No. 19-_____

In The
Supreme Court of the United States

LMP SERVICES, INC.,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Chicago's requirement that licensed food trucks install GPS devices that create comprehensive records of their movements in order to protect restaurants from competition is an unreasonable search under the Fourth Amendment.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner LMP Services is an Illinois corporation wholly owned by Laura Pekarik. Petitioner has no parent corporations and no publicly held company owns 10% or more of its stock.

Respondent is the City of Chicago, a municipal corporation established under the laws of Illinois.

RELATED CASES

- *LMP Services, Inc.* v. *City of Chicago*, No. 12 CH 41235, Circuit Court Of Cook County, Illinois. Judgment entered December 5, 2016.
- *LMP Services, Inc.* v. *City of Chicago*, No. 1–16–3390, Illinois Appellate Court. Judgment entered December 18, 2017.
- *LMP Services, Inc.* v. *City of Chicago*, No. 123123, Illinois Supreme Court. Judgment entered May 23, 2019.

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INTRODUCTION

This case asks whether the government can require GPS tracking of licensed food trucks to protect local restaurants from competition. In 2012, Chicago prohibited food trucks from operating within 200 feet of any business selling food to the public. To enforce this "200-foot ban," Chicago mandates that food trucks install and operate GPS tracking devices, which allow the City to investigate if a food truck violated the ban at any point within the past six months. The scheme requires no warrant and offers no opportunity for pre-compliance review.

Chicago's GPS requirement is a search. In both *United States* v. *Jones* and *Grady* v. *North Carolina*, this Court held that the compelled installation of a GPS device is a Fourth Amendment "search." But on May 23, 2019, the Illinois Supreme Court held the opposite. Interpreting "the search and seizure clause in [the Illinois Constitution] using the same standards as are used in construing its federal counterpart," App. 16, the court held that Chicago's GPS requirement is not a search. *Id*. at 18. In so holding, the court distinguished both *Jones* and *Katz* v. *United States* by noting that they are "criminal cases" while Chicago's GPS requirement is civil in nature. *Id*. at 17. The court also held that, even if the GPS requirement is a search, it is reasonable under the *Colonnade–Biswell* exception to the warrant requirement, in part because the entire food industry is "closely regulated." *Id*. at 18.

The Illinois Supreme Court's decision warrants this Court's review. The court's holding that Chicago's GPS requirement is not a search squarely conflicts with this Court's decisions in *Jones* and *Grady*, which held that GPS tracking is a search whether done for criminal or civil purposes. Meanwhile, both the Second and Seventh circuits have refused to decide whether warrantless GPS tracking of regulated businesses is a search. These decisions carry grave implications, not just for mobile vendors, but for the millions of Americans who need a government license to do their jobs. Given the dramatic rise in the percentage of workers who need such a license over the past half-century, this question is of increasing national importance.

This Court should also review the Illinois Supreme Court's holding that Chicago's GPS requirement is reasonable under the *Colonnade–Biswell* exception, which permits warrantless searches of "closely" or "pervasively" regulated businesses. In *City of Los Angeles* v. *Patel*, this Court stressed that the *Colonnade–Biswell* exception is narrow, with the Court identifying only four industries that fall within it. Yet lower courts have stretched the exception to licensed and regulated businesses throughout the American economy. This includes Illinois courts, which have deemed the entire food industry closely regulated. This Court should accept review and instruct lower courts that *Colonnade–Biswell*'s narrow exception cannot be permitted to swallow the rule.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 2019 IL 123123. *See* App. 1–21. The opinion of the Illinois Appellate Court is reported at 95 N.E.3d 1259. *See* App. 22–53. The opinion of the Cook County Circuit Court is unpublished but included in the Appendix at pp. 54–79.

JURISDICTION

The Illinois Supreme Court entered judgment on May 23, 2019. *See* App. 1. On July 15, 2019, Justice Kavanaugh extended Petitioner's deadline for filing this petition pursuant to S. Ct. R. 13.5 until September 20, 2019. *See* Application No. 19A58. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

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

Article I, Section 6 of the Illinois Constitution provides: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."

Chicago's prohibition on food trucks operating within 200 feet of a restaurant is contained in Section 7-38-115(f) of the Municipal Code of Chicago:

> (f) No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m.

Chicago's mandate that food trucks install and operate GPS tracking devices is contained in Section 7-38-115(l) of the Municipal Code of Chicago:

> (l) Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at

places and times as shown in the data tracked from the vehicle's GPS device.

Chicago's regulations concerning the installation and operation of GPS devices by mobile food vendors can be found in the Appendix at pp. 86–88.

STATEMENT

A. Background

Petitioner LMP Services is an Illinois corporation that operates a food truck named Cupcakes for Courage. Laura Pekarik, LMP's sole owner, was inspired to start the food truck after taking time off work to care for her sister Kathryn, who had non-Hodgkin's lymphoma. Together, Laura and Kathryn baked cupcakes and came up with recipes to keep Kathryn's mind off her cancer. Once Kathryn recovered, Laura decided to become her own boss, so she took their recipes and bought her first truck. After getting licensed in 2011, Cupcakes for Courage began selling cupcakes on public and private property throughout Chicago.

At the time, Chicago was one of the few major U.S. cities that forbade cooking onboard food trucks. Although this did not affect Petitioner, others were excited when officials announced in 2012 they were considering a new ordinance. But the Illinois Restaurant Association and some restaurateurs were not enthusiastic about the prospect of new competition. They found a receptive ear in Alderman Tom Tunney, a former chairman of the Illinois Restaurant Association

and owner of several restaurants, who chaired the City Council's Economic Development Committee, the body chiefly responsible for vetting the ordinance.

Tunney announced he would "protect[ ] brick-and-mortar restaurants" from food trucks, and the resulting ordinance reflects that. It continued a ban on food trucks operating on public or private property within 200 feet of any brick-and-mortar business selling food. It quadrupled the fines for violating the 200-foot ban to up to $2,000 per violation—over ten times the fine for parking in front of a fire hydrant. And it required food trucks to install and operate GPS tracking devices as a condition of licensure. This GPS requirement serves to enforce the 200-foot ban; both reside in the same section of Chicago's code, and the requirement states that "[f]or purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device." Municipal Code of Chicago § 7-38-115(l).

After the Chicago City Council enacted the ordinance in July 2012, the Chicago Board of Health enacted GPS regulations. Those regulations mandate that a GPS device must send real-time location data to a GPS service provider—a private company with which the food truck must contract—at least once every five minutes whenever the truck is vending food, is otherwise open to the public, or is being serviced at a commissary. App. 86. The service provider must retain both the truck's current location and at least six months of historical data. *Id*. at 87. Officials may

request those data without prior judicial authorization for numerous reasons, including to "establish[] compliance with" the 200-foot ban. *Ibid*. Additionally, the ordinance requires service providers to make available "a publicly-accessible application programming interface (API)"—a virtual door through which the public can access GPS data. *Id*. at 88. A press release issued by the mayor made clear that "data on food truck locations will be available online to the public. Food truck operators will be required to use mounted GPS devices in each truck so that the City and consumers can follow their locations."[1]

B. Proceedings Below

On November 14, 2012, Petitioner brought suit in Cook County Circuit Court, contending that the 200-foot ban violated the Illinois Constitution's due process and equal protection guarantees because its sole purpose—protecting restaurants from potential food-truck competition—was illegitimate. Petitioner also challenged the GPS requirement as an unreasonable warrantless search under Article I, Section 6 of the Illinois Constitution, which Illinois courts analyze in limited lockstep with the Fourth Amendment. Chicago moved to dismiss, which the court substantially denied.

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[1] Press Release, Mayor's Press Office, City Council Approves Mobile Food Ordinance to Expand Food Truck Industry Across Chicago (July 25, 2012), https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2012/July/7.25.12ApproveFoodTrucks.pdf.

After discovery, the parties filed cross-motions for summary judgment.

On December 5, 2016, the trial court granted Chicago's motion for summary judgment and denied Petitioner's motion. App. 54. The court found the 200-foot ban legitimate because it helped "balanc[e] [the] interests" of food trucks and restaurants. *Id*. at 62–67. Regarding the GPS requirement, the court held in part that it was not a "search" because Chicago did not surreptitiously install the device but instead requires food trucks to install the devices themselves. *Id*. at 72–74.

Petitioner appealed the trial court's decision. But on December 18, 2017, the appellate court affirmed. App. 22. Regarding the 200-foot ban, the appellate court noted that restaurants pay property taxes and other fees it felt exceed similar payments made by food-truck owners. *Id*. at 38–39. Thus, the court held that Chicago could legitimately "protect those" restaurants from competition. *Id*. at 38. And like the trial court, the appellate court held that the GPS requirement was not a search because Chicago, rather than installing the tracking device itself, requires Petitioner to do it. *Id*. at 50.

Petitioner was granted leave to appeal to the Illinois Supreme Court, which affirmed on May 23, 2019. App. 1. The court first held that the 200-foot ban was constitutional because Chicago could legitimately protect restaurants from competition since they "bring stability" to neighborhoods while food trucks, in the court's opinion, do not. *Id*. at 9–10. The court then

rejected Petitioner's GPS claim, construing Illinois' search and seizure clause in "lockstep" with the Fourth Amendment and relying exclusively on U.S. Supreme Court cases.

Regarding Petitioner's GPS claim, the Illinois Supreme Court first held that Chicago's GPS requirement does not effect a search. The court noted that a search can occur under either the property-rights framework laid out in *Jones* or the reasonable expectation of privacy test developed in *Katz*. But the court distinguished both *Jones* and *Katz* as "criminal cases," whereas "[t]he City requires food truck owners to install GPS devices on their vehicles as a condition of their license . . . ." App. 16–18. The court further noted that Chicago requires GPS data be sent to service providers rather than to the City itself, and that the City had not requested data from any service provider. *Ibid*. Although the court claimed *Katz* was inapplicable, it went on to presume that any expectation of privacy Petitioner might have was attenuated to nonexistent because food trucks are licensed and Laura or her employees sometimes post the truck's location on social media. *Ibid*.

The Illinois Supreme Court then held that, even if Chicago's GPS requirement is a search, it is reasonable. The court first held, consistent with prior Illinois caselaw, that the food industry is "closely regulated" and therefore qualifies for one of this Court's narrow exceptions to the warrant requirement. App. 18–19. The court then held that Chicago's GPS requirement met the three-prong test for warrantless

administrative searches laid out in *New York* v. *Burger*, 482 U.S. 691 (1987). *Id*. at 19–21.

This timely Petition followed.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court, purporting to apply this Court's precedents, held that subjecting licensed food trucks to warrantless GPS tracking is not a search—and that even if it is, no warrant is required because the food industry is "closely regulated." The first holding squarely conflicts with this Court's recent GPS cases; such requirements *are* Fourth Amendment searches. The second holding extends a growing trend among the lower courts of turning what has always been a *narrow* exception to the warrant requirement into the *de facto* rule. These are threshold Fourth Amendment questions with grave implications for the millions of Americans who work in licensed occupations. This Court should grant review and clarify that Americans do not forfeit protection from warrantless GPS tracking and other searches simply because they work in regulated industries.

I. The Illinois Supreme Court's holding that requiring licensed businesses to install GPS devices is not a search conflicts with this Court's precedents on an issue of national importance.

Twice in the past decade, this Court has held that installation of a GPS tracking device is a Fourth Amendment search. *United States* v. *Jones*, 565 U.S. 400, 404 (2012); *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1371 (2015). In that same span, the Court has also reiterated that businesses do not forfeit Fourth Amendment protection simply because they are regulated. *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2452 (2015). Yet the Illinois Supreme Court, purporting to apply this Court's precedents, rejected both principles. App. 16–18. In the Illinois Supreme Court's view, when the government conditions entry into a regulated industry on the warrantless installation of a GPS device, no search has occurred. *Ibid*. On that logic, the millions of Americans who work in licensed occupations could be required to install GPS devices or submit to other warrantless intrusions, and the Fourth Amendment would have nothing to say. This Court should accept review to clarify that forcing licensed businesses to install GPS devices is a Fourth Amendment search.

A. The Illinois Supreme Court's holding that warrantless installation of a GPS device is not a search conflicts with this Court's decisions in *Jones* and *Grady*.

Chicago forces food trucks, as a condition of licensure, to physically install a GPS tracking device that records their movements. App. 86. The device transmits that location data to a third-party servicer, which must make at least six months of data available to Chicago officials upon request.[2] *Id*. at 87. The scheme requires no warrant and offers no opportunity for pre-compliance review.

The Illinois Supreme Court, purporting to apply Fourth Amendment principles, App. 16, was "unable to find from the record or the cases cited by [Petitioner] that the GPS requirement effects a search." *Id*. at 18. Petitioner cited *Jones* and *Grady* for the proposition that warrantless installation of a GPS device is both a trespassory search and a violation of Petitioner's reasonable expectation of privacy. But the court distinguished *Jones* as a "criminal case[]" and found that Petitioner has virtually no expectation of privacy because Laura or her employees sometimes post the truck's general location online. *Id*. at 17. The court did not mention or attempt to distinguish *Grady*.

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[2] GPS servicers are City agents. *Cf. United States* v. *Ackerman*, 831 F.3d 1292, 1301–02 (10th Cir. 2016) (Gorsuch, J.) (private organization was government agent due to "comprehensive statutory structure" reflecting "congressional knowledge of and acquiescence in the possibility" that organization would conduct search pursuant to statute).

The Illinois Supreme Court's decision plainly conflicts with this Court's precedents. In *Jones*, officials attached a GPS device to a suspect's vehicle without his consent and recorded his location for four weeks. This Court unanimously found that a search had occurred. 565 U.S. at 404. A five-justice majority found a trespassory search because "[t]he Government physically occupied private property for the purpose of obtaining information." *Ibid*. Five justices also agreed that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" and therefore constitutes a search under *Katz*. *Id*. at 430 (Alito, J., concurring); *id*. at 415 (Sotomayor, J., concurring).

These holdings of *Jones* are not limited to the criminal context. That much was clear when *Jones* was decided. *See City of Ontario* v. *Quon*, 560 U.S. 746, 755 (2010) ("It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations.").

In any case, this Court expressly resolved the issue in *Grady*. There, a convicted sex offender challenged a North Carolina statute requiring him to wear a GPS device upon release. The lower courts distinguished *Jones*, placing "decisive weight on the fact that the State's monitoring program is civil in nature." *Grady*, 135 S. Ct. at 1371. But this Court unanimously rejected that logic, applied *Jones*, and held that forcing subjects to wear GPS devices "effects a Fourth Amendment search." *Ibid*. (citing *Quon*, 560 U.S. at 755).

Jones and *Grady* make clear that Chicago's GPS requirement is also a search. Chicago forces licensed food trucks to physically install GPS devices, which is a trespassory search under the *Jones* majority's property-based framework. And the requirement that GPS servicers store at least six months of location data for officials' review far exceeds the four weeks that five concurring justices in *Jones* said impinged on a reasonable expectation of privacy under *Katz*. The Illinois Supreme Court's attempt to distinguish *Jones* as "criminal" directly conflicts with this Court's precedents.

B. The Illinois Supreme Court also wrongly implied that licensing requirements cannot be searches, which conflicts with this Court's decision in *Patel*.

In finding no search, the Illinois Supreme Court also called Chicago's GPS requirement "very different" because food trucks are "require[d] . . . to install GPS devices on their vehicles as a condition of their license to operate." App. 17. The court thus implied that occupational licensing requirements, even those that "physically occup[y] private property for the purpose of obtaining information," *Jones*, 565 U.S. at 404, simply cannot be searches.

But in *Patel*, this Court said just the opposite. There, a Los Angeles ordinance required licensed hoteliers to maintain records about their guests and

make those records available to police for inspection. 135 S. Ct. at 2448. Though these requirements were conditions of licensure, *id.* at 2455, this Court repeatedly stated that the ordinance imposed "searches," *id.* at 2452–54. This makes sense, as the Court has repeatedly stressed that the right to earn a living cannot be conditioned on the waiver of constitutional rights.[3]

Simply put, this Court's decision in *Patel* shows that the government cannot immunize searches from Fourth Amendment scrutiny by making them conditions of licensure. The Illinois Supreme Court's contrary suggestion directly conflicts with that precedent.

C. Whether it is a search to condition licensure on warrantless GPS tracking is an issue of national importance on which lower courts need guidance.

