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

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**PLAINTFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

## INTRODUCTION

Plaintiffs' food trucks, Pizza di Joey and Madame BBQ, are two Baltimore-area mobile vendors that serve pizza and barbeque sandwiches to hungry Baltimoreans. But there are large swaths of Baltimore that Plaintiffs' trucks cannot visit. This is because Defendant prohibits mobile vendors from parking and operating within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food, merchandise, or service as the vendor.

The Mayor and City Council of Baltimore (hereinafter "City") now asks that Plaintiffs' Complaint be dismissed. But Plaintiffs allege facts that, if proven, show there is no reasonable relationship between the City's 300-foot proximity ban and any legitimate government interest. Like plaintiffs in other rational-basis cases, they are entitled to introduce evidence to prove those facts. Indeed, that is how plaintiffs throughout the nation have won virtually every substantive challenge to similar "proximity restrictions." The City's attempt to short-circuit this process ignores case law and improperly views the rational-basis test as a rubber stamp for government action. Because Plaintiffs have pleaded a plausible—indeed likely—claim for relief, they ask this Court to deny the City's Motion to Dismiss.

## ARGUMENT

The City has moved to dismiss Plaintiffs' Complaint. Dismissal is proper only "if the alleged facts and permissible inferences [in the complaint], so viewed, would, if proven, nonetheless fail to afford relief to the plaintiff." *Ricketts v. Ricketts*, 393 Md. 479, 492 (2006). On a motion to dismiss, courts "must assume the truth of all well-pled facts in the complaint as well as the reasonable inferences that may be drawn from those relevant and material facts," *id.* at 491-92, and construe those allegations in the light most favorable to the plaintiff. Plaintiffs know of no substantive challenge to a restriction like Baltimore's 300-foot proximity ban being dismissed; indeed, research shows that every challenge to a proximity restriction has proceeded to an evidentiary hearing. *See, e.g., LMP Servs., Inc. v. City of Chicago, Ill.*, 12 Ch 41235 (Cook Cty. Cir. Ct. June 13, 2013) (denying motion to dismiss in a challenge to Chicago's 200-foot proximity ban).[1]

In Section I, Plaintiffs demonstrate that the facts and inferences contained in the four corners of their Complaint concerning Baltimore's 300-foot proximity ban adequately state a claim for relief under the substantive due process and equal protection guarantees of Article 24 of the Maryland Declaration of Rights. In Section II, Plaintiffs demonstrate why the factual disputes and imagined justifications for the ban raised in Defendant's Motion to Dismiss are procedurally improper, lack logical support, and do not justify dismissing Plaintiffs' Complaint.

### I. PLAINTIFFS HAVE PLEADED SUFFICIENT FACTS TO DEMONSTRATE THAT THE 300-FOOT PROXIMITY BAN VIOLATES THEIR ARTICLE 24 EQUAL PROTECTION AND SUBSTANTIVE DUE PROCESS RIGHTS.

Plaintiffs' Complaint states a valid claim for relief under the equal protection and substantive due process guarantees of Article 24 of the Maryland Declaration of Rights. In their Complaint, Plaintiffs explain that they have a liberty interest in operating their food truck businesses that is protected by the Maryland Declaration of Rights. And they allege numerous facts that together

[1] Plaintiffs can provide a copy of the order upon the Court's request.

demonstrate that Baltimore's 300-foot proximity ban is an act of pure economic protectionism that arbitrarily and irrationally infringes upon that liberty interest. Because the allegations and inferences arising from the four corners of the Complaint would, if proven, entitle Plaintiffs to a judgment declaring the 300-foot ban invalid, the City's Motion to Dismiss should be denied.

Below, Plaintiffs explain more fully why Defendant's Motion to Dismiss is improper. In Part A, Plaintiffs discuss the motion to dismiss standard and the minimal burden it imposes. In Part B, Plaintiffs explain how their right to operate their food trucks constitutes a constitutionally-protected liberty interest. In Part C, Plaintiffs walk through the Complaint to show how they allege facts that together demonstrate how the 300-foot proximity ban violates that liberty interest. And in Part D, Plaintiffs explain how granting Defendant's Motion to Dismiss would directly conflict with both Maryland's well-established Article 24 jurisprudence and a wealth of case law from other jurisdictions striking down restrictions that are functionally identical to the 300-foot ban.

