In The

# Court of Appeals

Of Maryland

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**September Term, _____**
**No. _____**

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# PIZZA DI JOEY, LLC and MADAME BBQ, LLC,

***Petitioners*,**

**v.**

# MAYOR AND CITY COUNCIL OF BALTIMORE,

***Respondent*.**

**On Appeal from the Court of Special Appeals, No. 2411, Sept. Term, 2017**

**Appeal from the Circuit Court for Baltimore City, Maryland**
**(The Honorable Karen C. Friedman, Circuit Judge)**

## PETITION FOR A WRIT OF CERTIORARI


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## INTRODUCTION

For generations, this Court has safeguarded the right to pursue one's calling, "a significant liberty and property interest protected by Article 24."[1] Whether a complete ban or a narrow restriction, this Court meaningfully evaluated the restriction and invalidated those that furthered no legitimate interest. In so doing, this Court has implicitly rejected protectionism, declaring ordinances that stifle one business for another private party's benefit to be "wholly unrelated to any legitimate government objective."[2]

But while this Court's actions have been consistent, its terminology has not. This Court has articulated several different standards for reviewing laws like Baltimore's 300-foot ban, which prohibits vendors from parking "within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product . . . as that offered by the mobile vendor." These varying standards—which include real-and-substantial scrutiny, *Waldron*'s heightened scrutiny, and rational-basis review—confused courts below, which disagreed about which to use. This confusion extended to whether protectionism is a legitimate government interest.

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[1] *Attorney Gen. v. Waldron*, 289 Md. 683, 722 (1981).
[2] *Verzi v. Baltimore Cty.*, 333 Md. 411, 427 (1994).

This Court should accept review to guide lower courts on how to evaluate laws like the 300-foot ban, which Baltimore admittedly "designed to address competition that mobile vendors create for brick-and-mortar retail business establishments." Review will let this Court ratify its implicit rejection of protectionism, on which there is substantial controversy in state and federal courts. And it will let this Court clarify whether businesses subject to vague penal statutes must commit a crime to challenge them. Resolving these issues will impact every Marylander's constitutional rights.

## QUESTIONS PRESENTED

Baltimore makes it a misdemeanor for vendors to operate on private or public property within 300 feet of a business that is "primarily engaged in selling the same type of food product" as the vendor. Baltimore admits its 300-foot ban exists to "address competition that mobile vendors create for brick-and-mortar retail business establishments," that different officials could and have interpreted the same terms in the ban differently, and that deciding if a vendor committed a crime is "always a subjective analysis."

1. Does Baltimore's 300-foot ban violate Article 24 of the Maryland Declaration of Rights?

## PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, OR REGULATIONS

**Maryland Constitution, Declaration of Rights, Article 24**

**Baltimore City Code, Article 15, §§ 17–33, –42, –44**

**Maryland Rule 8–131**

## STATEMENT OF FACTS

This matter arises from the Court of Special Appeals' (CSA) May 30, 2019 reported opinion regarding Baltimore City Code, Art. 15, Section 17–33 (the "300-foot ban").[3] Petitioners Pizza di Joey, LLC and Madame BBQ, LLC contend the ban, which prohibits vendors from parking "within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product . . . as that offered by the mobile vendor," violates Article 24. They wanted to operate at their own property and other private-property locations. But the ban makes that a crime.

Baltimore admitted it designed the ban to suppress competition for fear consumers' choices might harm brick-and-mortars' bottom lines. Numerous agencies enforce the ban; in response to restaurant complaints, officials order vendors to stop selling certain items or move. Baltimore admitted it would cite vendors who refused, fine them $500, and potentially revoke their licenses.

[3] The CSA's mandate was entered on July 2, 2019. App. 64.

Unsurprisingly, most vendors comply rather than be accused of a crime and lose their livelihood.

Although the ban's purpose is clear, its meaning is not. Baltimore admitted the terms "primarily engaged in" and "same type of food product" lacked definitions to guide vendors and officials. It admitted different officials enforce the ban differently, that there's "no objective standard" to judge whether someone violated the ban, and that such a determination is "always a subjective analysis."

This case has revealed five distinct ways to enforce the ban. One depends on whether specific items a vendor sells are also sold by nearby businesses. The second depends on whether officials believe a vendor and restaurant have the same cuisine or culinary themes. The third, which Baltimore's counsel announced at trial, looks at a vendor's marketing slogan and whether food nearby restaurants sell could be marketed similarly. The fourth prohibits vendors selling foods containing starches from operating near starch-serving restaurants. And the fifth, which the CSA spontaneously suggested, is the "cube rule," an Internet creation that looks at "the location of the structural starch," *i.e.*, how many of a food item's sides are covered by bread or a tortilla. App. 62–63 & n.17.