The Illinois Supreme Court's holding has national implications. Just last year, this Court expressed concern over the use of technology "rapidly approaching GPS-level precision" to monitor ordinary citizens. *Carpenter* v. *United States*, 138 S. Ct. 2206, 2219 (2018);

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[3] *See*, *e.g.*, *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 679 (1989) (urine samples taken as condition of state employment were still searches subject to Fourth Amendment); *Garrity* v. *New Jersey*, 385 U.S. 493, 497–98 (1967) (police officers' choice to waive Fourteenth Amendment rights or "lose their means of livelihood" was not truly "voluntary"); *Frost* v. *R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926) (commercial trucker's choice "to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden" was "no choice" at all).

see also Jones, 565 U.S. at 430 (Sotomayor, J., concurring) (worrying that "Government will [soon] be capable of duplicating the [location] monitoring undertaken in this case by enlisting . . . owner-installed vehicle tracking devices").

Yet just as government's capacity to monitor citizens' physical movements has become "remarkably easy, cheap, and efficient," *Carpenter*, 138 S. Ct. at 2218, occupational licensing has become ubiquitous. As both the Obama and Trump administrations have observed, "[m]ore than one-quarter of U.S. workers now require a license to do their jobs[.]"[4]

The implications are clear: If Chicago can mandate the warrantless installation and use of a GPS tracking device as a condition of occupational licensure without it effecting a "search," the millions of Americans who need a license to work can be subjected to warrantless searches with Fourth Amendment impunity.

Indeed, that prospect is *already* a reality for millions of Americans. Over a dozen major cities have adopted ordinances requiring licensed for-hire drivers

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[4] Dep't of the Treasury Office of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, Occupational Licensing: A Framework for Policymakers 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; *accord* Press Release, Dep't of Labor, U.S. Secretary of Labor Addresses Occupational Licensing Reform (July 21, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170721.

and others to install GPS devices,[5] yet the Second Circuit refused to say whether such ordinances impose searches. *See El-Nahal* v. *Yassky*, 835 F.3d 248, 253 (2d Cir. 2016).[6] The United States Department of Transportation has imposed a similar requirement on 3.5 million federally-licensed commercial truckers, yet the Seventh Circuit likewise declined to say whether those truckers have been searched. *See Owner-Operator Indep. Drivers Ass'n* v. *U.S. Dep't of Transp.*, 840 F.3d 879, 892 (7th Cir. 2016). And now, the Illinois Supreme Court has decided that requiring food trucks to install GPS devices is *not* a search—a decision with major implications for trucks subject to similar requirements in cities like Boston and New York.[7]

This Court should grant review and say what all these courts refused to say—and what lower courts

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[5] *See*, *e.g.*, Anchorage, Alaska, Code § 11.10.185(A) (2019); Atlanta, Ga., Code §§ 22-332, 22-242 (2019); Birmingham, Ala., Code § 12-16-3 (2017); Charlotte, N.C., Code § 22-176(b)(4) (2019); Cincinnati, Ohio, Code § 407-153 (2019); Columbus, Ohio, Code § 593.06 (2019); Hous., Tex., Code § 46.11(c) (2019); Minneapolis, Minn., Code § 341.597 (2019); New Orleans, La., Code § 162-661 (2019); N.Y.C. Admin. Code § 19-609(b) (2019); Portland, Or., Code § 16.40.140(J) (2017); Sacramento, Cal., Code § 5.18.230 (2019); S.F., Cal., Transp. Code § 909(f)(5) (2019); Seattle, Wash., Code § 6.310.320(T) (2019); Washington, D.C., Mun. Regulations § 822.16 (2016).

[6] *But see id.* at 259 (Pooler, J., concurring in part and dissenting in part) (stating that conditioning taxicab licenses on installation of GPS tracking devices "worked an unlicensed physical intrusion on a constitutionally protected effect" and therefore constituted a search).

[7] *See* Boston, Mass., Code § 17.10.8(9) (2018); N.Y.C. Rules, tit. 24, § 6-21(a) (2019).

across the country need to hear: that requiring warrantless inspections as a condition of licensure triggers Fourth Amendment scrutiny. The millions of Americans who need a government license to earn a living deserve nothing less.

II. The Illinois Supreme Court's decision deepens confusion over the scope of the *Colonnade–Biswell* exception to the warrant requirement.

Review is also warranted because the Illinois Supreme Court's decision deepens confusion over the scope of the *Colonnade–Biswell* exception to the warrant requirement. The Illinois Supreme Court held that, even if Chicago's GPS requirement is a search, it is reasonable under the *Colonnade–Biswell* exception because the food industry is "closely regulated" and Chicago's ordinance and regulations are an adequate warrant substitute. App. 18–20. Lower courts across the country have similarly expanded the *Colonnade–Biswell* exception to cover much of the economy. But this trend, if left uncorrected, would turn what has always been a *narrow* exception to the warrant requirement into the *de facto* rule.

Over 50 years ago, this Court held that, absent consent or a warrant, the government cannot enter "the portions of commercial premises which are not open to the public." *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). Petitioner's food truck is private property whose interior is not open to the public. That means

Chicago's warrantless GPS requirement is "*per se* unreasonable" unless the City can establish that one of "a few specifically established and well-delineated exceptions" applies. *Patel*, 135 S. Ct. at 2452 (quotation marks omitted).

One of those few exceptions permits warrantless inspection of "closely" or "pervasively" regulated industries. This Court first recognized the exception in *Colonnade Catering Corp.* v. *United States*, where federal agents conducted a warrantless inspection of a federal liquor licensee, kicking down a door in the process. 397 U.S. 72 (1970). The Court concluded that while the agents' use of force was unreasonable, they needed no warrant given the long history of federal liquor regulation. *Id*. at 76. Two years later in *United States* v. *Biswell*, the Court held that warrantless inspections of federal firearms dealers were not unreasonable given the "urgent federal interest" in regulating firearms. 406 U.S. 311, 317 (1972).[8]

But this Court has always stressed that the *Colonnade–Biswell* exception is a narrow one. Six years after *Biswell*, the Court rebuffed Congress's attempt to require warrantless inspections of all businesses engaged in interstate commerce. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). In so doing, the Court held that warrantless inspections of liquor businesses and firearms dealers were "exceptions"

[8] *See also Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981) (holding warrantless mine inspections constitutional in light of "the mining industry [being] among the most hazardous in the country").

arising from "relatively unique circumstances." *Id.* at 313. So too in *New York* v. *Burger*, where the Court extended *Colonnade–Biswell* to include junkyards but maintained the doctrine's "narrow focus." 482 U.S. 691, 701 (1987).

The Court maintained that narrow focus in *City of Los Angeles* v. *Patel*, where it rejected Los Angeles' claim that hotels were closely regulated. 135 S. Ct. 2443, 2455 (2015). The Court explained that "[t]he clear import of our cases is that the closely regulated industry . . . is the exception." *Ibid*. Indeed, "[o]ver the past 45 years, the Court has identified *only four* industries" that qualify for the exception: liquor, firearms, mining, and junkyards. *Id*. at 2454 (emphasis added). Adding hotels to that list simply because they were licensed or commonly regulated would have allowed "what has always been a narrow exception to swallow the rule." *Id*. at 2455.

Despite these warnings, the Illinois Supreme Court held that the *Colonnade–Biswell* exception applied because "the food industry . . . is traditionally closely regulated." App. 18. Long before Petitioner challenged Chicago's GPS requirement, federal and state courts in Illinois deemed the entire food industry closely regulated. *Contreras* v. *City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997); *City of Chicago* v. *Pudlo*, 123 Ill.App.3d 337, 379 (1st Dist. 1983). But those decisions are controversial, and other courts have rejected their conclusion.

In *Sweet Sage Café, LLC* v. *Town of North Redington Beach*, for instance, a federal district court examined an ordinance declaring restaurants "closely regulated" and requiring warrantless inspections to ensure they were "complying with Town code provisions." 380 F. Supp. 3d 1209, 1216 (M.D. Fla. 2019). The town defended the ordinance by citing several cases holding that food businesses were subject to the *Colonnade–Biswell* exception, all of which relied on the Seventh Circuit's decision in *Contreras*. But in rejecting those cases, the court in *Sweet Sage Café* noted that the Seventh Circuit did not evaluate the district court's view in *Contreras* that restaurants are closely regulated. When the *Sweet Sage Café* court did that evaluation, it noted that the district court's view in *Contreras* relied entirely on two inapposite cases. *Id*. at 1227. The court in *Sweet Sage Café* concluded that "as feared by the Court in *Patel*, finding that a restaurant, or more broadly an establishment that sells food, is part of a closely-regulated industry would allow the [*Colonnade–Biswell*] exception to swallow the rule." *Ibid*.

Although the court in *Sweet Sage Café* meaningfully evaluated whether an industry was closely regulated, most lower courts do not. As a result, courts across the country have expanded *Colonnade–Biswell* to cover not just restaurants, but a wide swath of industries and occupations spanning much of the

economy, including barbershops,[9] day cares,[10] funeral homes,[11] banks,[12] nursing homes,[13] insurance companies,[14] securities agents,[15] recycling centers,[16] medical providers,[17] precious metal dealers,[18] dog breeders,[19] commercial trucking,[20] taxidermists,[21] sellers of rabbits

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[9] *Stogner* v. *Kentucky*, 638 F. Supp. 1, 3 (W.D. Ky. 1985).

[10] *Rush* v. *Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009); *but see id.* at 722 ("We cannot stress forcibly enough that there is no basis for applying the 'pervasively regulated business' exception to the warrant requirement merely because a business . . . requires a license.").

[11] *Heffner* v. *Murphy*, 745 F.3d 56 (3d Cir. 2014).

[12] *United States* v. *Chuang*, 897 F.2d 646, 651 (2d Cir. 1990).

[13] *People* v. *Firstenberg*, 155 Cal. Rptr. 80, 84–86 (Ct. App. 1979).

[14] *De La Cruz* v. *Quackenbush*, 96 Cal. Rptr. 92, 98 (Ct. App. 2000).

[15] *In re Karel*, 144 Idaho 379 (2007).

[16] *Merserole Street Recycling, Inc.* v. *City of New York*, No. 06 Civ. 1773, 2007 WL 186791, at *4 (S.D.N.Y. Jan. 23, 2007).

[17] *Medical Soc'y of N.J.* v. *Robins*, 729 A.2d 1056, 1058 (N.J. Super. Ct. App. Div.1999); *but see Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (holding that medical facilities providing abortions are *not* closely regulated).

[18] *Liberty Coins, LLC* v. *Goodman*, 880 F.3d 274, 285 (6th Cir. 2018).

[19] *Professional Dog Breeders Advisory Council* v. *Wolff*, No. 1:CV-09-0258, 2009 WL 2948527, at *9 (M.D. Pa. Sept. 11, 2009).

[20] *United States* v. *Delgado*, 545 F.3d 1195 (9th Cir. 2008).

[21] *United Taxidermists Ass'n* v. *Ill. Dep't of Natural Resources*, No. 07-3001, 2011 WL 3734208, at *3 (7th Cir. Aug. 25, 2011).

for research,[22] commercial fishing,[23] seed producers,[24] convenience stores,[25] and cigarette sellers.[26]

This expansion has prompted confusion and criticism from both courts and commentators. One federal district court recognized, for instance, that "[t]here is no clearly defined test used to determine whether a particular business is closely regulated."[27] Last year, the Colorado Court of Appeals noted that "[d]espite the Court's admonition that the closely regulated industry 'is the exception,' other courts have found that many and varied industries fall within that exception."[28] One scholar echoed that insight, noting "[t]hat these industries span much of the commercial world highlights the exception's transformation from a limited and narrow doctrine to the default rule in searches of businesses."[29] In another's view, this "regulatory power threatens individual liberties, particularly since

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[22] *Lesser* v. *Espy*, 34 F.3d 301, 1307 (7th Cir. 1994).

[23] *United States* v. *Raub*, 637 F.2d 1205, 1209 n.5 (9th Cir. 1980).

[24] *Gunnink* v. *Minnesota*, No. A09-396, 2010 WL 10388, at *3 (Minn. Ct. App. Jan. 5, 2010).

[25] *Midwest Retailer Associated, Ltd.* v. *City of Toledo*, 563 F. Supp. 2d 796, 805–06 (N.D. Ohio 2008).

[26] *United States* v. *Hamad*, 809 F.3d 898, 906 (7th Cir. 2016).

[27] *United States* v. *Kolokouris*, No. 12-CR-6015, 2015 WL 4910636, at *20 (W.D.N.Y. Aug. 14, 2015), report and recommendation adopted, 2015 WL 7176364 (W.D.N.Y. Nov. 13, 2015).

[28] *Maralex Res., Inc.* v. *Colo. Oil & Gas Conservation Comm'n*, 428 P.3d 657, 663 (Colo. Ct. App. 2018).

[29] Note, *Rethinking Closely Regulated Industrie*s, 129 Harv. L. Rev. 797, 806 (2016).

virtually all regulatory regimes can be premised on some public health or public safety rationale."[30]

This cannot go on. The Court has repeatedly held that the "ban on warrantless searches . . . applies to commercial premises" and that *Colonnade–Biswell* is only a narrow exception to that ban. *Marshall*, 436 U.S. at 312; *Patel*, 135 S. Ct. at 2455. Yet lower courts, including the Illinois Supreme Court, continue to expand the exception with little discretion and no end in sight. *See Pennsylvania* v. *Maguire*, ___ A.3d ___, 2019 WL 3956257, at *14 (Pa. Aug. 22, 2019) (Wecht, J., concurring and dissenting) (criticizing holding that trucking is closely regulated as "more akin to an assumption reached by piggybacking off of the uncited, unverified, and unidentified work of the lower courts rather than a carefully contemplated legal holding"). This Court should accept review to stem the flood and provide much-needed guidance for lower courts on the proper scope of the *Colonnade–Biswell* exception.[31]

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[30] Fabio Arcila, *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 Admin. L. Rev. 1223, 1225 (2004).

[31] Accepting review will also guide lower courts on how to decide whether warrantless searches are reasonable under the *Colonnade-Biswell* exception. Although warrantless searches are *per se* unreasonable and the government bears the burden of proving their reasonableness, *Chimel* v. *California*, 395 U.S. 752, 762 (1969), numerous courts conduct only glancing review and actually require the *party being searched* to prove that the search is *unreasonable*. Indeed, that is what happened here when the Illinois Supreme Court declared that "Plaintiff has failed to establish that [Chicago's GPS requirement is] unconstitutional." App. 21.

III. This case is an ideal vehicle for clarifying these issues.

This case presents the Court with an ideal vehicle for clarifying that warrantless GPS tracking of licensed businesses is a Fourth Amendment search and that *Colonnade–Biswell* is a narrow exception to the warrant requirement that does not include restaurants. Because the case was resolved on summary judgment, there are no factual disputes for this Court to parse, nor any factual findings to which this Court must defer. At each level below, the courts rejected Petitioner's argument that Chicago's GPS requirement is a search. Moreover, both the Illinois Supreme Court and the trial court held that, even if the GPS requirement was a search, it was reasonable under *New York* v. *Burger*. App. 19–21.

Additionally, the decision below turns on U.S. Supreme Court precedent and does not rest upon any independent and adequate state grounds.[32] The Illinois Supreme Court evaluated Chicago's GPS requirement using Fourth Amendment principles. Although Petitioner's challenge to the requirement arose under Article I, Section 6 of the Illinois Constitution, courts in Illinois employ a limited lockstep approach that uses Fourth Amendment principles to resolve the challenge. Indeed, the Illinois Supreme Court's decision acknowledged that "we interpret the search

[32] The Illinois Supreme Court's decision contains no statement "that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

and seizure clause in our state constitution using the same standards as are used in construing its federal counterpart, unless a narrow exception applies." App. 16. The court found no such narrow exception. Nothing prevents this Court from reaching and resolving these critical threshold Fourth Amendment issues.

CONCLUSION

As surveillance tools become ever more sophisticated, this Court has stood vigilant to "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001); brackets in original). Indeed, *Kyllo*, *Jones*, and *Carpenter* all rejected attempts to conduct "tireless and absolute surveillance" "without regard to the constraints of the Fourth Amendment." *Carpenter*, 138 S. Ct. at 2218. The Illinois Supreme Court's decision that GPS tracking of regulated businesses is exempt from Fourth Amendment scrutiny flouts these precedents. And left unchecked, it would put millions of

hardworking Americans at risk of warrantless surveillance. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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2019 IL 123123

IN THE

SUPREME COURT

OF

THE STATE OF ILLINOIS

(Docket No. 123123)

LMP SERVICES, INC., *et al.* v.
THE CITY OF CHICAGO, Appellee
(LMP Services, Inc., Appellant).

Opinion filed May 23, 2019.

JUSTICE BURKE delivered the judgment of the court, with opinion.

Chief Justice Karmeier and Justices Thomas, Kilbride, Garman, Theis, and Neville concurred in the judgment and opinion.