### A. A Motion to Dismiss Turns Exclusively on Whether the Four Corners of a Complaint State a Claim for Relief.

The purpose of a complaint is to identify the facts and legal claims that entitle a plaintiff to relief; when presented with a motion to dismiss, "the court must determine whether the Complaint, *on its face*, discloses a legally sufficient cause of action." *See Pittway Corp. v. Collins*, 409 Md. 218, 234 (2009). The plaintiff's burden at this stage is admittedly easy to satisfy. *Conwell Law LLC v. Tung*, 221 Md. App. 481, 513 (2015) (stating that it is "not hard to withstand a motion to dismiss"). This is because the court's analysis is limited to the four corners of the complaint, *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475 (2004), and the court must assume the truth of both all well-pleaded facts and any reasonable inferences that may be drawn from those facts. *Pittway Corp.*, 409 Md. at 239. In other words, the motion to dismiss stage is neither the time nor the place for Defendant's factual disputes and imagined justifications. Dismissal is only appropriate if the facts

and inferences arising from Plaintiffs' Complaint *itself* would, if proven, still not afford them relief. *Pittway Corp.*, 409 Md. at 239.

But Defendant's Motion and memorandum make no serious attempt to accept the truth of the facts alleged in the Complaint. Indeed, except for its brief "Summary of the Complaint" section, Defendant's memorandum fails to even cite to Plaintiffs' Complaint. Instead, it puts forward its own facts and inferences, ones that directly conflict with those laid out in Plaintiffs' Complaint. For example, Defendant asserts that its 300-foot proximity ban furthers a legitimate government interest, *see* Def.'s Mot. at 10-11, even though numerous paragraphs in Plaintiffs' Complaint specifically allege that it does not. *See, e.g.*, Compl. ¶¶ 77-80. Moreover, Defendant repeatedly invents justifications for its proximity ban that appear nowhere within the four corners of Plaintiffs' Complaint. *See, e.g.*, Def.'s Mot. at 8. But a motion to dismiss does not give Defendant license to escape constitutional scrutiny of its ordinance by inventing facts and justifications. Because the face of Plaintiffs' Complaint discloses a legally sufficient cause of action, Defendant's Motion should be denied.

### B. Plaintiffs Have a Liberty Interest in Operating Their Food Truck Businesses Free from Arbitrary and Irrational Government Regulations That Is Protected by Article 24's Equal Protection and Substantive Due Process Guarantees.

Plaintiffs operate food trucks in the Baltimore area, from which they sell food to pedestrians throughout the city. Compl. ¶¶ 5, 9, 28, 41. Plaintiffs willingly comply with numerous regulations that serve valid health and safety purposes. *See id.* ¶ 49. But as Plaintiffs' Complaint makes clear, Defendant's 300-foot proximity ban is not such a regulation, as it furthers no public interest and instead serves only to insulate certain businesses from competition. *Id.* ¶¶ 94, 96, 107-08.

Numerous decisions from the Maryland Court of Appeals make clear that Plaintiffs have a liberty interest in engaging in the profession of their choice. *See, e.g.*, *Att'y Gen. of Md. v. Waldron*, 289 Md. 683, 718-22 (1981) (asserting that "the right to pursue one's calling in life is a significant liberty interest entitled to some measure of constitutional preservation"); *Md. State Bd. of Barber Examiners v.*

*Kuhn*, 270 Md. 496, 510 (1973) (striking down a prohibition on cosmetologists that "arbitrarily and unreasonably limit their right to pursue a lawful occupation"); *see also, e.g.*, *Schware v. Bd. of Bar Examiners*, 353 U.S. 232, 238-39 (1957) ("A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment.").