This indeterminacy led Pizza di Joey and Madame BBQ to largely stop vending in Baltimore. Pizza di Joey's turning point came when a police officer confronted him at a nearby deli's behest. Because the ban's vague terms meant

Pizza di Joey's money and vending license were always at risk, its owner, Joseph Salek-Nejad, stopped vending in numerous Baltimore neighborhoods and started vending primarily in Anne Arundel County.

Nicole McGowan likewise avoided vending due to the ban. When Ms. McGowan expanded Madame BBQ's menu, her concerns grew too, since it increased the chances of being accused of a crime. The ban meant Madame BBQ couldn't vend at Waverly Brewing Company and other locations. And although Ms. McGowan owned a commissary in Locust Point, she feared operating even there due to a nearby restaurant.

Following a two-day trial, the trial court found the 300-foot ban prevented vending in large parts of Baltimore. Due to the ban's severe practical effect, the trial court claimed to apply *Waldron*'s heightened scrutiny, yet upheld the ban based on speculation from the city's expert witness.[4] App. 13–14; *see also* App. 10–12. In light of "voluminous evidence" regarding the ban's ambiguity, however, the court evaluated whether it was vague. *See* App. 14. Concluding the ban "does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks," App. 21, the court enjoined it.

[4] The circuit court's judgment adjudicated all claims in this action in their entirety.

On appeal, the CSA affirmed and reversed in part. It held—despite the trial court's finding to the contrary—that the ban constituted only a minor restriction of Petitioners' rights. *See* App. 43. Rejecting *Waldron* and embracing deferential review, it held that Baltimore could suppress competition, and that numerous contrary cases from this Court were outdated or inapplicable. App. 42–58.

The CSA's vagueness decision was similarly far-reaching. It held—even though Petitioners' due-process claim turned on the ban's ambiguous terms and enforcement, and the city argued the ban was not vague—that the trial court should have ducked the issue. App. 60–61. And it held that, absent a "fundamental" constitutional right, individuals and businesses cannot bring pre-enforcement facial vagueness challenges. App. 61. To challenge the law, they must break it. App. 61–62.

## ARGUMENT

### I. THIS COURT SHOULD CLARIFY THE STANDARD FOR EVALUATING RESTRICTIONS ON ONE'S RIGHT TO PRACTICE HER TRADE.

This Court should clarify how to evaluate constitutional challenges to ordinances like the 300-foot ban. Petitioners' challenge rests on numerous Court decisions striking down anti-competitive laws. Some, like *Dasch v. Jackson*,[5] *State Board of Barber Examiners v. Kuhn*,[6] and *Mayor & City Council of Havre de*

[5] 170 Md. 251 (1936).
[6] 270 Md. 496 (1973).

*Grace v. Johnson*,[7] used "real and substantial" review. In *Waldron*, this Court employed heightened scrutiny to invalidate a law that kept former judges receiving pensions from practicing law for pay.[8] And in both *Kirsch v. Prince George's County*[9] and *Verzi v. Baltimore County*,[10] this Court invalidated restrictions on college-student occupied rentals and tow-truck operators, respectively, under rational-basis review.

These cases have a common thread: facts matter. No matter the label used, in each case this Court meaningfully evaluated the law's reasonableness rather than credulously accepting abstract speculation. But courts are confused whether these cases, and the meaningful review they employed, remain good law. Here, the CSA decided that *Governor v. Exxon*[11] ended real-and-substantial review, meaning it could ignore cases like *Kuhn* and *Johnson*—although, post-*Exxon*, this Court cited both decisions favorably.

The lower courts were also confused about *Waldron*'s heightened scrutiny. The trial court felt it was the right standard, but then credited unsubstantiated speculation in upholding the ban. The CSA, on the other hand, conceded that *Waldron* calls for meaningful review, but said it was inapplicable because the

[7] 143 Md. 601 (1923).
[8] 289 Md. at 727–28.
[9] 331 Md. 89 (1993).
[10] 333 Md. 411 (1994).
[11] 279 Md. 410 (1978).

ban's terms—as opposed to its practical effect—do not totally prohibit vending.[12] Instead, it held Petitioners were entitled only to "traditional" rational basis review. In applying that standard, the court unblinkingly accepted Baltimore's speculation about empty storefronts despite evidence that numerous East-Coast cities without bans have thriving restaurant and vending industries.