OPINION

Plaintiff, LMP Services, Inc. (LMP), filed a complaint against the City of Chicago (City)[1] alleging that sections 7-38-115(f) and 7-38-115(*l*) of the Municipal Code of Chicago (Code) (Chicago Municipal Code

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[1] Greg Burke and Kristin Casper, the owners of the food truck "Schnitzel King," originally filed suit against the City along with LMP, which is owned by Laura Pekarik and operates "Cupcakes for Courage" food trucks. The Schnitzel King food truck went out of business in 2014. Burke and Casper were then voluntarily dismissed from the case.

§ 7-39-115(f), (*l*) (amended July 25, 2012)) are constitutionally invalid. Section 7-38-115(f) prohibits food trucks from parking within 200 feet of the entrance of a ground-floor restaurant (200-foot rule), and section 7-38-115(*l*) requires food truck owners to permanently install on their vehicles a global positioning system (GPS) device that transmits location information to a GPS service (GPS requirement).

The circuit court of Cook County granted the City's motion for summary judgment, upholding the constitutional validity of the two provisions. The appellate court affirmed that ruling. 2017 IL App (1st) 163390. We granted LMP's petition for leave to appeal. Ill. S. Ct. R. 315 (eff. July 1, 2017). For the reasons that follow, we affirm the judgment of the appellate court.

BACKGROUND

In July 2012, the Chicago City Council passed Ordinance 2012-4489. Chi. City Clerk J. Proc. 31326 (July 25, 2012), https://chicityclerk.s3.amazonaws.com/s3fspublic/document_uploads/journals-proceedings/2012/072512.pdf [https://perma.cc/CHN8-KNZU]. The ordinance amended some provisions and added others to chapters 4-8 and 7-38 of the Code regarding the regulation of mobile food vehicles (food trucks) within the City. The ordinance kept in place section 7-38-115(f), a proximity restriction known as "the 200-foot rule" that had been in effect since September 1991. This provision states that "[n]o operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any

principal customer entrance to a restaurant which is located on the street level." Chicago Municipal Code § 7-38-115(f) (amended July 25, 2012). The provision also defines "restaurant" as "any public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses." *Id.* The restriction applies regardless of whether the food truck is parked on private or public property.

Although Ordinance 2012-4489 did not amend section 7-38-115(f) itself, the ordinance added or amended other provisions of the Code that affect section 7-38-115(f). For example, Ordinance 2012-4489 amended section 7-38-128(d) to increase the minimum fine for any violation of section 7-38-115 to $ 1000, quadrupling the previous minimum fine amount. See *id.* § 7-38-128(d) ("Any person who violates sections 7-38-115 and 7-38-117 of this chapter shall be fined not less than $ 1,000.00 and not more than $ 2,000.00 for each offense. Each day that the violation occurs shall be considered a separate and distinct offense.").

The ordinance also added section 7-38-117 to the Code. This new provision established a "mobile food vehicle stands program" whereby the City reserved a number of designated areas on the public way where a certain number of food trucks are permitted to operate without being subject to the 200-foot rule. *Id.* § 7-38-117(c).

Another new provision that was added to the Code by the ordinance is section 7-38-115(*l*). This provision established a "GPS requirement" that compels food truck owners to install on their food trucks a permanent GPS device "which sends real-time data to any service that has a publicly-accessible application programming interface (API)." *Id.* § 7-38-115(*l*).

Soon after the passage of Ordinance 2012-4489, a complaint was filed against the City by LMP, a corporation owned by Laura Pekarik, who began operating the food truck "Cupcakes for Courage" throughout the Chicagoland area in 2011. In the complaint, LMP alleged that sections 7-38-115(f) and 7-38-115(*l*) of the Code are constitutionally invalid. Specifically, LMP alleged the 200-foot rule contained in subsection (f) violates the equal protection and due process clauses in article I, section 2, of the Illinois Constitution (Ill. Const. 1970, art. I, § 2) because it is protectionist and unreasonably favors brick-and-mortar restaurants over food trucks. LMP further alleged that the GPS requirement in subsection (*l*) is unconstitutional because it constitutes a continuous, unreasonable, warrantless search of food trucks in violation of article I, section 6, of the Illinois Constitution (Ill. Const. 1970, art. I, § 6).

The circuit court dismissed LMP's equal protection claim but allowed the remainder of the claims to go forward. Following discovery, both parties moved for summary judgment, and the circuit court granted the City's motion. The circuit court held that plaintiff's substantive due process challenge to the 200-foot rule failed because the rule satisfies the rational basis test.

The court concluded that the 200-foot rule balances the needs of both restaurants and food trucks and serves to protect a legitimate City interest in reducing pedestrian traffic. Therefore, the court held that the 200-foot rule does not violate due process and is constitutionally valid.

The circuit court also upheld the constitutionality of the GPS requirement, finding that it was not a search because the State did not physically trespass upon plaintiff's property to install the GPS unit on the food truck. The circuit court also held that, even if the GPS requirement constituted a search, it was not unreasonable. Citing *New York v. Burger*, 482 U.S. 691 (1987), the court held that warrantless inspections of closely regulated businesses, such as food services, must meet three criteria to be constitutionally valid: (1) there must be a substantial governmental interest that informs the regulatory scheme permitting the warrantless inspection, (2) the warrantless inspection must be necessary to further the purpose of the regulatory scheme, and (3) the regulatory scheme must provide a constitutionally adequate substitute for a warrant. The circuit court held the GPS requirement satisfied the *Burger* test because the City has a substantial interest in ensuring food safety and must know the location of food trucks to be able to make inspections. Further, the court held that food trucks have no expectation of privacy as to their location and, therefore, there is no reason why the City could not make compliance with the GPS requirement a condition of plaintiff's licensure.

The appellate court affirmed the circuit court's grant of summary judgment. 2017 IL App (1st) 163390. Addressing plaintiff's substantive due process challenge to the 200-foot rule, the appellate court held that a food truck owner's right to conduct its business on public property, *i.e.*, the streets of Chicago, is not a fundamental right for substantive due process purposes and, thus, the 200-foot rule need only pass the rational basis test to be valid. *Id.* ¶ 26. After thoroughly examining each of plaintiff's arguments, the court upheld the 200-foot rule "as a rational means of promoting the general welfare of the City of Chicago." *Id.* ¶ 32. The court rejected plaintiff's protectionist argument, holding that the City has a legitimate interest in protecting brick-and-mortar restaurants because they bring critical economic benefits to the City, including the payment of taxes and other fees, that exceed any similar expenditure by food trucks. Thus, the appellate court concluded that the 200-foot rule strikes an appropriate balance between the interests of brick-and-mortar restaurants and their food truck competitors.

As to the GPS requirement, the appellate court held that it is not a search. The appellate court concluded that, because food trucks do not have a constitutional right to conduct business on the streets and sidewalks of Chicago, the City may require food trucks to install a GPS device as a condition of licensure.

LMP petitioned for leave to appeal in this court, which we granted. We also allowed the Illinois Policy Institute, Restore the Fourth, Inc., the Pacific Legal Foundation, and the Illinois Food Truck Owners

Association, together with the National Food Truck Association and CATO Institute, to file *amicus curiae* briefs in support of plaintiff. Ill. S. Ct. R. 345 (eff. Sept. 20, 2010). In addition, we allowed the Illinois Restaurant Association to file an *amicus curiae* brief in support of the City. *Id.*

ANALYSIS

Plaintiff asks that we reverse the appellate court's affirmance of the circuit court's grant of summary judgment to the City and find, instead, that sections 7-38-115(f) and 7-38-115(*l*) of the Code are constitutionally invalid. Whether a municipal code provision or ordinance violates the constitution is a question of law that we review *de novo*, applying the same rules of construction as would govern the construction of statutes. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). Like statutes, municipal code provisions are presumed constitutional, and the burden of rebutting that presumption rests with the challenging party, who must demonstrate a clear constitutional violation. *Id.* A reviewing court must affirm the constitutionality of a statute or ordinance if it is "reasonably capable of such a determination" and resolve any doubt as to the statute's construction in favor of its validity. *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20.

The 200-Foot Rule

Plaintiff argues that section 7-38-115(f) is unconstitutional because it violates its substantive due

process rights guaranteed by article I, section 2, of the Illinois Constitution. Ill. Const. 1970, art. I, § 2. Substantive due process bars arbitrary governmental action that infringes upon a protected interest. *People v. Pepitone*, 2018 IL 122034, ¶ 13. The nature of the protected interest determines the level of scrutiny. Where, as here, the challenged provision does not affect a fundamental right, the rational basis test applies. *Id.* ¶ 14. When applying the rational basis test, our inquiry is twofold: we must determine whether there is a legitimate governmental interest behind the legislation and, if so, whether there is a reasonable relationship between that interest and the means the governing body has chosen to pursue it. See *People v. Reed*, 148 Ill. 2d 1, 11 (1992). The party challenging a legislative enactment as failing rational basis review bears the burden of proving by clear and affirmative evidence that the enactment constitutes arbitrary, capricious, and unreasonable legislative action; that there is no permissible interpretation that justifies its adoption; or that it does not promote the safety and general welfare of the public. *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 226 (1989). Further, when determining whether a legislative enactment survives rational basis review, courts do not consider the wisdom of the enactment or whether it is the best means of achieving its goal. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 125 (2004); *People ex rel. Lumpkin v. Cassidy*, 184 Ill. 2d 117, 124 (1998); *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003) ("The judgments made by the legislature in crafting a statute are not subject to courtroom fact-finding and may be based on rational

speculation unsupported by evidence or empirical data."). With these standards in mind, we now consider the constitutional validity of the 200-foot rule in section 7-38-115(f) of the Code.

Both brick-and-mortar restaurants and food trucks are important businesses that bring significant benefits to the City. However, they do so in very different ways. Brick-and-mortar restaurants bring stability to the neighborhoods in which they are located. The restaurants pay property taxes and have a vested interest in seeing that their neighborhoods continue to grow and thrive so that their own businesses will flourish. Moreover, in certain areas of the City, such as Greektown, restaurants are a vibrant part of the community and bring a long-term sense of cohesiveness and identity to the area. In this way, brick-and-mortar restaurants can help establish certain parts of the City as tourist destinations in and of themselves, thereby increasing revenue for the City and improving stable economic growth.

In contrast, while food trucks bring a life and energy to the City that is all their own, they simply do not have the same long-term, stabilizing effect on City neighborhoods as brick-and-mortar restaurants do. Indeed, the business model of food trucks and a good deal of their appeal are built on mobility, not stability: The trucks may be in the City one day and in Evanston or Aurora the next.

The City has a legitimate governmental interest in encouraging the long-term stability and economic

growth of its neighborhoods. The 200-foot rule, which helps promote brick-and-mortar restaurants and, thus, neighborhood stability, is rationally related to this legitimate interest. Importantly, too, in 2012, when the City passed Ordinance 2012-4489, section 7-38-117 was added to the Code. This section created a number of food truck stands, *i.e.*, designated areas along the public way where food trucks are permitted to park without being subject to the 200-foot rule. Thus, the City has not entirely banned food trucks. Rather, it has created a regulatory scheme that attempts to balance the interests of food trucks with the need to promote neighborhood stability that is furthered by brick-and-mortar restaurants.

Plaintiff contends, however, that the 200-foot rule unreasonably and arbitrarily infringes on its constitutionally protected interest to pursue a trade, occupation, or profession. Citing remarks made by Mayor Rahm Emanuel and several aldermen when Ordinance 2012-4489 was introduced, plaintiff claims that the sole purpose for the proximity restriction is impermissible protectionism, because it does not allow food trucks to trade freely within the marketplace and, instead, shields brick-and-mortar restaurants from competition. Plaintiff maintains that protecting brick-and-mortar restaurants from food truck competition is not a legitimate interest. In support of this contention, plaintiff relies principally on *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill. 2d 98, 100 (1960).

In *Chicago Title & Trust*, the plaintiffs sought a permit from the Village of Lombard to construct a new

gas station on land that had been purchased. Although the property was zoned for this use, the Village denied the permit based on a municipal ordinance providing that " 'no filling station may be erected on a lot within 650 feet of any lot upon which a filling station, licensed under the provisions of this ordinance, is in operation.' " *Id.* The plaintiff alleged that the proximity restriction in the ordinance was arbitrary and unreasonable. The Village, however, claimed that the proximity restriction promoted the public's health and safety by limiting the number of gas stations within a 650-foot radius. *Id.* at 101. The court invalidated the ordinance, stating that it could not "find on this record a rational basis for the restriction, and we agree with the court below that it is arbitrary and unreasonable." *Id.* at 107.

Plaintiff's reliance on *Chicago Title & Trust* is misplaced. The case is distinguishable from the present case for several reasons. First, the ordinance in *Chicago Title & Trust* unduly infringed upon a protected property interest by preventing a property owner from constructing a gas station on his land even though the property was zoned to permit that use. In the case before us, however, plaintiff, like all food trucks, does not own the land on which it operates. Rather, it conducts its business on City streets along the public way. In *Triple A Services*, 131 Ill. 2d at 237, we rejected the notion that food trucks operating on the public way are vested with any degree of property interest and, therefore, held that food trucks have "no due process right against the city's subsequent

regulation of those streets in the valid exercise of the city's police power." Thus, while plaintiff has a protected interest in pursuing its business and is licensed to conduct business on the streets of Chicago, plaintiff has no constitutionally protected property interest to conduct business at any particular location within the City. Further, the ordinance in the present case does not restrict new restaurants from locating near existing restaurants or prevent land owners from using their property for a purpose allowed by existing zoning laws. Instead, the ordinance prevents mobile food trucks from parking adjacent to brick-and-mortar restaurants.

Chicago Title & Trust also differs from the present case in another important respect. In *Chicago Title & Trust*, the village was unable to show that any legitimate governmental interest was advanced by the proximity restriction. Although the village claimed the ordinance promoted the health and safety of its residents, the record contained no evidence to indicate that gas stations located in close proximity to each other had any adverse effect on health or safety. *Chicago Title & Trust*, 19 Ill. 2d at 104-05. In fact, the court noted that several existing gas stations within the village were located within 650 feet of each other with no ill effect on health or safety and that the ordinance did not place any restrictions on these gas stations. *Id.* at 106-07. Thus, the ordinance did nothing more than advance an arbitrary preference for one similarly situated business over another. *Id.* at 107. In contrast, in this case, there are very real differences between

brick-and-mortar restaurants and food trucks and in the effects they have on City neighborhoods. It is not irrational or arbitrary for the City to take this reality into account when crafting a regulatory scheme.

A case more on point to the present one is *Triple A Services*, in which this court upheld a Chicago ordinance that prohibited food trucks from conducting business within a certain section of the City identified as the "Medical Center District." *Triple A Services*, 131 Ill. 2d at 223. Applying the rational basis test, we held that the City had the power to regulate the use of its streets for private gain and, therefore, had the authority to prohibit food trucks from operating in the medical district. *Id.* at 229. Moreover, we found that the prohibition was rationally related to the City's legitimate interest in ensuring that emergency vehicles, medical personnel, and medical clients had easy access to the medical facilities; in enhancing the appearance of the district; and in promoting sanitary conditions within the area. *Id.* at 232. Thus, we upheld the ordinance as constitutionally valid. *Id.* at 236. Similarly, in the present case, the City has a legitimate interest in ensuring the long-term viability of its neighborhoods, an interest that food trucks do not further.

In sum, we find that plaintiff has not met its considerable burden of showing that the 200-foot rule is an arbitrary and unreasonable municipal action and that no permissible interpretation justifies its adoption. The 200-foot rule is not unreasonable because it is a part of a regulatory scheme that seeks to balance the interests of food trucks with the City's need to

advance the stability and long-term economic growth of its neighborhoods. Having found that the 200-foot rule is rationally related to a legitimate governmental interest, we need not consider the City's alternative rationales for upholding the constitutionality of the 200-foot rule.

The GPS Requirement

Plaintiff maintains, as it did in the courts below, that section 7-38-115(*l*) of the Code (Chicago Municipal Code § 7-38-115(*l*) (amended July 25, 2012)) is constitutionally invalid. This provision, which was added to the Code by Ordinance 2012-4489, requires food trucks to be equipped with a permanently installed functioning GPS device "which sends real-time data to any service that has a publicly-accessible application programming interface (API)." *Id.* The GPS device, therefore, transmits the food truck's location to the service provider and, according to the City of Chicago Rules for Mobile Food Vendors and Shared Kitchens (Rules),[2] must do so whenever the food truck is serving the public or being serviced at a commissary. Also, the Rules state that the service provider must maintain "at least six (6) months of historical location information." Chi. Dep't Pub. Health, City of Chicago Rules: Mobile Food Vendors and Shared Kitchens 13 (updated Jan. 1, 2019), https://www.chicago.gov/content/dam/city/depts/dol/rulesandregs/Mobile%20Food%20Vendor%20

[2] The City supplemented the record with a copy of the updated City of Chicago Rules concerning Mobile Food Vendors and Shared Kitchens that issued on January 1, 2019.

and%20Shared%20Kitchen%20Rules%20Final_01.01.18.pdf [https://perma.cc/Y7H6-8S8P] (Rule 8(C)).