Indeed, Maryland courts routinely strike down regulations that infringe upon that liberty interest when those regulations lack a real and substantial relationship to a legitimate government purpose. This is particularly true with regard to economic regulations challenged under Article 24's equal protection guarantee. *See, e.g.*, *Verzi v. Baltimore Cty.*, 333 Md. 411 (1994) (striking down out-of-county tow truck regulations); *Kirsch v. Prince George's Cty.*, 331 Md. 89 (1993) (striking down mini-dorm regulations of residential properties for college students); *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981) (striking down a prohibition on pensioned, retired judge from practicing law); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585 (1971) (striking down regulation of crabbing and oystering that required county residency); *Md. Coal & Realty Co. v. Bureau of Mines*, 193 Md. 627 (1949) (striking down strip mining regulation); *The City of Havre de Grace v. Johnson*, 143 Md. 601 (1923) (striking down taxi residency requirements). Maryland courts have likewise invalidated economic regulations challenged under Article 24's guarantee of substantive due process. *See, e.g.*, *Md. State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496 (1973); *Md. Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 119 (1973).[2]

Plaintiffs have a liberty interest, protected by the Maryland Declaration of Rights, in operating their food truck businesses free from arbitrary and irrational government regulations. As

[2] As such, Defendant errs in claiming that Article 24's substantive due process guarantee only applies to fundamental rights. Def.'s Mot. at Part IV. The Court of Appeals has explicitly stated that economic regulations that infringe upon the liberty interest identified by Plaintiffs can violate the right to substantive due process. *See, e.g.*, *Kuhn*, 270 Md. 496. *Samuels*, cited by Defendant, is inapposite, as it specifically turns on a public employee's right to continued employment pursuant to a state contract. *See infra* 8-9.

explained below, Plaintiffs' Complaint makes clear that Defendant's 300-foot proximity ban impermissibly infringes upon that liberty interest and violates Plaintiffs' constitutional rights.

### C. Plaintiffs' Complaint Pleads Sufficient Facts that Demonstrate that the 300-Foot Proximity Ban Violates Their Equal Protection and Substantive Due Process Rights Under Article 24.

The facts laid out in Plaintiffs' Complaint make clear that Baltimore's 300-foot proximity ban violates their constitutional rights in operating their businesses by arbitrarily and irrationally restricting where Plaintiffs' food trucks may operate. The Complaint alleges that the 300-foot proximity ban—unlike other, permissible regulations, such requiring food trucks to provide trash receptacles (Compl. ¶ 49)—effectively prevents Plaintiffs from operating their vehicles throughout large swaths of Baltimore. It further alleges that the ban arbitrarily discriminates against Plaintiffs and other food trucks based purely on what they serve. And the Complaint explains that the ban lacks any rational relationship to a legitimate government interest. Indeed, the Complaint makes clear that there is only one, illegitimate purpose for the law: to protect the private financial interests of brick-and-mortar businesses.

First, the Complaint explains how the 300-foot proximity ban operates and how it prevents Plaintiffs' food trucks from operating in large swaths of Baltimore. The City regulates all mobile vendors, including food trucks, pursuant to Article 15, Subtitle 17 of the Baltimore City Code and the Street Vendor Program Rules and Regulations. *Id.* ¶¶ 46-48. In order to operate in Baltimore, mobile vendors must comply with a variety of uncontroversial regulations, such as displaying an identification badge while working. *See id.* ¶ 49. But the City also prohibits mobile vendors from operating within 300 feet of a brick-and-mortar business that is "primarily engaged in selling the same" product or service as the vendor. *Id.* ¶¶ 50, 53. The proximity ban applies to mobile vendors operating on either public or private property. *Id.* ¶ 51. While this ban limits all mobile vendors, it falls particularly hard on food trucks because the prevalence of restaurants and other food-selling

establishments throughout the city creates thousands of no-vending zones. *Id.* ¶¶ 66-68. Although the ban prevents Pizza di Joey from operating within 300 feet of a pizzeria, its effect is in fact much broader. That is because City officials enforce the ban to also prohibit food trucks from operating within 300 feet of brick-and-mortar businesses with the same culinary theme. *Id.* ¶¶ 53, 67. Thus, as written and enforced, the ban makes large swaths of Baltimore off-limits to food trucks like those operated by Plaintiffs. *Id.* ¶¶ 30, 68, 81, 85, 89.