For generations, this Court has held that the right to practice one's trade is important and merits constitutional protection. Nothing in *Salisbury Beauty Schools v. State Board*[13] or any other case has changed that. But confusion has caused protection of that right to become random, turning on whatever standard the court thinks may apply. This Court should establish how courts should evaluate ordinances like the 300-foot ban.

## II. THIS COURT SHOULD DECIDE WHETHER GOVERNMENTS MAY USE THE POLICE POWER TO SUPPRESS COMPETITION TO ENRICH A PREFERRED CONSTITUENCY.

Baltimore admitted it "designed [the 300-foot ban] to address competition that mobile vendors create for brick-and-mortar retail business establishments." That protectionist purpose conflicts with this Court's holdings, which have implicitly rejected stifling one person's constitutional rights to financially benefit another private party. Those holdings accord with numerous jurisdictions

[12] In so doing, the appellate court mischaracterized *Verzi*'s restriction as a total ban and wrongly claimed this Court applied *Waldron*'s heightened scrutiny there. App. 53.

[13] 268 Md. 32 (1973).

invalidating protectionist laws. But some other jurisdictions have approved of using public power for private gain. And the CSA read *Salisbury* as embracing protectionism. This Court should decide if the Maryland Constitution endorses restricting competition for a private party's financial benefit.

### A. The decision below conflicts with *Johnson*, *Verzi*, and other Maryland cases that implicitly reject protectionism.

In upholding the 300-foot ban, the CSA held Baltimore could protect restaurants at food trucks' expense because it felt restaurants make greater investments and need protection. It ignored precedents like *Johnson* and *Verzi*, where this Court struck down anti-competitive laws, instead reading *Salisbury* as endorsing protectionism.

Like the standard of review issue, confusion exists regarding whether *Salisbury* or any case supports blatant protectionism. This Court has historically invalidated anti-competitive laws, declaring that under the police power "the interest of the public generally as distinguished from those of a particular class must require the regulatory interference. . . ."[14] That's why this Court proudly declared in 2000 that it had "str[uck] down discriminatory economic regulation[s]" that "impose[] economic burdens, in a manner tending to favor [some Maryland] residents . . . over [other Maryland] residents . . . ."[15]

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[14] *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 175 (1974).
[15] *Frankel v. Bd. of Regents*, 361 Md. 298, 315 (2000).

This prohibition had been black-letter law. In 1994, *Verzi* held that restricting competition "is wholly unrelated to any legitimate government objective."[16] Two decades earlier, this Court in *Kuhn* invalidated a statute that protected barbers by prohibiting cosmetologists from cutting men's hair, declaring "it cannot be seriously argued that . . . the statute bears a real and substantial relation to [a legitimate government] objective."[17] And years before that, this Court in *Johnson* invalidated Havre de Grace's taxicab ordinance because "it was intended to confer the monopoly of a profitable business upon residents of the town."[18]

But the CSA rejected *Verzi*, *Kuhn*, and *Johnson*, instead viewing *Salisbury* as blessing "economic regulations targeted at curbing unfair competition." App. 45. But the regulation in *Salisbury* prohibited beauty schools from charging above-cost, which this Court upheld *not* to shield cosmetologists from competition, but to ensure schools effectively trained their students.[19] In fact, this Court noted the regulation had *only* an incidental "effect of . . . limit[ing] competition."[20] That's why in both *Kuhn* (decided shortly after *Salisbury*), and *Verzi* (decided 20 years later), this Court continued invalidating protectionist laws.

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[16] 333 Md. at 427.
[17] 270 Md. at 512.
[18] 143 Md. at 608.
[19] 268 Md. at 50, 54–55, 59.
[20] *Id*. at 59.

### B. The decision below thrusts Maryland into the controversial debate of whether protectionism is a legitimate interest.

Whether explicitly protectionist laws are valid is highly controversial. Some state and federal courts have rejected using public power for private gain, while others have blessed officials picking winners and losers.