Although section 7-38-115(*l*) and the Rules require the service provider to have a "publicly-accessible" API, there is no requirement that the location data be made available to the public. The Rules specifically state that, if the food truck so chooses, their service provider may deny public access to the food truck's location data. In addition, in accord with Rule 8(B), the City will not request location information from a GPS service provider unless:

> "(1) The information is sought to investigate a complaint of unsanitary or unsafe conditions, practices, or food or other products at the vehicle;
>
> (2) The information is sought to investigate a food-related threat to public health;
>
> (3) The information is sought in connection with establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promulgated thereunder;
>
> (4) The information is sought for purposes of emergency preparation or response;
>
> (5) The City has obtained a warrant or other court authorization to obtain the information; or
>
> (6) The City has received permission from the licensee to obtain the information." *Id.* (Rule 8(B)).

Plaintiff contends that the requirement that it install a GPS unit in its food truck and transmit its location to a service provider constitutes a warrantless search in violation of the Illinois Constitution. Our state constitution, like our federal constitution, prohibits only those searches that are unreasonable. Article I, section 6, of the Illinois Constitution provides, in part: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. 1970, art. I, § 6. Under the limited lockstep doctrine, we interpret the search and seizure clause in our state constitution using the same standards as are used in construing its federal counterpart, unless a narrow exception applies. *People v. Fitzpatrick*, 2013 IL 113449, ¶ 28.

It is plaintiff's contention that because the City requires food trucks to install a GPS device on their vehicles as a condition of their licensure, there is no voluntary consent to this physical intrusion on their private property and, therefore, the GPS requirement is a search pursuant to the property-based framework in *United States v. Jones*, 565 U.S. 400 (2012). See also *El-Nahal v. Yassky*, 835 F.3d 248, 259 (2d Cir. 2016) (Pooler, J., concurring in part and dissenting in part). Plaintiff also asserts that the GPS requirement is a search pursuant to *Katz v. United States*, 389 U.S. 347 (1967), because it intrudes on plaintiff's reasonable expectation of privacy. Plaintiff contends that the search effected by the GPS requirement is unreasonable and,

therefore, violates article I, section 6, of the Illinois Constitution.

The cases plaintiff cites in support of its claim that the GPS requirement effects a search are distinguishable from the case at bar. Both *Jones* and *Katz* were criminal cases. In *Jones*, the government, without a warrant and unknown to the defendant, placed a GPS device on the defendant's private car to track his whereabouts over a period of several weeks. *Jones*, 565 U.S. at 402-03. The Court held that the GPS device was an intrusion on the defendant's private property and the long-term monitoring it permitted constituted a search within the meaning of the fourth amendment. *Id.* at 404. In *Katz*, the government, without a warrant, attached an electronic monitoring device to a public phone booth that the government believed the defendant was using for his drug trade. *Katz*, 389 U.S. at 348. The government then listened in on the defendant's conversations, and the information obtained was used against defendant at trial. *Id.* On appeal, the United States Supreme Court found that the monitoring device was a search even though the phone booth was not the defendant's private property. *Id.* at 353. The Court ruled it a search because the defendant had a reasonable expectation of privacy in his phone conversations. *Id.*

The situation here is very different. The City requires food truck owners to install GPS devices on their vehicles as a condition of their license to operate on the streets of Chicago. The GPS device does not transmit the food truck's location data directly to the

City, nor does plaintiff allege that the City has ever obtained plaintiff's location data from its service provider without obtaining a warrant. In fact, plaintiff admits that, at present, the City has *never* requested location data from any food truck's service provider. In addition, plaintiff also admits that food trucks generally post their location on social media to attract customers. Thus, any expectation of privacy a food truck might have in their location is greatly diminished, if it exists at all.

Plaintiff contends that, because a food truck's service provider must maintain location records for six months, this long-term monitoring provides greater information about the food truck than its mere location and, because this information is accessible by the general public, the GPS requirement is "overbroad" and invalid. However, as we already explained above, the City has never requested location data from plaintiff's service provider. Plaintiff is simply incorrect when it contends that the GPS requirement mandates that location data be provided to the general public.

We are unable to find from the record or the cases cited by plaintiff that the GPS requirement effects a search of plaintiff's food truck within the meaning of article I, section 6, of the Illinois Constitution. Nevertheless, even if we were to assume, *arguendo*, that the GPS requirement constitutes a search, we would find it to be reasonable.

Food trucks operate within the food industry, which is traditionally closely regulated. Accordingly,

"the warrant and probable-cause requirements, which fulfill the traditional Fourth Amendment standard of reasonableness for a government search [citation] have lessened application in this context." *Burger*, 482 U.S. at 702-03. The *Burger* Court held that warrantless inspections of highly regulated businesses will be deemed reasonable only if (1) there is a substantial government interest that informs the regulatory scheme under which the search is made, (2) the warrantless inspection is necessary to further the regulatory scheme, and (3) the regulatory scheme is a constitutionally adequate substitute for a warrant. *Id.* Plaintiff agrees that the *Burger* standard for determining reasonableness is applicable in this case but argues that the test is not met. We disagree.

Plaintiff does not dispute that the City has a substantial interest in knowing a food truck's location and in having access to records regarding a food truck's movements and locations over a period of time. Knowing the location where a business is being operated is a basic necessity. The City needs to regularly inspect food service businesses for compliance with health and food safety regulations. This is easily accomplished at brick-and-mortar restaurants because they are licensed to operate at a specific location and are stationary. Food trucks, however, are mobile and move about the City. The GPS requirement provides the City with a means of obtaining a food truck's location to effectuate inspections. Also, the City has a legitimate interest in having a reliable means of locating a food truck in the event of a public health emergency.

Although plaintiff agrees that the *Burger* test's first criterion—substantial interest—is met, plaintiff contends that the GPS requirement does not meet the second *Burger* criterion because it is not "necessary" to further the regulatory scheme. According to plaintiff, since the location data has never been sought by the City and because the City could use less intrusive means to obtain a food truck's location, the GPS requirement is not necessary. However, as the City explained, relying on other means of obtaining a food truck's location, such as social media or simply phoning the food truck, has proven unreliable. Information on social media is often outdated or inaccurate, and food trucks, when busy, often fail to answer phone calls. Thus, the GPS system is the best and most accurate means of reliably locating a food truck, which is particularly important and necessary in the event of a serious health issue.

Finally, plaintiff argues that the third *Burger* criterion is not met because the regulatory scheme is not a constitutionally adequate substitute for a warrant. Plaintiff bases this claim on the assertion that the regulatory scheme requiring food trucks to be equipped with a GPS device is excessive because it requires the location information to be provided to the general public. However, as we explained earlier, plaintiff is simply incorrect. The GPS requirement does not require food trucks to make the location data transmitted to their service provider accessible to the public.

Because we find that the GPS requirement passes the *Burger* test, we find that it is not an unreasonable search and, therefore, passes constitutional muster.

CONCLUSION

Plaintiff has failed to establish that sections 7-38-115(f) and 7-38-115(*l*) of the Municipal Code of Chicago are unconstitutional. Accordingly, we affirm the judgment of the appellate court, which affirmed the circuit court's order granting summary judgment to the City of Chicago.

Affirmed.

2017 IL App (1st) 163390

FIRST DIVISION
December 18, 2017

No. 1-16-3390	Appeal from the Circuit Court of Cook County.
LMP SERVICES, INC., Plaintiff-Appellant,	No. 12 CH 41235
v.	Honorable Helen A. Demacopoulos, Judge Presiding.
THE CITY OF CHICAGO, Defendant-Appellee.	

JUSTICE HARRIS delivered the judgment of the court, with opinion.

Presiding Justice Pierce and Justice Mikva concurred in the judgment and opinion.

OPINION

Plaintiff-appellant, LMP Services, Inc. (LMP), filed this lawsuit seeking both declaratory and injunctive relief against two sections of an ordinance passed by defendant-appellee, City of Chicago (City). The two challenged ordinances pertained to the operation of mobile food vehicles (hereinafter food trucks) within

Chicago. Under the first challenged ordinance, food trucks may not, with limited exceptions, locate themselves within 200 feet of the principal customer entrance of a restaurant located at street level. LMP challenged this ordinance under the due process and equal protection clauses of the Illinois Constitution. Under the second challenged provision, food trucks must be equipped with a Global Positioning System (GPS) that sends real-time data to any service that has a publicly accessible application programming interface. LMP challenged this provision as a violation of its right under the Illinois Constitution to be free from unreasonable searches.

After LMP filed an amended complaint, the City moved to dismiss all of LMP's claims. The circuit court granted the motion with respect to the equal protection claim but denied the motion as to the due process and search claims. The City answered the remaining claims and the parties proceeded to discovery. At the close of discovery, the parties moved for cross-summary judgment. As to the 200-foot rule, the circuit court found it rationally related to (1) the City's need to balance the interests of both the food trucks and brick-and-mortar restaurants and (2) the City's need to balance sidewalk congestion. As to the GPS requirement, the circuit court found LMP lacked standing because the City had never requested its GPS information and, therefore, a search had not occurred. The court further concluded that, even if a search had occurred, the search was reasonable and therefore constitutional.

LMP now appeals the circuit court's grant of summary judgment in favor of the City. Upon this court's review, we agree with the circuit court's findings that LMP's constitutional challenge to both sections of the ordinance fails. The City has a critical interest in maintaining a thriving food service industry of which brick-and-mortar establishments are an essential part. The 200-foot exclusion represents a rational means of ensuring the general welfare of the City and is neither arbitrary nor unreasonable. The GPS is not a search pursuant to *United States v. Jones*, 565 U.S. 400 (2012). The GPS rule represents a method of requiring a licensee to maintain records as to its operational location in an electronic form as a condition of conducting business from the city street. Accordingly, the circuit court's grant of summary judgment in favor of the City is affirmed.

JURISDICTION

On June 13, 2013, the circuit court granted the City's motion to dismiss LMP's equal protection claim. On December 5, 2016, the circuit court granted the City's motion for summary judgment on LMP's due process and illegal search claims. LMP's cross-motion for summary judgment was denied the same day. On December 28, 2016, LMP timely filed its notice of appeal as to the December 5, 2016 order.[1] Accordingly,

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[1] LMP does not challenge the order of June 13, 2013, and has therefore forfeited review of its equal protection claim. *Lewanski v. Lewanski*, 59 Ill. App. 3d 805, 815-16 (1978).

this court has jurisdiction over this matter pursuant to article VI, section 6, of the Illinois Constitution and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, § 6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. May 30, 2008).

BACKGROUND

The plaintiff-appellant, LMP is a closely held Illinois corporation in Elmhurst, Illinois. Its owner, Laura Pekarik, operates the food truck called Cupcakes for Courage. Cupcakes for Courage is licensed in Chicago as a "mobile food dispenser," and since June 2011, Pekarik has sold cupcakes from the food truck.

On July 25, 2012, the Chicago city council passed an ordinance to expand food truck operations within the city limits of Chicago. The ordinance allows for food preparation on food trucks and established a number of regulations governing location, operation, and inspection of food trucks. The ordinance authorizes the commissioner of transportation for the City to establish fixed stands where parking space for food trucks is reserved. Chicago Municipal Code § 7-38-117(c) (added July 25, 2012). The ordinance requires a "minimum of 5 such stands" in each "community area * * * designated in section 1-14-010 of this Code [(Chicago Municipal Code § 1-14-010 (added Dec. 15, 1993))], that has 300 or more retail food establishments." *Id*.

Those community areas are the Loop,[2] Near West, Near North, Lincoln Park, Lakeview, and West Town.

Beyond food stands, food trucks may park in legal parking spots on the street for up to two hours. Chicago Municipal Code § 7-38-115(b) (amended July 25, 2012). Food trucks may not park within 20 feet of a crosswalk, 30 feet of a stop light or stop sign, or adjacent to a bike lane. Chicago Municipal Code § 7-38-115(e) (amended July 25, 2012). In addition, the ordinance provides:

> "No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m." Chicago Municipal Code § 7-38-115(f) (amended July 25, 2012).

"Restaurant" is defined as:

> "[A]ny public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms, and sandwich shops." *Id*.

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[2] The Loop is geographically defined as the downtown area of Chicago boarded [sic] by Lake Michigan to the east, the Chicago River to the north and west, and Congress Parkway to the south.

There are two exceptions to the 200-foot requirement. The first exception allows food trucks to park at one of the five established food stands even if that stand is within 200-feet of the primary entrance of a restaurant. The second exception allows food trucks to park near construction sites and serve those sites.

Mobile food vendors are also subject to regulations designed to ensure safe food preparation and sanitary operations, including requirements for storage and plumbing equipment, food preparation, cleaning products, temperature control, and the presence of certified food service manager when food is prepared. Chicago Municipal Code §§ 7-38-132; 7-38-134 (added July 25, 2012). Each food truck must be linked to a commissary used daily for supplying, cleaning, and servicing. Chicago Municipal Code § 7-38-138 (added July 25, 2012). The Chicago board of health (board) is authorized to enact rules and regulations to implement those requirements (Chicago Municipal Code § 7-38-128 (added July 25, 2012)) and the department of public health conducts inspections. Chicago Municipal Code § 7-38-126 (added July 25, 2012).

The ordinance also has a requirement concerning the use of GPS equipment on the food trucks. The ordinance provides:

> "Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this

> chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device." Chicago Municipal Code § 7-38-115(1) (amended July 25, 2012)

The Board subsequently enacted "Rules and Regulations for Mobile Food Vehicles." Rule 8 provides that the GPS device be permanently installed; be an "'active,'" not "'passive,'" device that sends real-time location data to a GPS provider; and be accurate no less than 95% of the time. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(1)-(3) (eff. Aug. 7, 2014), https://www.cityofchicago.org/content/dam/city/depts/bacp/general/MFV_Rules_and_Regulations-8-7-2014.pdf. The City claimed that the GPS requirement's purpose was so that it could locate food trucks in order to conduct field inspections and investigate public health complaints.

The rule further provides that the device must function during business operations and while at a commissary and transmit GPS coordinates to the GPS service provider at least once every five minutes. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(4)-(5) (eff. Aug. 7, 2014). The rule further provides that the City will not request GPS information without consent, a warrant, or court authorization unless the information is needed "to investigate a complaint of unsanitary or unsafe conditions, practices, or food or other products at the vehicle"; "to investigate a food-related threat to public

health"; to "establish[h] [sic] compliance with" the ordinance and regulations; or for "emergency preparation or response." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(B) (eff. Aug. 7, 2014). Rule 8 also clarified that, while GPS providers must "be able to provide" an API "that is available to the general public," licensees need not "provide the appropriate access information to the API" unless the City establishes a website to display food truck locations and the licensee chooses to participate. Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(C)-(D) (eff. Aug. 7, 2014). The food truck "is not required to provide such information or otherwise allow the City to display the vehicle's location." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(D) (eff. Aug. 7, 2014).

LMP filed this lawsuit on November 14, 2012, and later amended it on March 8, 2013, challenging both the 200-foot exclusion rule and GPS requirement. Its suit alleged that the 200-foot rule violated the due process and equal protection clauses of article I, section 2 of the Illinois Constitution and the GPS tracking scheme violated the search, seizures, privacy and interceptions clause of article I, section 6 of the Illinois Constitution. The City moved to dismiss the complaint in its entirety, and after briefing, the circuit court granted the City's motion with respect to LMP's equal protection claim but denied it as to the due process and search claims. The City then answered the amended complaint and the parties proceeded to discovery. The City set forth three reasons for imposing the 200-foot

restriction: (1) balance the interests of brick-and-mortar restaurants with the food trucks, (2) encourage food trucks to locate in underserved areas, and (3) manage sidewalk congestion.

The parties engaged in an extensive discovery phase regarding the City's justification for the 200-foot rule and the GPS requirement. The City testified that the 200-foot rule applied "as the crow flies," radiating out 200 feet in all directions from a restaurant's front door. This means a food truck cannot park on the other side of the street or a block over if that position is within 200 feet of a restaurant's principal entrance. The rule also applies to a food truck parked on private property. Pekarik's [sic] testified that the 200-foot rule excluded her from many areas she would like to conduct business from in the Loop. As to the construction site exception, the City testified that trucks need only operate within proximity of the construction site, though it could not give a precise definition of "proximity."

Plaintiff hired expert witness, Renia Ehrenfeucht, a professor of urban planning and sidewalk usage, to conduct an observational study of seven different food truck locations across the northern portion of the Loop. Based on what her team observed, she reached two conclusions: (1) there was no observed difference in pedestrian congestion impacts based on the distance between a food truck's operations and a restaurant's front door and (2) there was no difference in the degree of pedestrian congestion at mobile food truck stand locations versus other public-private locations.