Second, enforcement of the proximity ban turns not on any public health and safety criteria, but instead solely on what is sold by a vendor and nearby brick-and-mortar businesses. *Id.* ¶ 79. That means that although the ban prevents Pizza di Joey from operating near a pizzeria or Italian restaurant, it would permit Madame BBQ to operate from that same precise location. *Id.* ¶¶ 76, 84, 99-100. One such example is Bagby Pizza Co., located at 1006 Fleet Street. Although Pizza di Joey cannot operate within 300 feet of Bagby Pizza, Madame BBQ can. *Id.* ¶ 74. This same scenario plays out all across Baltimore. *Id.* ¶ 76.

Third, the Complaint alleges that the ban does not ameliorate, cure, or even address any legitimate health and safety concerns. *Id.* ¶ 79. It notes that the ban is instead nothing more than economic protectionism that discriminates against mobile vendors for the exclusive benefit of brick-and-mortar businesses. *Id.* ¶ 80. By way of comparison, Baltimore imposes no proximity ban that would prevent the opening of competing restaurants near existing brick-and-mortar food establishments that serve the same fare. *Id.* ¶¶ 69-73. For example, Pizza di Joey cannot operate within 300 feet of Bagby Pizza Co., but it could open a competing brick-and-mortar pizzeria immediately next door to Bagby Pizza Co. *Id.* ¶ 74.

These facts together demonstrate that the 300-foot proximity ban (1) arbitrarily discriminates between food trucks; (2) arbitrarily restricts where mobile vendors, like Plaintiffs, may operate; (3) bears no rational relationship to any legitimate government interest; and (4) serves only to protect

the private financial interests of brick-and-mortar businesses from mobile vendor competition. Because these allegations together constitute a valid claim for relief under Article 24, Defendant's Motion to Dismiss should be denied.

### D. Granting Defendant's Motion to Dismiss Would Contravene Maryland's Well-Established Article 24 Jurisprudence and a Wealth of Cases Striking Down Similar Restrictions.

Plaintiffs' Complaint states a claim for relief under the Maryland Declaration of Rights. Under the standard applicable to motions to dismiss, that is enough, and accordingly Defendant's Motion should be denied. But Defendant invites this Court to do something novel by ignoring that well-known standard and dismissing Plaintiffs' case, even though such an action would contradict Maryland's well-established Article 24 jurisprudence. This Court should decline Defendant's invitation.

As Plaintiffs have previously noted, Maryland courts properly view motions to dismiss as establishing a low threshold, a threshold that Plaintiffs' Complaint easily satisfies. *Conwell Law LLC*, 221 Md. App. at 513 (stating that it is "not hard to withstand a motion to dismiss"). It is perhaps for that reason that Defendant's Motion cites only a single case where a Maryland court has granted a motion to dismiss that alleged a violation of Article 24. *See Samuels v. Tschechtelin*, 135 Md. App. 483 (2000). But even a cursory look at *Samuels* reveals its total inapplicability. In *Samuels*, a public employee claimed that he had a due process right to continue on as administrator of a community college. *Id.* at 497-98, 518-19. But the Court of Special Appeals noted that any such right arose out of a state-law contract, *id.* at 534, and that protection of such a contractual right did not sound in substantive due process. *Id.* at 536. By contrast, Plaintiffs' rights to operate their businesses do not arise out of a public-employment contract, nor do they claim some sort of "lifetime Constitutional right to continued state employment." *See Higginbotham v. Pub. Serv. Comm'n of Md.*, 171 Md. App. 254, 269 (2006) (citations omitted). Instead, Plaintiffs have a well-established liberty interest and

right to pursue the occupation of their choice free from arbitrary regulations—a right that finds protection in Article 24 of the Maryland Declaration of Rights. *Samuels* is therefore of no moment.

The dearth of cases supporting dismissal is unsurprising. Constitutional controversies are decided on facts, not surmise. And when a plaintiff contends that a legislative action lacks a real and substantial relationship to a legitimate government interest, Maryland courts give that plaintiff an opportunity to prove out its case by adducing facts through discovery and otherwise. *See Comprehensive Accounting Serv. Co. v. Md. State Bd. of Pub. Accountancy*, 284 Md. 474, 483-84 (1979) (reversing the grant of a motion to dismiss because plaintiff was "not afforded an opportunity as it should have been to undertake to prove the absence of a rational basis" of a state licensing law).

