, their assertion that the right is Constitutionally fundamental is shown to be conclusory and without basis. Rights are fundamental only if "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." *Samuels,* 135 Md. App. at 537 *quoting Glucksberg*, 521 U.S. at 720-21. Plaintiffs' alleged right to be free from the 300-foot rule does not remotely approach this exacting standard. In *Samuels*, for example, the Court of Special Appeals held that an alleged state-law contract right in public employment was not so fundamental as to require due process protection. Far less do Plaintiffs have a fundamental right to be free from a local ordinance that, like hundreds of similar ordinances (including those cited in Footnote 2 of this memorandum), restricts in some way their latitude to operate their business. To hold otherwise would take courts

back to the long discredited *Lochner* era, entangling the courts in myriads of ordinances and municipal regulations.

In summary, Plaintiffs' Due Process claim fails because they have not identified a constitutionally fundamental right of which they were allegedly deprived.

CONCLUSION

For all the foregoing reasons, the Court should dismiss the Complaint, with prejudice and without leave to amend, and the sign the attached proposed order.

Respectfully Submitted,

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