The City explained the need for the UPS [sic] requirement because it may be necessary to track a food truck's location to conduct a health or administrative investigation. The City admitted that it had never requested GPS data from any licensed food truck. In the few instances the City needed to find a truck, the field inspectors utilized social media to determine a food truck's location. Since the GPS requirement only applies while the food truck is in operation, the City admitted the GPS unit may need to be physically turned on by the truck operator.

At the close of discovery, the parties filed cross-motions for summary judgment. The circuit court ruled that rational-basis review applied to LMP's due process challenge to the 200-foot rule. Under this review, the circuit court upheld the 200-foot rule based on the City's argument that the rule balances the interests of brick-and-mortar restaurants and food trucks. The circuit court found the rule rationally related to the City's interest in managing sidewalk congestion. It rejected the argument that the rule helped spread food truck business to underserved sections of the city. As to the GPS requirement, the court determined LMP lacked standing to even challenge the provision because LMP failed to show its data had ever been requested by the City. The circuit court further explained that even if a search had taken place, the search was reasonable because the City's interest in food safety, the GPS data is necessary to find food trucks for purposes of inspection or notifications, and the rules limit the type of

information and the circumstances under which the City will obtain it.

LMP timely appealed the circuit court's grant of summary judgment and this appeal now follows.

ANALYSIS

On appeal, LMP raises two issues: (1) the circuit court erred in concluding that the 200-foot rule does not violate its substantive due process rights, and (2) the circuit court erred in concluding the GPS requirement is not a search.

LMP's appeal arises from an order granting summary judgment in favor of the City upholding the validity of the 200-foot rule and the GPS requirement, our review is therefore *de novo*. *Progressive Universal Insurance Co. of Illinois v. Liberty Mutual Fire Insurance Co*., 215 Ill. 2d 121, 128 (2005). *De novo* review is also the appropriate standard when the appellate court reviews the constitutionality of a statute. *Kanerva v. Weems*, 2014 IL 115811, ¶ 33.

LMP alleges the 200-foot restriction violates its due process right under article I, section 2 of the Illinois Constitution, which protects the right of Illinoisans to pursue a legitimate occupation. In claiming a violation of its due process rights, LMP states in its amended complaint, "[t]his lawsuit seeks to vindicate the fundamental rights of the Plaintiffs, who own and operate mobile-vending vehicles, to earn an honest

living free from unreasonable and anticompetitive government restrictions."

The fourteenth amendment to the United States Constitution and article I, section 2, of the Illinois Constitution protect individuals from the deprivation of life, liberty, or property without due process of law. U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2. Case law pertaining to due process recognizes two distinct due process analyses: substantive due process and procedural due process. *Doe v. City of Lafayette*, 377 F.3d 757, 767-68 (7th Cir. 2004); *In re JR.*, 341 Ill. App. 3d 784, 791 (2003). "Whereas procedural due process governs the procedures employed to deny a person's life, liberty or property interest, substantive due process limits the state's ability to act, irrespective of the procedural protections provided." *In re Marriage of Miller*, 227 Ill. 2d 185, 197 (2007) (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992)). In the case before us, LMP raises no argument concerning the denial of notice or procedure; accordingly, we review LMP's claim only as it relates to substantive due process.

When a party claims a due process violation, a court "must first ascertain that a protected interest has been interfered with by the state. Then and only then does one consider what process is due." *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 241 (2005); *In re J.W.*, 204 III. 2d 50, 66 (2003). This is a critical step because the "nature of the right dictates the level of scrutiny a court must employ in determining whether the statute in question comports

with the constitution." *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 307 (2008).

LIMP frames the 200-foot rule as a means to suppress its economic rights in violation of article I, section 2, of the Illinois Constitution. The ordinance states in relevant part, "[n]o operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance * * * which is located on the street level." Chicago Municipal Code § 7-38-115(f) (amended July 25, 2012). In arguing that its due process right has been violated, LMP cites the accepted general principle that "every citizen has the right to pursue a trade, occupation, business or profession" and this right "constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions." *Caldwell Banker Residential Real Estate Services of Illinois, Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985).

The right to pursue a profession is not a fundamental right for substantive due process purposes, and the legislature's, or in this case the Chicago City council's, infringement on this right need only be examined using the rational basis test. *Potts v. Illinois Department of Registration & Education*, 128 Ill. 2d 322, 329 (1989). The state, in the proper exercise of its general police powers, may regulate this "economic right," where the public health, safety, or general welfare so requires. *Id.* at 330 (citing *Pozner v. Mauck*, 73 Ill. 2d 250 (1978)).

The fact that the challenged provisions are part of an ordinance enacted by the City and not statutes enacted by the Illinois General Assembly is immaterial. Under the Illinois Constitution of 1970, the City is a home rule unit of local government. Ill. Const. 1970, art. VII, § 6. This provision of our constitution directly allows the City to "regulate for the protection of the public health, safety, morals and welfare." Ill. Const. 1970, art. VII, § 6(a). Local governments granted home rule act with the same powers as the state unless specifically limited by the General Assembly. *City of Urbana v. Houser*, 67 III. 2d 268, 273 (1977).

While acknowledging the rational basis standard, LMP argues that under Illinois law, the rational basis test requires a "definite and reasonable relationship to the end of protecting the public health, safety and welfare." *Church v. State*, 164 Ill. 2d 153, 165 (1995); *Krol v. County of Will*, 38 Ill. 2d 587, 590 (1968) (requiring a definite and substantial relation to a recognized police-power purpose). LMP fails to recognize that this argument concerning a "heightened" rational basis test was rejected by the Illinois Supreme Court in *Napkton*, 229 Ill. 2d 296. In that case, the plaintiff "used the term 'substantial relationship' or 'real and substantial' to describe the applicable level of judicial scrutiny" our supreme court should apply in reviewing her facial challenge to Hinsdale's zoning law. *Id.* at 309. In rejecting plaintiff's argument, the court stated,

> "We clarify that the 'substantial relation' language used in cases addressing the validity of zoning regulations has been simply an

> alternate statement of the rational basis test which was tailored to address the specific interests advanced by the enactment of zoning ordinances, namely, the promotion of the public health, safety, morals, or general welfare." *Id.* at 315.

In accordance with *Napleton*, we reject LMP's argument that in order to survive rational basis scrutiny, the challenged ordinance must have "a definite and substantial" relationship to a recognized police power. As stated by our supreme court in *Napleton*, a challenged zoning ordinance will survive rational basis scrutiny "if it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable." *Id*. at 319 (citing *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106 (2004)).

When Illinois courts apply the rational basis test, "a court must identify the public interest that the statute is intended to protect, examine whether the statute bears a reasonable relationship to that interest, and determine whether the method used to protect or further that interest is reasonable." *Arangold Corp. v. Zehnder*, 204 Ill. 2d 142, 147 (2003). A court's review under this standard is "limited" and " 'highly deferential.' " *Id*. Furthermore, under this test "mathematical precision" is not required and "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by the evidence or empirical data." (Internal quotation marks omitted.) *Cutinello v. Whitley*, 161 Ill. 2d 409, 421-22 (1994). Whether a statute is wise or the best way of achieving

a stated end is left to the determination of the legislature. *Arangold Corp*., 204 Ill. 2d at 147.

Like statues, ordinances are presumed constitutional, and the opposing party bears the burden of rebutting this presumption. *American Federation of State, County, & Municipal Employees (AFSCME), Council 31 v. State,* 2015 IL App (1st) 133454, ¶ 19. This court must, whenever possible, construe a statue to uphold its constitutionality. *Id*. A party raising a challenge that an ordinance is facially unconstitutional bears the burden of establishing a clear constitutional violation. *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 20. Any doubts are resolved in favor of the challenged regulations. Granite City Division of *National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 164-65 (1993). Under these guidelines, a facial challenge represents "the most difficult challenge to mount successfully because an enactment is invalid on its face only if no set of circumstances exists under which it would be valid." *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20. "The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Napleton*, 229 111. 2d at 306.

When LMP challenged the 200-foot rule, the City responded with three government objectives the rule is meant to further (1) strike a balance between brick-and-mortar restaurants and food trucks, (2) spread retail food options to underserved areas of the City, and (3) control sidewalk congestion in the applicable areas. If any one of these justifications is found to be

sufficient, the ordinance will be upheld as constitutional. In arguing for reversal before this court, LMP asserts the 200-foot rule is unconstitutional because it is blatant protectionism and protecting brick-and-mortar restaurants from food truck competition is not a legitimate government interest.

We reject LMP's assertion that the City may not protect brick-and-mortar restaurants and uphold the 200-foot rule as a rational means of promoting the general welfare of the City of Chicago. Both the City and its expert testified that brick-and-mortar restaurants bring critical economic benefits to communities, including the payment of property taxes. Unlike brick-and-mortar restaurants, LMP and all food trucks do not pay property taxes or other assorted fees to the City that would be associated with the operation of a brick-and-mortar restaurant occupying real property in the City. Property taxes represent a key source of revenue for the City. The 200-foot rule seeks to protect those in the food service industry who pay and support the City's property tax. base from those food businesses that do not. Moreover, brick-and-mortar restaurants also pay utility taxes, lease taxes, and, yes, even restaurant taxes. Chicago Municipal Code §§ 3-30-030 (added Nov. 19, 2003) (restaurant tax); 3-32-030 (amended Oct. 28, 2015) (lease tax); 3-53-020 (added June 10, 1998) (electricity use tax); and 3-80-040 (added Sept. 14, 2016) (water and sewer tax).

Illinois courts have previously found that it is completely rational for an Illinois municipality to favor businesses generating tax dollars over businesses that

do not. In *Napleton*, a challenged zoning change prohibited "new depository or nondepository credit institutions from being located on the first floor of any building in the B-1 or B-3 zoning district." 229 Ill. 2d at 302. In upholding the validity of the ordinance, our supreme court stated:

> "[i]t was reasonable and legitimate for Hinsdale to conclude that the continued vitality of its business districts required an appropriate balance between businesses that provide sales tax revenue and those that do not, and its passage of the challenged amendments precluding new banks and financial institutions from locating on the ground floors of buildings in the designated districts because they impose an opportunity cost in forgone tax revenue is rationally related to that purpose." *Id*. at 321.

In the same line of reasoning, it is reasonable and legitimate for the City to conclude that continued receipt of property taxes and other city fees associated with running a brick-and-mortar restaurant "required an appropriate balance" with those food businesses that do not.

This proposition is not new and has been accepted as a legitimate and reasonable government action by previous courts. In *City of New Orleans v. Dukes*, the United States Supreme Court acknowledged that the City of New Orleans may ban pushcart food vendors from the city's historic French Quarter. 427 U.S. 297, 303 (1976). In upholding the ban under a rational basis

review, the Court recognized the ban as a legitimate way for the city of New Orleans "to preserve the appearance and custom valued by the Quarter's residents and attractive to tourists." (Internal quotation marks omitted.) *Id*. at 304.

In *Vaden v. Village of Maywood*, the Seventh Circuit, applying Illinois law, upheld as a legitimate and rational exercise of municipal authority, a Village of Maywood ordinance, which restricted mobile food vending near schools. 809 F.2d 361 (7th Cir. 1987). As the Seventh Circuit pointed out, "distinctions between street vendors and merchants with a fixed place of business have been accepted by other courts in upholding similar ordinances against equal protection challenges."[3] *Id*. at 366. Cases like *Dukes*, *Napleton*, and *Vaden* establish that courts have long upheld city ordinances favoring one business over another under rational basis review.

As LMP admits, it seeks to overturn the 200-foot rule because its main affect [sic] is to prevent it from parking in areas close to a restaurant's front door where large amounts of potential customers gather. Notwithstanding LMP's license, which granted them the privilege to conduct business on the City's streets and sidewalks, LMP fails to recognize that while one has a constitutional right to pursue a profession (*Rios v. Jones*, 63 Ill. 2d 488, 496-97 (1976)), Illinois courts

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[3] While the court discusses this in terms of equal protection, the court had previously noted that whether framed as a due process or equal protection challenge, rational basis review applied. *Vaden*, 809 F.2d at 365.

have long recognized that no individual or business has the constitutional right to conduct business from the city street or sidewalk. *City of Chicago v. Rhine*, 363 Ill. 619 (1936). The *Rhine* court dealt with a City ordinance that completely prohibited a person from selling newspapers in the Loop or Wilson Avenue districts. *Id*. at 620. In upholding the complete prohibition against the sale of newspapers in those areas, the court stated, "[Rhine] had no property right in. the use of any of the streets of Chicago for the location and maintenance of his business." *Id.* at 625. Tellingly, LMP does not address *Rhine* or its progeny in either its opening or reply brief to this court.

The proposition that no individual has the constitutional property right to conduct business from the streets or sidewalks located within the state of Illinois has been reaffirmed several times since *Rhine*. In *Good Humor Corp. v. Village of Mundelein*, 33 III. 2d 252, 253-54 (1965), the Illinois Supreme Court upheld an ordinance, which prohibited all vending from the streets or sidewalks in the Village of Mundelein. Relying on *Rhine*, the court upheld the ordinance and found no due process violation because, "[t]he assumed property right upon which the plaintiff's case against the validity of the ordinance is based is nonexistent." *Id*. at 259 (citing *Rhine*, 363 Ill. at 625).

In *Triple A Services, Inc. v. Rice*, 131 Ill. 2d 217, 221-22 (1989), our supreme court was confronted with a Chicago ordinance that banned mobile food trucks from selling within the Medical District. After upholding the ordinance under a rational basis review, our

supreme court again reiterated that no individual has the right to use streets or sidewalks for private gain. *Id*. at 229. The *Triple A Services, Inc*., court further recognized that Chicago's ability to regulate its streets and sidewalks had become even more evident since the *Rhine* decision because of the adoption of the 1970 Constitution and the introduction of "home rule." *Id*. at 230 (citing Ill. Const. 1970, art. VII, § 6). Under article VII, section 6, Chicago had the "same powers as the sovereign, except where such powers are limited by the General Assembly." *Id*.

In accord with *Rhine*, *Good Humor Corp*., and *Triple A Services, Inc*., we reiterate that no individual or business has a constitutional property right to use Chicago's streets and sidewalks for private gain. It is only through the issuance of a license that plaintiff may conduct business on the City streets. The issuance of said license did not create a vested property right but rather a "revocable privilege to do an act or a series of acts upon the land of another without possessing any estate or interest in such land." *Grigoleit, Inc. v. Board of Trustees of the Sanitary District of Decatur*, 233 Ill. App. 3d 606, 612 (1992) (citing *City of Berwyn v. Berglund*, 255 Ill. 498, 500 (1912)). As plaintiff acknowledged at oral argument, the City could outright ban all food trucks from operating on the city streets. The issuance of a license to operate on the city street did not abrogate the City's power to legislate for the general welfare, and "[i]t is presumed, absent unequivocal language, that a city, in granting a license, reserves the ability to exercise its police power and place additional

regulatory burdens on license holders." (Internal quotation marks omitted.) *Triple A Services, Inc*., 131 Ill. 2d at 235.

While LMP points out the main thrust of the 200-foot rule is to prohibit street parking, it also points to at least two instances where the 200-foot rule prohibits it from operating on private property. Yet this fact does not render the 200-foot restriction unconstitutional. LMP has raised a facial challenge to the constitutionality of the 200-foot rule, and this court will only sustain a facial challenge "if no set of circumstances exists under which it would be valid." *Napleton*, 229 Ill. 2d at 306. "The fact that the enactment could be found unconstitutional under some set of circumstances does not establish its facial invalidity." *Id*. (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 504 (1982)). Significantly, courts are to give "wide latitude" to the states "in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude." *Dukes*, 427 U.S. at 303. For this reason, LMP's argument concerning the incidental effect of the 200-foot rule does not support its facial invalidity.

We also find all of the cases relied upon by LMP to be readily distinguishable from the facts of this case and do not support a finding of facial invalidity. In attacking the 200-foot rule, LMP relies primarily on *Chicago Title & Trust Co. v. Village of Lombard*, 19 III. 2d 98 (1960), a case involving a proximity restriction between existing and new gas stations. In *Chicago Title*,

our supreme court invalidated a Village of Lombard ordinance that prevented the establishment of any new gas station within 650 feet of any existing gas station. *Id*. at 100. While proposed on the basis of safety, the reviewing court found the fact that new stations could be built within 150 feet of schools, hospitals, and churches completely undermined the claim of safety. *Id*. at 104. Additionally, the rule had no effect on those stations within 650 feet already in existence. *Id*. at 106-07. Therefore, the court found no rational basis for the safety concerns. *Id*. at 107. Unlike, *Chicago Title*, the restriction at issue in this case was not proffered solely based on safety and does not favor existing food trucks over new truck competitors.