With all this in mind, Defendant's plea for dismissal falls flat. Not only does Defendant cite only one inapposite Maryland case in which a motion to dismiss was granted, but it also studiously avoids mentioning the multitude of cases in which Maryland courts have struck down regulations under Article 24 on the merits. This multitude of cases stands for two interrelated propositions: 1) that the equal protection and substantive due process elements of Article 24 amount to a meaningful standard of review, *see infra* Section II.A, and 2) that well-pleaded equal protection and substantive due process challenges are viable claims that should survive motions to dismiss. *See Frankel v. Bd. of Regents of Univ. of Md. Sys.*, 361 Md. 298 (2000); *Verzi v. Baltimore Cty.*, 333 Md. 411 (1994); *Kirsch v. Prince George's Cty.*, 331 Md. 89 (1993); *Att'y Gen. of Md. v. Waldron*, 289 Md. 683 (1981); *Md. State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496 (1973); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585 (1971).

Moreover, courts outside of Maryland have almost uniformly struck down restrictions like Baltimore's 300-foot proximity ban, which again demonstrates that complaints challenging proximity restrictions present a viable claim for relief. *See Chi. Title & Trust Co. v. Vill. of Lombard*, 166 N.E.2d 41, 44-46 (1960) (invalidating 650-foot proximity restriction between new and existing filling

stations); *People v. Ala Carte Catering Co.*, 159 Cal. Rptr. 479, 481-85 (Cal. App. Dep't Super. Ct. 1979) (invalidating 100-foot proximity restriction); *Duchein v. Lindsay*, 345 N.Y.S.2d 53, 55-58 (N.Y. App. Div. 1973), *aff'd*, 34 N.Y.2d 636 (1974) (same); *Mister Softee v. Mayor & Council of City of Hoboken*, 186 A.2d 513, 519-20 (N.J. Super. Ct. Law Div. 1962) (same), *overruled on other grounds by Brown v. City of Newark*, 552 A.2d 125, 132 (N.J. 1989); *see also LMP Servs., Inc. v. City of Chicago*, 12 CH 41235 (Cook Cty. Cir. Ct. June 13, 2013) (denying motion to dismiss in a challenge to Chicago's 200-foot proximity ban).

The City's Motion, in essence, asks this Court to act well outside both Maryland's Article 24 jurisprudence and the broad weight of authority that demonstrates that claims challenging proximity restrictions are meritorious and should be allowed to proceed. Because all of the facts and inferences in Plaintiffs' Complaint present a viable claim for relief, this Court should reject Defendant's invitation and deny its Motion. As explained below, even if this Court were to look beyond the four corners of the Complaint to consider Defendant's pretextual justifications—something wholly inappropriate in the motion to dismiss context—the result should be the same.

## II. THE CITY'S PRETEXTUAL JUSTIFICATIONS ARE NOT RATIONALLY RELATED TO THE 300-FOOT PROXIMITY BAN.

Perhaps recognizing that it would be improper to dismiss Plaintiffs' Complaint based on the facts laid out in the Complaint's four corners, Defendant asks this Court to consider facts outside the Complaint, including Defendant's imagined justifications for the 300-foot proximity ban. These extra-pleading imaginations are procedurally inappropriate at this juncture. Moreover, the Maryland Declaration of Rights and courts embrace a meaningful standard of review—the real and substantial test—when scrutinizing economic regulations. Viewed through that light, it is clear that the 300-foot ban bears no rational relationship to any legitimate government interest.

Defendant's procedurally inappropriate gambit fails for three reasons. First, it treats Maryland's real and substantial test as a rubber stamp under which this Court may rely on

supposition and conjecture rather than facts and evidence. Second, by misleadingly conflating Maryland's real and substantial test with the more lenient federal rational-basis standard, Defendant glosses over the fact that Maryland courts have repeatedly invoked the real and substantial test in striking down regulations that violate Article 24. Finally, in search of favorable case law, Defendant puts forward three wholly inapposite federal cases despite the fact that this is a *Maryland* court interpreting the *Maryland* Declaration of Rights. In essence, what Defendant argues is that rational-basis review, particularly regarding economic regulations, means the government always wins. Because that is simply not true, Defendant's Motion should be denied.