Two nearby states that have weighed vending restrictions like Baltimore's have rejected the idea that higher rents and taxes justify protectionism. In *Good Humor Corp. v. City of New York*, the New York Court of Appeals held that the police "power is not broad enough to prohibit use of the street for a lawful business . . . for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes."[21] Thirty years later, this same principle led the high court to affirm a lower court decision striking down New York City's 250-foot ban on vending similar commodities near brick-and-mortar competitors.[22]

New Jersey has ruled similarly: in *N.J. Good Humor, Inc. v. Board of Commissioners of Borough of Bradley Beach*,[23] the borough—like Baltimore—argued its vending restriction "protect[ed] the business and profits of the local small merchants who own or rent properties" and guarded against "a decrease in

[21] 290 N.Y. 312, 317 (1943).
[22] *Duchein v. Lindsay*, 34 N.Y.2d 636, 638–69 (1974).
[23] 124 N J.L. 162 (1940).

real estate values" that would lead to a "shrinkage in values and tax returns to the municipality."[24] But the high court held the borough could not "prohibit particular classes of business, lawful in themselves, for the enrichment of another class."[25]

Numerous other courts have rejected protectionism, including the Pennsylvania Supreme Court[26] and U.S. Courts of Appeal for the Fifth,[27] Sixth,[28] and Ninth Circuits.[29] But some courts have not, including the Illinois Supreme Court[30] and the U.S. Courts of Appeal for the Second[31] and Tenth Circuits.[32] Maryland, with *Johnson* and *Verzi*, was seemingly in the former camp, but *Salisbury* led the CSA to side with the latter jurisdictions. This Court should decide if the Maryland Constitution abides laws designed to enrich one private party by infringing on another's rights.

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[24] *Id*. at 167.
[25] *Id*. at 168.
[26] *See, e.g.*, *Olan Mills, Inc. v. City of Sharon*, 371 Pa. 609, 611 (1952) (invalidating tax imposed on transient photographers as "a sword against legal and fair competition").
[27] *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).
[28] *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).
[29] *Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008).
[30] *LMP Services, Inc. v. City of Chicago*, No. 123123, 2019 IL 123123, 2019 WL 2218923, at *4 ¶ 20 (2019).
[31] *Sensational Smiles, LLC v. Mullen*, 793 F.3d 281 (2d Cir. 2015).
[32] *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004).

## III. THIS COURT SHOULD GRANT REVIEW TO PROVIDE CLARITY REGARDING WHO MAY CHALLENGE VAGUE PENAL LAWS.

Petitioners complained that the 300-foot ban violated due process. They presented evidence showing that its key terms "primarily engaged in selling" and "same type of food product" have no fixed meanings, that different officials read them differently, and that whether a vendor commits a crime is inherently subjective. Petitioners argued this ambiguity meant the ban lacked a rational basis.

The trial court, however, took a slightly different tack. Based on the "voluminous evidence" Petitioners presented, it held the ban violated due process because it "simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks." App. 21. In other words, the ban violated due process not because it lacked a rational basis, but because it was vague.

The Supreme Court has invalidated vague penal laws three times in the past five years, including last month in *United States v. Davis*.[33] But the CSA held the trial court should not have even considered vagueness. It held that courts should *only* consider a facial vagueness challenge when the law impinges on a "fundamental" constitutional right. App. 61. Holding that the right to practice one's trade is not fundamental, the CSA said Petitioners could only challenge the

[33] 139 S. Ct. 2319 (2019).

ban as-applied. App. 62. And because both assiduously avoided breaking the law, it said no vagueness inquiry could occur. *Id*. In other words, even though the ban could cost them their livelihood and give them a criminal record, Petitioners must violate it to challenge its vagueness. The court likewise held that, even though Petitioners' due-process claim turned on the fact no one understood the ban, the trial court should not have resolved their due-process claim using a slightly different legal theory that arises under the same constitutional provision and turns on the same exact facts. App. 60–61.

These holdings are wrong. The CSA's holding that individuals and businesses cannot generally bring pre-enforcement vagueness challenges contradicts this Court's holdings and, if left undisturbed, would reduce Marylanders' rights below the federal constitutional floor. Nor was the trial court required to ignore evidence of the ban's vagueness because Petitioners had used that same evidence in pressing a slightly different legal theory under the same constitutional provision.

### A. This Court, and courts nationwide, entertain pre-enforcement facial vagueness challenges, and barring such challenges would reduce Marylanders' rights beneath the federal floor.

The CSA created a major constitutional conundrum in holding that "a facial vagueness challenge can be made only when the challenged statute implicates a fundamental constitutional right." App. 61. As this Court held in *Davis v. State*,

"if a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional."[34] Both courts recognized that the ban directly affects Petitioners. But because the CSA felt Petitioners' rights were not "fundamental," it held they must violate the ban to challenge its vagueness. That decision conflicts with cases from Maryland, other states, and the federal judiciary.