Chicago Title is distinguishable for several other reasons. *Chicago Title* was decided before the 1970 Illinois Constitution and the implementation of home rule. As explained in *Triple A Services Inc*., the home rule provision dramatically altered Chicago's authority, and it can now act with the "same powers as the sovereign." *Triple A Services, Inc*., 131 Ill. 2d at 230. Notably, the court in *Triple A Services, Inc*., also rejected plaintiff's attempt to rely on nonhome rule case law. *Id*. at 231 (citing *Rocking H. Stables, Inc. v. Village of Norridge*, 106 Ill. App. 2d 179 (1969)). Besides not addressing home rule, *Chicago Title* is also distinguishable because the plaintiff in that case sought to use a piece of real property. 19 Ill. 2d at 106-07 (denies to plaintiffs the right to use their property as a gas station). Unlike the private real property at issue in *Chicago Title*, LMP seeks to make use of Chicago's streets

and sidewalks for its own private gain. As previously stated, LMP has no property right to use the streets and sidewalks for its own private gain. *Rhine*, 363 Ill. at 625.

LMP claims that *Chicago Title* stands for the proposition that proximity based restrictions that "promote monopoly" are inherently suspect. See *Chicago Title*, 19 Ill. 2d at 107 ("[i]t exempts from its requirements businesses already established, and, in operation and effect, tends to promote monopoly"). LMP argues that the 200-foot restriction promotes a monopoly because it prevents it from "vending in the vast majority of the Loop" and reduces competition. As previously stated, LMP and all food trucks have no constitutional property right to conduct any private business from the streets or sidewalks of Chicago. *Rhine*, 363 III. at 625. Moreover, LMP appears to take the position that the 200-foot restriction promotes a monopoly by the brick-and-mortar restaurants regardless of who actually owns them. Black's Law Dictionary defines monopoly as "[c]ontrol or advantage obtained by *one supplier or producer* over the commercial market within a given region." (Emphasis added.) Black's Law Dictionary (10th ed. 2014). LMP presents no evidence, nor does this court expect it could, that brick-and-mortar restaurants are controlled by one supplier or producer. LMP's claim that the rule supports a monopoly has neither a basis in law or fact and is rejected by this court.

LMP also argues that Illinois may not discriminate against two different business models and cites

Exchange National Bank of Chicago v. Village of Skokie, 86 Ill. App. 2d 12 (1967). In *Exchange National*, plaintiff was denied a special use permit to open an automated car wash. *Id*. at 13-14. While the court reversed the denial of the permit as arbitrary and unreasonable, it stated in *dicta* that the village did not have the municipal authority to legislate "economic protection for existing businesses against the normal competitive factors which are basic to our economic system." *Id*. at 21.

Exchange National, like *Chicago Title*, is a pre-1970 case and does not deal with home rule authority. This alone undercuts the weight to be given to it. Equally as important, the case simply does not support LMP's position. In making its argument, LMP willfully fails to recognize that it is not the same business as a brick-and-mortar restaurant. Unlike *Exchange National*, this is not a case where there are two similar business [sic], one automated and one not, both seeking to permanently operate from private real property. LMP does not seek to permanently conduct its bakery business from a brick-and-mortar establishment in Chicago using automated techniques, and the 200-foot rule it seeks to invalidate does not prevent it from so doing. Accordingly, *Exchange National* does not support LMP's position.

The other cases relied upon by LMP also involved the use of private real property and are therefore distinguishable from the case currently before the court. A case relied upon by LMP, *Cosmopolitan National Bank v. Village of Niles*, 118 Ill. App. 3d 87 (1983),

involved a piece of real property. See *id*. at 88-89 (noting the issue before the court was the denial of a special use permit to operate a McDonald's restaurant). It is further distinguished by the fact that the plaintiff in *Cosmopolitan National Bank* did not seek to invalidate any Niles ordinance. LMP also relies on *Church*, but that case involved licensures and whether the legislature could require practical experience as a prerequisite for issuing a license to become a private alarm installer. 164 Ill. 2d at 167-68. LMP does not claim it has been denied a license because it lacks experience in the food truck business, so its reliance on this case is misplaced.

Based on the above, LMP has failed to establish that the 200-foot restriction is arbitrary and unreasonable as having no relation to the City's authority to promote its general welfare. Accordingly, the circuit court's order granting summary judgment in favor of the City as to the 200-foot restriction is affirmed.[4]

LMP next argues the requirement that it install a GPS unit in its truck and transmit its location to a service provider represents a warrantless search in violation of article I, section 6, of the Illinois Constitution. Under the challenged municipal provision, each food truck "shall be equipped with a permanently installed functioning [GPS] device which sends real-time data to

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[4] Because we uphold the 200-foot rule as a reasonable exercise of the City's power to protect businesses paying property tax over those that do not, we decline to address whether the other proffered reasons would also support the constitutionality of the 200-foot restriction.

any service that has a publicly-accessible application programming interface." Chicago Municipal Code § 7-38-115(1) (amended July 25, 2012). An applicable board of health rule explains that the GPS device need only transmit location data "while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary." Chicago Board of Health, Rules and Regulations for Mobile Food Vehicles, R. 8(A)(4) (eff. Aug. 7, 2014).

Section 6, of article I, of the Illinois Constitution states:

> i. "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized." Ill. Const. 1970, art. I, § 6.

We note that "the protection against unreasonable searches and seizures under the Illinois Constitution is measured by the same standards as are used in defining the protections contained in the forth [sic] amendment to the United States Constitution." *People v. Thomas*, 198 Ill. 2d 103, 109 (2001).

LMP contends that the GPS requirement constitutes a "search" pursuant to *Jones*, 565 U.S. 400. In the *Jones* case, the FBI suspected the defendant of drug trafficking and obtained a warrant authorizing

the installation of a GPS on defendant's car within 10 days. *Id*. at 402-03. The government installed the GPS device on the eleventh day. *Id*. at 403. The government eventually obtained an indictment and was permitted to use the data collected while defendant moved about the city streets. *Id*. The United States Court of Appeals for the District of Columbia reversed the conviction because the use of the GPS device violated the fourth amendment. *Id.* at 404. On appeal, the United States Supreme Court concluded that "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id*. In reaching this conclusion, the Court stated "[t]he Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." *Id*. at 404-05 (citing *Entick v. Carrington* (1765) 95 Eng. Rep. 807).

The Court reaffirmed this holing [sic] in *Florida v. Jardines*, 569 U.S. 1, 5-7 (2013). In *Jardines*, the Court held that having a drug-sniffing dog nose around a suspect's front porch was a search because the police had "gathered information by physically entering and occupying the [curtilage of the house] to engage in conduct not explicitly or implicitly permitted by the homeowner." *Id*. at 6. Then in *Grady v. North Carolina*, 575 U.S. ___, 135 S. Ct, 1368 (2015), the Court found that North Carolina's program of attaching GPS devices to recidivist sex offenders implicated the fourth

amendment. Following on *Jones* and *Jardines*, the Court stated, "it follows that a State also conducts a search when it attaches a device to a person's body." *Id*. at ___, 135 S. Ct. at 1370.

Based upon *Jones*, *Jardines*, and *Grady*, we reject LMP's claim that the GPS requirement at issue constitutes a search. No search occurred because the City has not physically trespassed on LMP's property. The key issue in the Court's finding that a search had occurred in the above cases was the *state's physical occupation* of property (*Jones*, 565 U.S. at 404; *Jardines*, 569 U.S. at 6) or the *state's physical intrusion* on the subject's body (*Grady*, 575 U.S. at ___, 135 S. Ct. at 1371). LMP never alleged the City physically entered its mobile food truck to place the device, nor does it allege the device is City property. Because there is no trespass, no search occurred within the context of *Jones*.

Normally, our inquiry would not end with the above. Pursuant to *Katz v. United States*, a search may also occur when the government intrudes on an individual's "reasonable-expectation-of-privacy." *Jones*, 565 U.S. at 409 (citing *Katz v. United States*, 389 U.S. 347 (1967)). However, LMP makes no argument concerning its "reasonable expectation of privacy" and we decline to engage in any analysis absent a properly raised argument by appellant. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016) (points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing).

This case resembles *Grigoleit*, 233 Ill. App. 3d 606 (1992). Grigoleit discharged its industrial waste-water into the sanitary district's publicly owned water pipes. *Id*. at 608. The ordinance under which this was allowed also required Grigoleit to allow the district access to all discharge locations. *Id*. at 609. Grigoleit refused all such requests for inspection, and the district revoked Grigoleit's license to discharge. *Id*. at 610. The circuit court reinstated the permit, and the district appealed to this court. We reversed the circuit court and reinstated the board's decision to revoke Grigoleit's license. *Id*. at 610-11. In so doing, this court stated, "Grigoleit is not in this instance subject to a regulatory scheme purporting to regulate the internal conduct of it [sic] business activities." *Id*. at 611. "Grigoleit instead is subject to regulation which controls the external disposal of wastewater it has generated onto property in which it possesses no interest." *Id*. at 612. We continued "[i]t has long been settled that a license in respect of real property, either oral or written, is a revocable privilege to do an act or a series of acts upon the land of another without possessing any estate or interest." *Id*.

We concluded that Grigoleit had no "constitutionally protected interest in the sewer connection and may not accept the privileges afforded by the license while simultaneously raising the fourth amendment as a bar to enforcement of the very conditions upon which extension of the license is predicated." *Id*. at 613. As the court succinctly concluded, "[i]f Grigoleit chooses to withhold consent to inspection (as it did here), the permit may be revoked and no inspection

takes place—there is no entry of Grigoleit's facility and there is no search implicating the fourth amendment." *Id*. at 614.

The same logic applied by this court in *Grigoleit* applies equally well here. Grigoleit and all other dischargers had no constitutional right to discharge waste into the district's water network. *Id*. at 613. Similarly, LMP and all food trucks have no constitutionally protected property right in conducting business from Chicago's streets or sidewalks. *Rhine*, 363 Ill. at 625. Like the conditions surrounding the district's issuance of discharge licenses, the GPS requirement at issue is a condition precedent that LMP and all food trucks must comply with to obtain a license to sell on the City streets or sidewalks. Like the ordinance in *Grigoleit*, the ordinance at issue here does not regulate the internal conduct of LMP's business activities. *Id*. at 611-12 (citing *New York v. Burger*, 482 U.S. 691, 702 (1987)). LMP makes no argument that the GPS requirement affects or regulates the internal operations of its bakery business. In accepting a license to conduct business from the City street, LMP cannot raise a fourth amendment challenge to "bar * * * enforcement of the very conditions upon which extension of the license is predicated." *Id*. at 613.

In view of the above, we affirm the circuit court's finding that the GPS requirement does not constitute a search within the meaning of the Illinois Constitution or the fourth amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, both the 200-foot restriction and the GPS requirement are constitutionally valid. The decision of the circuit court is affirmed.

Affirmed.

**IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—CHANCERY DIVISION**

LMP SERVICES, INC.	)	No. 12 CH 41235
PLAINTIFF	)	Calendar 13
V.	)	Judge Anna Helen Demacopoulos
CITY OF CHICAGO	)	
DEFENDANT	)	

MEMORANDUM OPINION AND ORDER

(Filed Dec. 5, 2016)

This case concerns the City of Chicago's regulation of food trucks. Plaintiff LMP Services, Inc. ("LMP"), owner of a food truck known as "Courageous Cupcakes", filed the lawsuit in response to an amended ordinance passed by the Chicago City Council on July 25, 2012. Plaintiff challenges the rule which prohibits food trucks from parking within 200 feet of an existing restaurant, as well as the requirement that each food truck maintain a global-positioning-system (GPS) unit which transmits their location to a third-party vendor. This matter having come before the Court on cross-motions for summary judgment, the Court having reviewed the motions, memoranda in support thereof, statements of undisputed facts and exhibits thereto, and the pleadings, heard arguments of counsel on October 19, 2016, and thereby being fully informed in the premises, finds as follows:

STATEMENT OF FACTS

On July 25, 2012, the Chicago City Council passed Ordinance 2012-4489, an amended ordinance regarding mobile food vehicles (food trucks) within the City of Chicago (the "City"). Ordinance 2012-4489 introduced numerous changes, such as the ability to obtain a license to sell food that is prepared and served from a mobile food truck, rather than only prepackaged food. This change resulted in an increase in the number and variety of food trucks wishing to do business in the City of Chicago.

Ordinance 2012-4489 maintained a proximity restriction first passed on September 11, 1991 that prohibits parking within 200 feet of the entrance of a restaurant (the "200-foot rule"). Municipal Code of Chicago ("MCC"), Sec. 7-38-115(f). The definition of a restaurant includes any "place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to a required license." *Id.* Plaintiff alleges that the definition includes businesses such as 7-Elevens (117 locations in Chicago), Starbucks (179 locations), and Dunkin' Donuts (193 locations). The 200-foot rule applies to food trucks whether they are operating on public or private property (except as to restaurants located on the private property to which the food truck is invited). MCC, Sec. 7-38-115(k)(1)(iii). Food trucks are also required to have a GPS device permanently installed on their vehicle "which sends real-time data to any service that has a publicly-accessible application programming

interface (API)" ("GPS requirement"). MCC, Sec. 7-38-115(l).

Ordinance 2012-4489 requires the City to establish "mobile food vehicle stands"—designated spaces on the public way where mobile-food vehicles may operate without being subjected to the 200-foot proximity restriction. Ordinance 2012-4489 requires the City to establish at least five mobile food vehicle stands "in each community areas [sic] . . . that has 300 or more retail foods [sic] establishments." MCC, Sec. 7-38-117. Additionally, a minimum fine of $1,000.00 was set for any violations of sections 7-38-115 and 7-38-117. MCC, Sec. 7-38-128(d) This amount is quadruple the amount for certain violations prior to the amended ordinance.

Laura Pekarik is the sole owner and shareholder of LMP. Ms. Pekarik owns and runs a brick and mortar bakery called "Courageous Bakery" located in Elmhurst, Illinois, as well as a food truck called "Cupcakes for Courage." Plaintiff's food truck travels through the Chicagoland area serving desserts to customers. Plaintiff complains that due to the 200-foot rule, there are large portions of Chicago that her food truck cannot park and customers she may not serve, even if she is a guest on private property. In the Amended Complaint, Plaintiff alleges the 200-foot rule and the GPS requirement violate constitutional rights provided in Article I, Sections 2 and 6 of the Illinois Constitution—Due Process (Count I) and Searches, Seizures, and Privacy (Count III). Plaintiff's equal protection claim (Count II), also brought under Article I, Section 2, was previously dismissed by the Honorable LeRoy K. Martin Jr.

LEGAL STANDARD

Summary judgment is appropriate where the pleadings, affidavits, depositions, admissions, and exhibits on file, when viewed in the light most favorable to the non-moving party, reveal that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames v. Sheahan*, 233 Ill.2d 276, 296 (2009) (*citing Adams v. Northern Illinois Gas Co.*, 211 Ill.2d 32, 43 (2004)). When the parties file cross-motions for summary judgment, they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law. *Steadfast Ins. Co. v. Caremark Rx Inc.*, 359 Ill. App. 3d 749, 755 (1st Dist. 2005). Summary judgment is "a drastic means of disposing of litigation and, therefore, should be granted only when the right of the moving party is clear and free from doubt." *Adames*, 233 Ill.2d at 296.

ANALYSIS

This dispute pits the interests of the traditional brick-and-mortar restaurant against the young rising pop star—the food truck. The public interest that the City is charged with protecting and furthering lies somewhere in the uncertain middle. The parties have

taken numerous depositions in this matter and the Court has reviewed nearly two thousand pages in supporting exhibits. For the following reasons, the Court grants the City's motion for summary judgment and denies Plaintiff's cross-motion for summary judgment.

Count I – 200 Foot Rule (Due Process)

The 200-foot rule provides:

> No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12:00 a.m. and 2:00 a.m.

MCC, Sec. 7-38-115(f).

The Court notes that the 200-foot rule is not a new regulation. As of the filing of this lawsuit in November 2012, the 200-foot rule had been in place with respect to food trucks for over eleven years.[1] Although, a prior rule containing a 200-foot proximity requirement was struck down by the Circuit Court in 1986, such provision was held unenforceable due to its vagueness—a

[1] Both the 1991 and 2012 ordinances provide, "No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level." Section 7-38-115(f), as amended in 2012, includes the following additional language, "provided, however, the restriction in this subsection shall not apply between 12:00 a.m. and 2:00 a.m."

challenge not raised against the 2012-4489 Ordinance.[2] *See Thunderbird v. Catering Co. v. City of Chicago*, No. 83 L 52921 (Cook Cty. Cir. Ct. Oct. 15, 1986) (O'Brien, T). Though the language of the 200-foot rule has not significantly changed since 1991, the marketplace for food trucks in Chicago has broadened both with a nationwide surge in interest in food trucks, as well as the expanded opportunities for entrepreneurship given the changes effected by Ordinance 2012-4489.