### A. Under Maryland's Real and Substantial Test, Facts Matter, and Maryland Courts Do Not Hesitate to Strike Down Regulations That Are Not Rationally Related to a Legitimate Government Interest.

In proposing several hypothetical justifications for the 300-foot proximity ban, Defendant hopes that this Court will ignore both this case's procedural posture as well as the meaningful review required by Maryland's real and substantial test. But, of course, Maryland's real and substantial test *is* a rigorous standard of review, and as the Court of Appeals has made clear, it "has not hesitated to strike down discriminatory economic regulation[s] that lacked any reasonable justification" using that test. *Frankel*, 361 Md. at 315.

Maryland's real and substantial test provides robust protections with regard to economic regulation. The root of those robust protections is that Maryland courts, rather than accepting platitudes about the propriety of the government's actions at face value, instead engage in substantive factual analysis in order to determine whether there in fact is a real and substantial relationship between an economic regulation and a legitimate government interest. *See, e.g.*, *id.* (stating that the Court has "not hesitated to carefully examine a statute and declare it invalid if we cannot discern a rational basis for its enactment" (internal quotations and citations omitted)). And as the Court in *Frankel* notes, many regulations that Maryland courts have invalidated under this

standard mirror Baltimore's 300-foot proximity ban in that they "imposed economic burdens, in a manner tending to favor [some Maryland] residents . . . over [other Maryland] residents." *Id.*

Defendant attempts to undercut the rigor of Maryland's real and substantial test by conflating it with the federal rational-basis standard. Def.'s Mot. at 5-6. While Defendant's Motion fails no matter what standard it is judged under, it is critical to recognize that Maryland's test stands apart from and provides more rigorous protection than its federal counterpart. *See DeWolfe v. Richmond*, 434 Md. 444, 456 n.9 (2013) (recognizing that the Court of Appeals has repeatedly held "that the protections provided under Article 24 are broader than those found in the United States Constitution"); *Sav-A-Lot, Inc.*, 270 Md. at 119 (1973) ("[I]t is readily apparent that whatever may be the current direction taken by the Supreme Court in the area of economic regulation, as distinguished from the protection of fundamental rights, Maryland and Pennsylvania adhere to the more traditional test formulated by the Supreme Court and enunciated in *Lawton v. Steele*, 152 U.S. 133, 137 (1894)."); *Verzi*, 333 Md. at 419 (citing *Waldron*, 289 Md. at 715). As a result of this more robust test, Maryland courts have consistently struck down economic regulations that violate Article 24's equal protection and substantive due process guarantees.

The Court of Appeals' approach in *Verzi v. Baltimore County* demonstrates the scrutiny that Maryland courts apply under the real and substantial test when evaluating an economic regulation. 333 Md. 411 (1994). In *Verzi*, Baltimore County prohibited police from using tow truck companies from other counties to clear traffic accidents. *Id.* at 415. Upon review, the Court of Appeals considered several justifications for the county's favoritism of in-county tow trucks, including the idea that the rule protected the public from fraud, deception, and abuse; that it minimized traffic congestions and delays; and that it enabled the county to effectively supervise the tow trucks. *Id.* at 425-26. Rather than take each justification at face value, the Court examined each justification and found it lacking based on the facts in the record. *Id.*

In addition, the Court held that the regulation violated equal protection even though it did not act to completely bar out-of-county tow trucks from operating in Baltimore County. *Id.* at 426-27. Finally, the Court, having found no rational basis for the distinction between in-county and out-of-county tow trucks, concluded that the "more reasonable and probable view [was] that [the classification] was intended to confer the monopoly of profitable business upon residents." *Id.* at 427 (citing *City of Havre de Grace*, 143 Md. at 608 (internal quotation marks omitted)). Because the out-of-county tow truck ban furthered no legitimate government interest, the Court declared that it violated Article 24's equal protection guarantee. *Id.* at 427-28.