Much of the CSA's confusion arose from its conflation of facial challenges with the overbreadth doctrine. The CSA was correct that the overbreadth doctrine does not apply here, but Petitioners never argued it did. Overbreadth is a "rule of standing which allows a defendant to challenge the validity of a statute even though the statute as applied to the defendant is constitutional."[35] But Petitioners are not challenging a statute that clearly applies to them but is vague as applied to others. The ban is vague for both Petitioners *and* everyone else. In such situations, anyone the ban directly affects may challenge it.

Indeed, this Court has repeatedly considered pre-enforcement facial vagueness challenges. In *Tidewater/Havre de Grace, Inc. v. Mayor & City Council of Havre de Grace*,[36] for instance, this Court evaluated whether an ordinance imposing docking and storage fees was vague. Marinas sued shortly

[34] 183 Md. 385, 389 (1944).
[35] *Galloway v. State*, 365 Md. 599, 617 (2001).
[36] 337 Md. 338 (1995).

after the ordinance was enacted, arguing it was "so 'riddled with uncertainties' that it violates the constitutional guarantee of due process."[37] No violation had occurred, but this Court reached the merits. Twenty years earlier in *Bowie Inn, Inc. v. City of Bowie*,[38] this Court considered a pre-enforcement facial vagueness challenge several businesses brought to a bottle-deposit ordinance. Individuals and businesses in other states have likewise brought and won pre-enforcement facial vagueness challenges against laws impinging on no "fundamental" rights.[39]

The decision below also conflicts with holdings by federal courts. Indeed, the Supreme Court's foundational vagueness case, *Connally v. General Construction Co*.,[40] was a pre-enforcement facial challenge. And individuals and businesses have won such challenges in federal appellate[41] and district courts.[42]

Accordingly, this Court should reaffirm that people need not break the law to get their day in court. In fact, the holding below creates a new and distinct constitutional injury. Eliminating Marylanders' right to bring pre-enforcement

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[37] *Id*. at 350.
[38] 274 Md. 230 (1975).
[39] *See, e.g.*, *Lexington Fayette Cty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't*, 131 S.W.3d 745, 756 (Ky. 2004) (holding portion of anti-smoking law facially vague in pre-enforcement challenge).
[40] 269 U.S. 385, 390 (1926).
[41] *See, e.g.*, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) (holding Arizona solicitation statute facially vague in pre-enforcement challenge).
[42] *See, e.g.*, *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390, 392 (E.D. Mich. 1980) (holding drug paraphernalia ordinance facially vague in pre-enforcement challenge).

facial vagueness challenges would cause their rights to fall beneath the standards laid out in cases like *Abbott Laboratories v. Gardner*, where the Supreme Court held in a pre-enforcement challenge that "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . ***must be permitted*** . . ."[43]

### B. The trial court was free to decide if the 300-foot ban was vague.

Maryland and federal jurisprudence shows that courts may rule upon dispositive legal issues before them. As the Supreme Court has held, once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties."[44]

And here, the issue was properly before the trial court. Petitioners complained the 300-foot ban violates due process. They argued that it violated due process due to the ambiguous way Baltimore interpreted and enforced it. They supported their argument with evidence, including Baltimore's admission that enforcement was always subjective. In response, Baltimore argued, both to the trial and appellate courts, that the ban was not vague. This was more than enough; as Maryland Rule 8-131(a) states, an issue is preserved if it was "raised in ***or***

[43] 387 U.S. 136, 153–54 (1967) (emphasis added).
[44] *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99 (1991).

decided by the trial court." And here, both occurred, with the trial court resolving Petitioners' due-process claim under a slightly different legal theory.

Supreme Court precedent shows this is unobjectionable. In *Lebron v. National Railroad Passenger Corp.*,[45] for instance, the plaintiff argued to the Supreme Court that Amtrak was a government entity, which he had expressly disavowed below. The Court entertained the argument, holding that "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."[46] Furthermore, the Court blessed the court of appeals reaching the argument, and held that because that court reached the issue, it would too.[47]

The CSA's admonition to the contrary, which contained no supporting citations, will chill courts from reaching dispositive legal arguments. This Court should remind lower courts that they may decide due-process claims based on the evidence, even if that evidence leads to a slightly different legal theory than one pressed by the parties.

[45] 513 U.S. 374, 378–79 (1995).
[46] *Id*. at 379 (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).
[47] *Id*.