In its motion for summary judgment, Plaintiff asserts that the 200-foot rule violates its due process rights, specifically the right to pursue a trade or business free from arbitrary and irrational regulation. Plaintiff argues that proximity restrictions have been invalidated by numerous courts, including the Illinois Supreme Court. Moreover, Plaintiff further argues that the 200-foot rule does not "definitely and substantially" advance any legitimate government interest as each of the stated bases for the rule are either illusory or improper.

In response and by its cross-motion for summary judgment, the City argues that Plaintiff (not the City)

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[2] The predecessor ordinance to the one at issue provided in relevant part, "No operator of (a mobile food dispensing vehicle shall park or stand such vehicle within 200 feet of . . . a place of business which deals in like or similar commodities such as are sold by the mobile unit." MCC, Sec. 130-4.12(d). The Court struck Sec. 130-4.12(d) as "vague and unenforceable," and prohibited the City from enforcing the ordinance. *Thunderbird Catering Co. v. City of Chicago*, No. 83 L 52921 (Cook Cty. Cir. Ct. Oct. 15, 1986).

bears the burden to show that the 200-foot rule is unreasonable and has failed to meet that burden. The City contends that balancing the interests of brick-and-mortar restaurants with that of the food trucks is a legitimate governmental interest. Further, the other bases for the restriction, including reducing pedestrian congestion and encouraging food trucks to locate in underserved areas are rationally related to the regulation, as well.

Rational Basis Test

When considering a substantive due process challenge, "a statute is unconstitutional if it impermissibly restricts a person's life, liberty or property interest." *People v. Johnson*, 225 Ill.2d 573, 584 (2007). Well-settled is the constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession. *Coldwell Banker Residential Real Estate Services, Inc. v. Clayton*, 105 Ill.2d 389, 397 (1985). "This inalienable right constitutes both a property and liberty interest entitled to the protection of the law as guaranteed by the due process clauses of the Illinois and Federal constitutions." *Id.* Ordinance 2012-4489, as with other ordinances regulating mobile food vendors or peddlers addressed by previous courts, "concerns regulation in the socio-economic sphere, and neither encroaches upon a fundamental right nor draws lines which create an inherently suspect classification." *See Triple A. Servs. v. Rice*, 131 Ill.2d 217, 226 (1989). Accordingly, the rational basis test will apply. *Napleton v. Vill. of Hinsdale*, 229 Ill.2d 296, 307 (2008).

Under the rational-basis test, the Court's inquiry is twofold: (1) the Court "must determine whether there is a legitimate state interest behind the legislation" and, (2) "if so, whether there is a reasonable relationship between that interest and the means the legislature has chosen to pursue it." *Johnson*, 225 Ill.2d at 584. "One who challenges an ordinance as failing this test of minimum rationality bears the burden of proving 'by clear and affirmative evidence that the ordinance constitutes arbitrary, capricious and unreasonable municipal action; that there is no permissible interpretation which justifies its adoption, or that it will not promote the safety and general welfare of the public.'" *Triple A Servs.*, 131 Ill.2d at 225-226 (*quoting City of Decatur v. Chasteen*, 19 Ill.2d 204, 210 (1960)). "If there is any conceivable set of facts to show a rational basis for the statute, it will be upheld." *Johnson*, 225 Ill.2d at 585. "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Harris v. Manor Healthcare Corp.*, 111 Ill.2d 350, 368-369 (1986) (*quoting Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 99 (1955)). The City has offered three rational bases for the 200-foot rule: "(1) it fosters restaurants – which provide important economic, cultural, and neighborhood benefits to the City- while at the same time allowing food trucks to prosper; (2) it helps spread retail food options to blocks or entire communities of the City that lack enough restaurants, and (3) it manages sidewalk

congestion caused by lines of food truck customers." (Def.'s. Mem. in Supp. Summ. J. 1). As noted above, it is Plaintiff's burden to show that the regulation is unreasonable, arbitrary or capricious rather than the City's burden to prove that it is reasonable. *Triple A Servs.*, 131 Ill.2d at 226. As discussed below, the Court finds that at least two rational bases exist for the 200-foot rule, namely the balancing of interests and reducing pedestrian congestion.

(1) Balancing of Interests

The City argues that Ordinance 2012-4489 serves the dual purpose of balancing the needs of both restaurants and food trucks. Plaintiff contends that the ordinance is intended to protect brick-and-mortar restaurants from competition, which is not a legitimate government purpose. Following review of Illinois law and the supporting exhibits to the cross-motions for summary judgment, the Court agrees that food trucks may be regulated in a manner that balances the needs of the community, which includes the interests of the brick-and-mortar restaurants.

Plaintiff relies upon *Chicago Title & Trust Co. v. Village of Lombard*, 19 Ill.2d 98 (1960) and cases from foreign jurisdictions in support of its contention that Illinois courts do not favor barriers to competition such as proximity limitations. In *Chicago Title*, the Illinois Supreme Court struck down an ordinance barring the construction of a gas station within 650 feet of another existing gas station. Noting that the ordinance permitted

existing service stations situated within 650 feet of each other to continue, the court found the proximity restriction arbitrary and unreasonable. The Court further concluded that the ordinance "exempts from its requirements businesses already established, and, in operation and effect, tends to promote monopoly." *Id.* at 107.

Chicago Title is readily distinguishable from the facts of the instant matter. In particular, the businesses to be separated by the Village of Lombard ordinance—gas stations—were the exact same type of business and in direct competition with one another. Here, the City has designed its regulation to separate two different types of business with different business needs. Plaintiff's expert, Dr. Henry Butler, Dean of George Mason University School of Law with a Ph.D. in economics, testified that the risk taken in opening a new restaurant "is a lot higher for the brick and mortar" than for a food truck. (City's MSJ, Ex. 7, Butler Dep. at 74:1-22). As to costs, according to *Streets of Dreams*, a report published by the Institute for Justice ("IFJ), "[s]treet vending allows entrepreneurs to establish their own businesses at a fraction of the cost of other potential ventures." (City's MSJ, Ex. 8 at IJ0169). The IFJ report illustrates this point with the example of Stephan Boillon, a chef in Washington, D.C., who lost his job in 2008. Mr. Bouillon [sic] wanted to start his own business, specifically a restaurant serving only cold sandwiches. *Id.* at IJ0170. This simple concept obviated the need to buy expensive cooking equipment. *Id.* However, setting up a brick and mortar restaurant

would have cost $750,000, "not including operating costs such as rent, utilities and insurance," whereas the mobile food truck he "put on the road cost only $50,000 to get up and running." *Id.* Were the City to bar new brick and mortar restaurants from opening within a certain distance of existing brick and mortar restaurants or food trucks from other food trucks, *Chicago Title* would be on point.

Moreover, Ordinance 2012-4498 does not tend to promote the monopoly criticized in *Chicago Title* as the 200-foot rule does not come close to excluding entire areas of Chicago, including the Loop. Plaintiff's principal, Ms. Pekarik, testified that although there are areas in the City from which she may not sell, she has been able to find appropriate places to vend in the Loop and her business is thriving such that she opened a brick-and-mortar bakery, purchased a second food truck, and now has 15 employees. (City's MSJ, Ex. 9, Pekarik Dep. at 20:1-3; 59:217; 74-79). Additionally, the amended ordinance specifically allows for more food trucks in specially designated areas known as mobile food vehicle stands, which are exempt from the 200-foot rule. MCC, Sec. 7-38-117(f).

About 19 years after *Chicago Title*, the Illinois Supreme Court addressed a mobile food vending ordinance much more restrictive than the ordinance before this Court today. In *Triple A Services v. Rice*, 131 Ill.2d 217 (1989), the Court upheld a complete ban of mobile food vending companies in the Medical District, challenged on both due process and equal protection grounds. The stated purpose of the ordinance was to "enhance[]

the professional appearance and ambience of the District. . . . [and] serve[ ] to protect against a decline in property values and to attract professional medical personnel and medical clients to the District." *Id.* at 228. Further, the ordinance prevented pedestrian and vehicular congestion, and acted to prevent sanitation problems arising from discarded food wrappers. *Id.* The Court found all of these purposes to be "legitimate governmental objectives." *Id.* at 228. While the appellate court had concluded that total ban of mobile food vendors from the Medical District was overly broad as a portion of the area designated in the ordinance was used for nonmedical purposes, the Illinois Supreme Court disagreed. The Court held that it did not find "that the means adopted by the Chicago city council to further the aforementioned objectives is so grossly overly broad as to render the ordinance arbitrary, capricious and unreasonable." *Id.* Noting that "[t]he fit between the means and the end to be achieved need not be perfect" and "rational distinctions may be made with substantially less than mathematical exactitude" the Court upheld the ordinance. *Id.* at 228-229.

In reaching its decision in *Triple A Services*, the Illinois Supreme Court relied upon *City of New Orleans v. Dukes*, 427 U.S. [sic] (1976), in which the Supreme Court upheld an ordinance which prohibited vendors from selling foodstuffs from pushcarts in the French Quarter of the City of New Orleans. While the ordinance grandfathered vendors who had continuously operated within the French Quarter for eight years prior to enactment of the ordinance, the Court

rejected petitioner's equal protection argument, holding that the ordinance rationally furthered the purpose of preserving " 'the appearance and custom valued by the Quarter's residents and attractive to tourists." The Supreme Court found that the legitimacy of that objective was "obvious." 427 U.S. at 304.

While the cases from foreign jurisdictions of New York, New Jersey, and California cited by Plaintiff, do tend to show a strong disapproval of proximity limitations or any geographic restraints on mobile food vendors as unfair attempts to regulate competition, they stand in contrast with Illinois law.[3] Other Illinois cases

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[3] In *People v. Ala Carte Catering Co.*, a California appellate court struck down a Los Angeles ordinance that barred catering trucks from selling within 100 feet of a restaurant. 98 Cal. App. 3d Supp. 1, 9 (Cal. App. Dep't Super. Ct. 1979). The basis for the ordinance was the potential "hazard to traffic" and "nuisance to pedestrians" created by the "unregulated stopping of vehicles for the sale of foods and beverages." *Id.* In striking down the ordinance, the court held it was a "naked restraint of trade," that was "arbitrarily made for the mere purpose of classification." *Id.* at 13. *See also Duchein v. Lindsay*, 345 N.Y.S.2d 53, 55-57 (N.Y. App. Div. 1973) (invalidating law prohibiting vending within 100 feet of businesses selling the same goods); *Mister Softee v. Mayor of Hoboken*, 186 A.2d 513, 519-20 (N.J. Super. Ct. Law Div. 1962) (invalidating law preventing vending within 200 feet of business selling similar merchandise). Although the preceding cases tend to show the aversion of courts in certain jurisdictions to any proximity limitations, this Court is bound by Illinois precedent which has expressly permitted proximity restrictions and even the total ban of food trucks and the like. *See e.g. Triple A Servs. v. Rice*, 131 Ill. 2d 217 (1989); *Good Humor Corp. v. Mundelein*, 33 Ill. 2d 252 (1965) (upholding ordinance banning ice cream trucks from village streets); *Chicago v. Rhine*, 363 Ill. 619 (1936) (upholding ban of the sale of all goods on the street except newspapers).

cited by Plaintiff in support of its theory that government regulation that affect competition in the marketplace is unconstitutional are unavailing as they concern specific zoning decisions or licensure. Finally, in considering the particular needs and characteristics of the City of Chicago—a city which is noted for its culture, uniquely diverse neighborhoods, and even popularity with culinary tourists, the Court finds that the balancing of interests between food trucks, brick-and-mortar restaurants, and other needs of the city is a rational basis for the 200-foot rule.

(2) Spreading Retail Food Options to Underserved Areas

The City contends that the 200-foot rule will encourage food trucks to locate to areas which are presently underserved by restaurants. Plaintiff argues that this reason is unfounded under basic principles of economics. The Court finds that Plaintiff has met its burden in showing that the 200-foot rule does not encourage food trucks to locate in areas lacking restaurants. Dr. Butler concluded that "[e]conomic theory predicts that the 200-foot rule cannot and will not achieve the City's stated goal of encouraging food trucks to operate in community areas lacking sufficient retail food options." (Plt. MSJ, Butler Aff. ¶15). This is because food truck operators are entrepreneurs who wish to maximize their profits and will go where the demand is the highest. *Id.* ¶14. Food trucks will focus on dense areas where consumers have relatively high levels of disposable income. *Id.* ¶17. Because "underserved"

areas generally lack these features, economic theory predicts little food-truck activity in such areas. *Id.* ¶21. Expert analysis also showed no evidence that food trucks were visiting the underserved areas since the passage of the amended ordinance. Professor Butler analyzed over 48,000 tweets of Chicago food trucks from November 26, 2013 to November 26, 2014, and concluded that food trucks do not often operate in the areas identified as underserved by the City such as Auburn Gresham, Beverly, Engelwood, Humbolt Park Morgan Park, and South Shore. *Id.* ¶¶39 [sic]. For these reason [sic], the Court finds the 200-foot [sic] is not rationally related to the purpose of spreading retail food options to underserved areas of the City.

(3) Managing Sidewalk Congestion

Lastly, the City argues that the 200-foot rule is rationally related to the City's interest "reducing congestion and delays on sidewalks because it creates a buffer between food truck customer lines and the congestion that can arise outside restaurants." (City's MSJ p. 11). Plaintiff responds that the 200-foot rule as between restaurants and food trucks is arbitrary because other businesses can be sources of pedestrian congestion such as theatres. Further, the exemption for food trucks serving construction workers or operating at food truck stands undermines the City's position because food truck stands and construction also may create pedestrian congestion. Finally, Plaintiff's expert, Renia Ehrenfeucht, Professor of Community and Regional Planning at the University of New Mexico, avers that

in her observational study of seven food truck locations, four of which were within 200 feet of a restaurant's principal entrance and the rest food truck stands, no difference in congestion was observed. (Plt.'s MSJ, Ehrenfeucht Aff., ¶¶27-28). Moreover, no one complained of the lines caused by food trucks.

Even if all of Plaintiff's arguments are true, this does not invalidate the 200-foot rule as a rational basis exists for reducing sidewalk congestion. Photos and notes collected through Professor Ehrenfeucht's study, as well [sic] by photos retrieved from Twitter, clearly show that food trucks result in significant sidewalk congestion. Moreover, restaurants often have sidewalk cafes during the warmer months, which further reduce available sidewalk space and cause congestion. (Plt.'s MSJ, Ex. 16, Hamilton Dep. at 36:8-11). It is well-settled that "[a] local ordinance aimed at remedying a problem need not entirely eliminate the problem." *Vaden v. Maywood*, 809 F.2d 361, 365 (7th Cir. 1987). Rather, "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Id.* (*quoting Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

The Illinois Supreme Court in *Triple A Services* relied upon *Vaden v. Village of Maywood*, 809 F.2d 361 (7th Cir. 1987), which upheld an ordinance banning the operation of mobile food vending businesses in Maywood from 8 a.m. to 4 p.m. on any day between August 25 and June 30 when a public elementary or secondary school was in operation. Plaintiff Vaden, who sold

snacks primarily to school children, challenged the ordinance on due process, equal protection, and other grounds. Noting that "[i]n determining the constitutionality of the ordinance, [the Court] cannot consider whether the Village Board acted wisely in regulating the business of its street vendors or whether it could have accomplished its goals more effectively; [the Court] consider[s] only whether the ordinance is wholly arbitrary." *Id.* at 364-365. Finding that the restriction was rationally related to the legitimate goal of preventing children from being delayed and distracted while traveling to and from school, the Seventh Circuit upheld the ordinance.

Though other businesses are sources of pedestrian congestion, lines at food trucks and traditional restaurants are more likely to occur at the same time than, perhaps, another business such as a theatre at lunch time. A "legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked. *In re Adopt* [sic] *O.J.M.*, 293 Ill. App. 3d 49, 64 (1st Dist. 1997) (*quoting McDonald v. Board of Election Commissioners*, 394 U.S. 802, 809 (1969) (internal quotes, citations omitted). In this case, although the 200-foot rule does not solve all sources of pedestrian congestion, the evidence shows that food trucks are a significant source of congestion, as are restaurants. Accordingly, the Court finds that the 200-foot rule is rationally related to the City's legitimate goal to reducing sidewalk congestion.

Count III – GPS Requirement (Unreasonable Search/Violation of Privacy)

The GPS requirement is a combination of MCC Section 7-38-115(1), created by Ordinance 2012-4489, and the regulations enacted by the City's Department of Public Health ("DPH") on December 21, 2012. The ordinance provides:

> Each mobile food vehicle shall be equipped with a permanently installed functioning global-positioning-system (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device.