*Verzi* demonstrates that under Maryland's real and substantial test, facts matter, and that constitutional litigation requires more than the mere invocation of a potentially legitimate interest. Like Baltimore County in *Verzi*, the City tries to justify its proximity ban by tossing out imagined justifications, Def.'s Mot. at 8-11, and by arguing that the ban does not absolutely prohibit food trucks from operating. *Id.* at 2, 11. But *Verzi* makes clear that neither of these gambits suffices, and that constitutional review in Maryland requires a hard factual look at what relationship, if any, exists between the 300-foot proximity ban and any legitimate government interest. *See also Sav-A-Lot, Inc.*, 270 Md. at 108-17 (carefully scrutinizing the government's four asserted justifications for prohibiting the advertisement of prescription drugs and finding that the law violated substantive due process under Article 24). Denying Defendant's Motion will allow this case to proceed, and will allow this Court to conduct that hard look with the benefit of discovery, facts, and evidence.

**B. Defendant's Hypothetical Justifications Do Not Justify the 300-foot Proximity Ban.**

*Verzi* and *Sav-A-Lot* demonstrate that the government's invocation of some imagined interest is not the alpha and omega of constitutional analysis, and that such pretextual justifications do not justify dismissing a well-pleaded complaint like the one before this Court. Yet in its Motion, Defendant tries to get this Court to do just that by supposing that the 300-foot proximity ban may

encourage brick-and-mortar businesses to open, eliminate vacant storefronts, and lead to neighborhood development. Def.'s Mot. at 8-10. This is nothing more than a dressed-up version of impermissible protectionism. And even if viewed as legitimate, the 300-foot ban does not substantially further any of these interests, as the facts laid out in Plaintiffs' Complaint make clear.

First, the City's attempt to dress up its protectionism as "economic development" amounts to nothing more than putting lipstick on a pig. Compare the gravamen of Plaintiffs' Complaint to Defendant's characterization of the 300-foot proximity ban. Plaintiffs allege that the 300-foot proximity ban's purpose is to enrich brick-and-mortar businesses at the expense of their mobile competitors, which the Maryland Declaration of Rights prohibits. Compl. ¶ 80. Defendant's Motion echoes that sentiment, stating that the ban's purpose is to enrich brick-and-mortar businesses at the expense of their mobile competitors, and that that will encourage more people to open brick-and-mortar stores because they will be protected from competition. Def.'s Mot. at 10-11.

Such semantic games elevate style over substance. And, if credited, such machinations would mean that virtually every regulation grounded in protectionism, like Baltimore's 300-foot proximity ban, could be recast in a similar manner so as to shield it from constitutional challenge. In *Verzi*, for example, Baltimore County could have argued—in response to the Court's observation that the ban on out-of-county towing companies conferred monopoly power upon certain residents, 333 Md. at 427—that the ban did not merely protect in-county towing companies from competition, but that such protectionism promoted economic development in Baltimore County by ensuring that towing jobs within the county were plentiful, storage lots remained highly utilized, and county tax coffers remained full. If Defendant's reformulation were valid, this should have led the Court of Appeals in *Verzi* to uphold the restriction. But the Court in *Verzi* struck down the restriction on

out-of-county towing companies, showing that Maryland courts will not allow semantics to defeat people's constitutional rights.

Second, even if one were to accept Defendant's semantic gambit, the 300-foot proximity ban would still not pass Maryland's real and substantial test for the simple reason that Defendant's claims are illogical. Again, as Plaintiffs' Complaint makes clear, the proximity ban discriminates between food trucks based on what they serve vis a vis nearby brick-and-mortar businesses. *See* Compl. ¶ 76. Thus, to credit Defendant's imaginations, one would have to believe that a rotating parade of food trucks serving burgers, tacos, desserts, sandwiches, and salads could all operate next door to a pizzeria without consequence, but that once a pizza food truck enters that mix, the City's parade of horribles will suddenly manifest, leaving a vacant storefront and a weakened neighborhood. This all-or-nothing dichotomy ignores basic economic reality and simply cannot support a discriminatory ordinance like the 300-foot ban.

### C. The Federal Cases Defendant Cites Fail to Justify Its Ability to Enact Discriminatory Economic Regulations Under the Maryland Declaration of Rights.

Side-stepping overwhelming Maryland case law that repudiates discriminatory economic regulations, Defendant primarily relies on three federal cases for the proposition that the government is free to enact policies that favor one business over another: *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), *Nordlinger v. Hahn*, 505 U.S. 1 (1992), and *Fitzgerald v. Racing Ass'n of Iowa*, 539 U.S. 103 (2003). Def.'s Mot. at 9-10. But this case asks a *Maryland* court to interpret the *Maryland* Declaration of Rights, something none of these three cases addresses. And even if these cases were on point—which they are not—none of them provides support for Baltimore's 300-foot proximity ban.