MCC, Sec. 7-38-115(1).

The DPH regulations state that the GPS need only transmit location data "while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary . . . " (Plt.'s MSJ, Ex. K, CITY000703). When required to function, the GPS device must transmit the vehicle's location at least once every five minutes. *Id.* City personnel may request location information from a GPS Service Provider if the information is sought to investigate a food-related threat to public health, "in connection with establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promogulated thereunder" or "for purposes of

emergency preparation or response." *Id.* The GPS Service Provider must maintain at least six months of historical location data for a mobile food vehicle. *Id.*

Plaintiff challenges the GPS requirement as an unreasonable search, and that the ordinance and regulations do not serve as an adequate substitute for a warrant. Plaintiff also complains that the data is not collected by the City, but rather by a third party which must hold six months of data open to the world. The City responds that GPS requirement is not a search by the government, and therefore, no warrant is required. Moreover, the City has never obtained Plaintiff's location data from the GPS Service provider, other than during the pendency of this lawsuit pursuant to subpoena issued by the City's counsel. Reviewing the data, however, would not be a search because LMP has no reasonable expectation of privacy when operating its food truck. Even if the requirement constitutes a search, it would be lawful as a reasonable search because the data is limited and serves important City interests. Finally, the City argues that there is no meaningful difference between what it transmitted by the GPS unit and what is routinely communicated by the food truck themselves via social [sic].

The GPS Requirement Does Not Constitute a Search or Seizure

As a preliminary matter, LMP has not been subject to a search or seizure, illegal or not, as the City never requested LMP's location data outside the pendency of

this lawsuit. Thus, LMP lacks standing to raise a challenge to the GPS requirement because it was never searched. Even had the City accessed LMP's data via the third-party GPS service provider, Plaintiff's constitutional claims fail as the GPS requirement does not constitute a search.

Plaintiff cites *United States v, Jones*, 565 U.S. 400 (2012), in support of its contention that the GPS requirement constitutes a search. In *Jones*, the defendant came under suspicion of trafficking in narcotics. *Id.* at 402. The government obtained a search warrant in federal court which authorized the installation of a GPS unit on the vehicle registered to Jones' wife (but of which Jones was the exclusive driver), however the warrant expired before the GPS unit was installed. *Id.* at 403. Over the next 28 days, the government collected data using the device and indicted Jones and several alleged co-conspirators with conspiracy to distribute five kilograms or more of cocaine. *Id.* Jones filed a motion to suppress the evidence obtained by the GPS unit which the District Court granted only in part, suppressing the data obtained while the vehicle was parked at Jones' residence. *Id.* Jones was then convicted with the data from the GPS unit having led to the alleged co-conspirators' house that contained $850,000 in cash, 97 kilograms of cocaine, and 1 kilogram of cocaine base. *Id.* at 403-404. Upon review, the Supreme Court noted that the "Government physically occupied private property for the purpose of obtaining information", and found that the installation of a GPS unit was an unconstitutional search. *Id.* at 404. The

Court further held that it need not reach the "reasonable expectation of privacy" analysis first articulated in Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967) due to such "physical intrusion" by the Government. *Id.* at 407. Our appellate court relied upon *Jones* in a similar case where special agents working for the Drug Enforcement Agency installed a GPS tracking device on a suspect's car without judicial authorization, and then monitored the suspect for a month. *People v. Bravo*, 2015 IL App (1st) 130145.

Jones and *Bravo* are distinguishable most notably because the government did not surreptitiously place the GPS unit on Plaintiff's food truck. There was no physical trespass to LMP's food truck for the purpose of installing the GPS unit. Rather, the GPS unit is a requirement of operations in the City, that is made obvious to Plaintiff by both the Municipal Code of Chicago and DPH regulations. As such, the GPS requirement does not constitute a search.

Even if the GPS Requirement Were Deemed a Search, It Would Be Reasonable.

Warrantless inspections of closely regulated businesses (such as food service) must meet three criteria as set forth by the United States Supreme Court in *New York v. Burger*, 482 U.S. 691 (1987). First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. *Burger*, 482 U.S. at 702. Second, the warrantless inspections must be necessary to further

the regulatory scheme. *Id.* Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. *Id.* at 703. The Court finds that the GPS requirement as codified by ordinance and DPH regulations satisfies the *Burger* test.

The parties do not dispute that the City has a substantial interest in ensuring food safety. Accordingly, as the DPH regulations more than adequately make clear that public health is a substantial basis for the regulation, the first requirement of the Burger test is satisfied. The regulations provide that City personnel will not require location information from a GPS service provider pertaining to a mobile food vehicle unless the information is sought (1) to investigate a complaint of unsanitary or unsafe conditions, (2) to investigate a food-related threat to public health, (3) in connection with establishing compliance with Chapter 7-38 of the MCC (which also includes numerous health and safety requirements), or (4) for purposes of emergency preparation or response. (Plt.'s MSJ, Ex. K, CITY0000703). Second, the warrantless inspections are necessary to further the regulatory scheme. The data required to be maintained enables the City to learn a food truck's current and prior locations for purposes of health inspection or notification of the public. That the City could obtain this information by consulting the food truck's Twitter feed or telephoning the truck is of no matter. Moreover, Ms. Pekarik testified that there is no requirement as to when or how soon

after arrival her employees will post the food truck's location on Twitter or Facebook and there have been times when the driver neglected to post on social media. (City's MSJ, Ex. 9, Pekarik Dep. at 24:23-26:24). As brick-and-mortar restaurants are subject to unannounced health inspections, there is no colorable reason that food trucks should not be subject to the same if the City deems it necessary. Lastly, the third requirement that the GPS requirement must satisfy the basic requirement of a warrant is satisfied as both the ordinance and the DPH regulations clearly inform a food truck licensee what data is collected and when it may be requested by the City. Accordingly, because all elements of the *Burger* test are satisfied, even if the GPS requirement constitutes a "search," it would pass constitutional muster.

LMP Has No Reasonable Expectation of Privacy

Plaintiff also contends that the GPS requirement violates its reasonable expectation of privacy. This contention borders on the absurd. That a business, serving food to the *public* should be permitted to conceal its location from governmental scrutiny, including the public health department, simply because it is on wheels is incomprehensible. The GPS requirement expressly states that the GPS unit only need transmit the food truck's location when the food truck is vending food, otherwise open for business, or being serviced at a commissary. (Plt.'s MSJ, Ex. K, CITY0000703). Plaintiff argues that occasionally keeping the location of the food truck secret may prevent competitor food trucks

from coming to the same parking spot and siphoning off customers. Another reason offered is that the GPS requirement will compromise an employee's safety from unwanted attention from members of the public or acquaintances outside the workplace. Neither reason serves as a basis for a reasonable expectation of privacy when operating a food business. Finally, it is well-settled that there is no reasonable expectation of privacy in a vehicle's location when operating in public. *United States v. Knotts*, 460 U.S. 276, 281 (1983) ("A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view.").

Because LMP has no reasonable expectation of privacy in its location when its food truck is open for business and serving food to the public, there is no constitutional right ceded in exchange for a food truck license. Thus, the Court need not reach the issue of whether the GPS requirement is a permissible condition of licensure. *Planned Parenthood of Ind., Inc. v. Comm'r of the Ind. State Dep't of Health*, 699 F.3d 962, 986 (7th Cir. 2012) ("The first step in any unconstitutional-conditions claim is to identify the nature and scope of the constitutional right arguably imperiled by the denial of a public benefit.")

CONCLUSION

Because the Court finds the 200-foot rule is rationally related to at least two legitimate government purposes, namely balancing of interests between food

trucks and brick-and-mortar restaurants and reducing pedestrian congestion, it finds the 200-foot rule does not violate Plaintiff's due process rights. Summary judgment as to Count I is entered in favor of the City.

The Court further finds that the GPS requirement does not constitute a "search" by the government and no seizure has occurred. That the requirement only applies when the food truck is open for business or being serviced at a commissary is key. There is no reasonable expectation of privacy when the food truck is open for business and serving food to the public. Moreover, as a food truck is a vehicle, there is no reasonable expectation of privacy on the public ways at any time. Finally, even were Plaintiff to have a constitutional right to privacy when open for business and the GPS requirement to constitute a search, such a warrantless search is likely to pass constitutional muster because the ordinance and regulations adequately inform the licensee when and why its location data might be retrieved. For these reasons, summary judgment as to Count III is entered in favor of the City.

WHEREFORE, IT IS HEREBY ORDERED:

1) The City of Chicago's Motion for Summary Judgment is granted.

2) Plaintiff's Motion for Summary Judgment is denied.

ENTERED:

Judge
Anna Helen Demacopoulos
DEC - 5 2016
Circuit Court – 2002

Judge Anna H. Demacopoulos

App. 80

No. 123123

IN THE
SUPREME COURT OF ILLINOIS

LMP SERVICES, INC.,

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

On Appeal From The Appellate
Court of Illinois, First District,
No. 1-16-3390,
There Heard On Appeal from the
Circuit Court of Cook County, Illinois,
County Department, Chancery Division
No. 12 CH 41235
The Honorable Anna H. Demacopoulos,
Judge Presiding

SUPPLEMENTAL AUTHORITY

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Carolyn Taft Grosboll
SUPREME COURT
CLERK

CITY OF CHICAGO
RULES

Mobile Food Vendors and Shared Kitchens

Last Updated: January 1, 2019

Mayor Rahm Emanuel
Commissioner Julie Morita, M.D.

BY AUTHORITY VESTED IN THE COMMISSIONER OF THE DEPARTMENT OF PUBLIC HEALTH PURSUANT TO SECTION 2-112-160(a)(7) OF THE MUNICIPAL CODE OF CHICAGO, THE FOLLOWING MOBILE FOOD VENDORS AND SHARED KITCHENS RULES ARE ADOPTED HEREIN.

By Order of the Commissioner:

Signed: Julie Morita Date: December 12, 2018

Commissioner Julie Morita, M.D.

Published: December 12, 2018

Effective: January 1, 2019

(Rules on "Mobile Food Vehicles," promulgated on December 4, 2014, are repealed and replaced by the rules contained herein as of January 1, 2019.)

Part I. General

Rule 1. Definitions.

(A) For purposes of these rules, the terms "commissary," "mobile frozen desserts vendor," "mobile food dispenser," "mobile food preparer," "mobile food vehicle," "mobile food vendor," "mobile food truck," and "mobile prepared food vendor" shall have the meanings ascribed to these terms in Section 4-8-010 of the Municipal Code of Chicago.

(B) For purposes of these rules, the following terms are defined as follows:

(1) "Certified combustible gas detector" refers to UL-Classified and Mine Safety and Health Administration (MHSA)-certification.

(2) "Chassis-mounted tank" refers to a propane or natural gas tank permanently installed as a part of the body of a mobile food vehicle.

(3) "Department" means the Chicago Department of Public Health.

(4) "Equipment"

a. Means an article that is used in the operation of a FOOD ESTABLISHMENT such as a freezer, grinder, hood, ice maker, MEAT block, mixer, oven, reach-in refrigerator, scale, sink, slicer, stove, table, TEMPERATURE MEASURING DEVICE for ambient air, VENDING MACHINE, or WAREWASHING machine.

b. Does not include apparatuses used for handling or storing large quantities of PACKAGED FOODS that are received from a supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks, and skids.

c. Also does not include KITCHENWARE or TABLEWARE that is multiuse, SINGLE SERVICE, or SINGLE USE; gloves used in contact with FOOD; temperature sensing probes of FOOD TEMPERATURE MEASURING DEVICES; probe type price or identification tags used in contact with FOOD; and pitchers, pots, and urns that

are not connected to the public water supply.

(5) "Food Code Rules" means the Chicago Food Code Rules promulgated by the Commissioner of Health, which were first published on March 23, 2018 and which became effective on July 1, 2018, as amended from time to time by the Commissioner of Health.

(6) "HVAC professional" refers to a heating, ventilation and air conditioning professional with current license as granted by the Illinois Department of Financial and Professional Regulation.

(7) "ILCS" refers to the Illinois Compiled Statues [sic] as published by the State of Illinois.

(8) "Natural gas" refers to compressed natural gas used as a fuel source as defined by NFPA 52.

(9) "NFPA" refers to the National Fire Protection Association.

(10) "NFPA 10" refers to National Fire Protection Association Code 10: *Standard for Portable Fire Extinguishers.*

(11) "NFPA 52" refers to National Fire Protection Association Code 52: *Vehicular Gaseous Fuel Systems Code.*

(12) "NFPA 58" refers to National Fire Protection Association Code 58: *Liquefied Petroleum Gas Code.*

(13) "NFPA 70" refers to National Fire Protection Association Code 70: *National Electrical Code.*

(14) "NFPA 96" refers to National Fire Protection Association Code 96: *Standard for Ventilation Control and Fire Protection of Commercial Cooking.*

(15) "NFPA 1192" refers to National Fire Protection Association Code 1192: *Standard on Recreational Vehicles.*

(16) "OSHA" refers to the U.S. Occupational Health and Safety Administration.

(17) "Propane" refers to liquefied petroleum gas.

(18) "Publicly-accessible API" means an application programming interface that is technically capable of allowing access by the public. The term does not mean an application programming interface to which the service provider must allow such access to the public.

(19) "Second-stage manufacturer" refers to a person or business that modifies a vehicle after final manufacturer construction—common terms for a second-stage manufacturer include, but are not limited to "customizer" and "up-fitter."

Part II. Mobile Food Vendors

* * *

Rule 8. Global Positioning System (GPS) requirements.

(A) All mobile food vehicles must be equipped with an operational Global Positioning System (GPS) device. The device must meet the requirements set forth in Section 7-38-115 of the Municipal Code of the City of Chicago, as well as the following:

(1) The device must be permanently installed in, or on, the vehicle.

(2) The device must be an "active," not "passive," device that sends real-time location data to a GPS service provider; the device is not required to send location data directly to the City.

(3) The device must be accurate no less than 95% of the time.

(4) The device must function while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary as required by Section 7-38-138 of the Municipal Code of the City of Chicago or these regulations. The device must function during these times regardless of whether the engine is on or off.

(5) When the GPS device is required to function, the device will transmit GPS coordinates to the GPS service provider no less frequently than once every five (5) minutes.

(B) City personnel will not request location information from a GPS service provider pertaining to a mobile food vehicle unless:

(1) The information is sought to investigate a complaint of unsanitary or unsafe conditions, practices, or food or other products at the vehicle;

(2) The information is sought to investigate a food-related threat to public health;

(3) The information is sought in connection with establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promulgated thereunder;

(4) The information is sought for purposes of emergency preparation or response;

(5) The City has obtained a warrant or other court authorization to obtain the information; or

(6) The City has received permission from the licensee to obtain the information.

(C) The GPS service provider must maintain at least six (6) months of historical location information and be able to provide the following:

(1) When requested pursuant to Rule (8.B.), reports of each transmitted position including arrival dates, times, addresses, and duration of each stop, in a downloadable format (i.e. PDF, CVS [sic] or Excel). If the request is to provide the current location of a vehicle, the GPS service provider must respond

immediately with the most recent location information for the vehicle.

(2) Reports that provide anonymous, aggregate information regarding mobile food vehicle operations within the City, and do not identify specific mobile food vehicles.

(3) A publicly-accessible API. The provider is free to deny access by the public.

(D) If the City establishes a website for displaying the real-time location of mobile food vehicles, for purposes of marketing and promotional efforts, the licensee may choose to provide the appropriate access information to the API of its GPS to enable the posting of the vehicle's location on such website. The licensee is not required to provide such information or otherwise allow the City to display the vehicle's location.

(E) The following will serve as evidence that the GPS requirements have been met:

(1) Proof of GPS installation.

(2) Proof from a GPS tracking device service provider the operator is in compliance with the requirements as stated in this Rule.

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No. 19-_____

LMP SERVICES, INC.,
Petitioner,
v.
CITY OF CHICAGO,
Respondent.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the PETITION FOR A WRIT OF CERTIORARI in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 5978 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 20th day of September, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
State of Nebraska
My Commission Expires Nov 24, 2020

Patricia C. Billotte
Notary Public

Andrew H. Cockle
Affiant

38585

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No. 19-_____

LMP SERVICES, INC.,
Petitioner,
v.
CITY OF CHICAGO,
Respondent.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 20th day of September, 2019, send out from Omaha, NE 1 package(s) containing 3 copies of the PETITION FOR A WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

To be filed for:

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Counsel for Petitioner

Subscribed and sworn to before me this 20th day of September, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
State of Nebraska
My Commission Expires Nov 24, 2020

Patricia C. Billotte
Notary Public

Andrew H. Cockle
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38585

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