The first case Defendant puts forward is *City of New Orleans v. Dukes*, wherein New Orleans passed a regulation prohibiting new pushcart businesses in the historic French Quarter neighborhood. 427 U.S. at 299. But, unlike that regulation, Baltimore's 300-foot proximity ban

expressly and intentionally discriminates against one business model in favor of another. Def.'s Mot. at 9-10 (admitting that the 300-foot rule confers an exclusive benefit to restaurants). Economic protectionism, which was not at issue in *Dukes*, is therefore front and center in this case. Moreover, in upholding the regulation in *Dukes*, the United States Supreme Court felt that the regulation helped protect a discrete, historic neighborhood. 427 U.S. at 304-06. But here, the City's proximity ban applies throughout Baltimore and whether a vendor may operate at a location turns not on how long they have been licensed, as in *Dukes*, but on whether they sell the same kind of product as their competitors. In short, *Dukes* provides no support to Baltimore or its 300-foot proximity ban.

Defendant's reliance on *Nordlinger v. Hahn* and *Fitzgerald v. Racing Ass'n of Central Iowa* is similarly misguided. *See* Def.'s Mot. at 9-10. These cases concern the taxing policies of state governments, which the states have "large leeway" over. *Nordlinger*, 505 U.S. at 11 (internal quotations and citations omitted). In *Nordlinger*, California attempted to protect the elderly and the poor by exempting certain types of property transactions from receiving updated tax assessments. *Id.* at 12-13, 17. In *Fitzgerald*, a racing association sued over the fact that its slot machines were taxed at a slightly higher rate than machines aboard riverboats. 539 U.S. at 109-10. But not only does Baltimore's 300-foot proximity ban not concern tax policy, it also actively and intentionally discriminates between similarly situated parties, Compl. ¶ 76, in an effort to expressly benefit one class of businesses by eliminating its competition. *Id.* ¶¶ 79-80. By contrast, California and Iowa enacted their tax policies to further discrete legitimate government interests. Neither *Nordlinger* nor *Fitzgerald* justifies Baltimore's 300-foot proximity ban.

In the end, neither *Dukes*, *Nordlinger*, nor *Fitzgerald* stands for the proposition that economic protectionism is a legitimate government interest. Indeed, numerous federal courts, having been presented with these same exact cases and arguments, have ruled that regulations meant to shield

politically connected businesses from competition are illegitimate. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 227 (5th Cir. 2013) (invalidating restriction that limited casket sales to only licensed funeral homes as impermissible protectionism);[3] *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008); *Craigmiles v. Giles*, 312 F.3d 220, 224, 228-29 (6th Cir. 2002). Nor do they suggest that the government can pursue legitimate interests by any means chosen. Regardless of whether Defendant's interests are legitimate, it is illogical to think that arbitrarily discriminating between food trucks based on their menus furthers any of Defendant's asserted justifications. Maryland's demanding real and substantial relationship test is not a rubber stamp for approving government regulations, and Plaintiffs have alleged sufficient facts to demonstrate that the 300-foot proximity ban is not rationally related to any legitimate government interest.

## CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court deny the City's Motion to Dismiss in full.


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[3] The holding in *Saint Joseph Abbey* further undercuts Defendant's "economic development" argument. Just as in *Verzi*, the restriction at issue in *St. Joseph Abbey* could have been alternatively framed as a concern that greater competition could force some funeral homes to close, could reduce the number of potential job opportunities available in the funeral home industry, and could result in the state receiving less sales-tax revenue due to the downward pressure increased competition would have on casket prices. But yet despite the availability of this alternative formulation, the Fifth Circuit did not hesitate to strike down the restriction.

## CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2016, this PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS was filed in person with the Circuit Court for Baltimore City and mailed first class, postage paid to:

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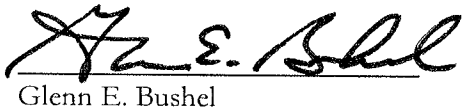

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