## CONCLUSION

For the reasons set forth above, Petitioners respectfully request this Court grant the petition.


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## CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

**1.** This brief contains 3,886 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

**2.** This brief complies with the font, spacing, and type size requirements stated in Rule 8-112. This brief was typed in 14 point Times New Roman.

Robert P. Frommer

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of July, 2019, one copy of the Petition for Writ of Certiorari was served, via UPS Ground Transportation, to:

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# APPENDIX

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| **v.** | *** FOR** |
| **MAYOR AND CITY COUNCIL OF BALTIMORE** | *** BALTIMORE CITY** |
| | *** Case No. 24-C-16-002852** |
| **Defendant.** | |

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

**MEMORANDUM OPINION AND ORDER**

## I. INTRODUCTION

Plaintiffs, Pizza di Joey, LLC, and Madame BBQ, LLC, filed an Amended Complaint for Declaratory Judgment and Injunctive Relief to enjoin the Mayor and City Council of Baltimore from enforcing , Article 15, Section 17-33 of the Baltimore City Code. Plaintiffs allege that the challenged regulation violates their rights to due process and equal protection that are guaranteed to them by Article 24 of the Maryland Declaration of Rights. This matter came before this Court for trial on September 28 and 29, 2017.

## II. PROCEDURAL HISTORY

On May 5, 2016, the Plaintiffs filed a Complaint for Declaratory Judgment and Injunctive Relief against the Mayor and City Council of Baltimore (hereinafter "Defendant"). On July 5, 2016, the Defendant filed a Motion to Dismiss, which was subsequently denied by Judge Jones. Plaintiffs filed an Amended Complaint for Declaratory Judgement and Injunctive Relief on October 17, 2016.

On June 21, 2017, Plaintiffs filed a Motion for Summary Judgment, which was denied by Judge Tanner on August 11, 2017. The Defendant filed a Motion for Summary Judgment as well on June 21, 2017, which Judge Tanner denied on August 11, 2017. The Plaintiffs filed a Motion

to Exclude Anirban Basu as an Expert Witness on June 21, 2017 and Judge Tanner denied this motion on August 11, 2017.

On September 15, 2017, Plaintiffs filed a Motion in Limine to Exclude Anirban Basu as an Expert Witness at Trial, and on September 27, 2017, the Defendant filed two additional motions: a Motion in Limine to Exclude Deposition Transcripts, and a Motion in Limine to Exclude Documents Produced on September 22, 2017. The parties appeared before this Court on September 28, 2017, to argue the above-mentioned motions. On September 28, 2017, this Court ruled as follows: (1) Plaintiff's Motion in Limine to Exclude Anirban Basu as an Expert Witness was denied; (2) Defendants Motion to in Limine Exclude Documents Produced on September 22, 2017, was denied; and (3) Defendant's renewed Motion for Summary Judgment was denied. Defendant's Motion in Limine to Exclude Deposition Transcripts was also heard but was thereafter withdrawn.

The trial began on September 28, 2017 and concluded on September 29, 2017.

## III. FINDINGS OF FACT

### a. Pizza di Joey, LLC

Plaintiff Pizza di Joey, LLC ("Pizza di Joey") is a closely held Maryland-based limited liability company that has its principal place of business in Baltimore, Maryland. Joseph Salek-Nejad, d.b.a. Joey Vanoni, is the owner of Pizza di Joey. Pizza di Joey owns and operates the Pizza di Joey food truck, which is licensed to operate in the city of Baltimore. The Pizza di Joey food truck has operated in Baltimore on public property, and on private property with the consent of the property owner. The Pizza di Joey food truck serves primarily authentic New York-style pizzas, and supplements its pizza offerings with meatball subs, pasta salads, and other Italian-American food products.

**b. Madame BBQ, LLC**

Plaintiff Madame BBQ, LLC ("Madame BBQ") is a closely held Maryland-based limited liability company that has its principal place of business in Baltimore, Maryland. Nicole McGowan is the owner of Madame BBQ. Madame BBQ owns and operates the Mindgrub Café food truck, which is licensed to operate in the city of Baltimore. Initially, Madame BBQ primarily operated the Madame BBQ food truck in Howard County, Maryland. It periodically operated the truck at special events in the city of Baltimore pursuant to a temporary permit obtained from the City of Baltimore. The Madame BBQ food truck primarily served barbeque fare, such as pulled pork sandwiches. While this case was pending, Madame BBQ rebranded its food truck as "MindGrub Café" and expanded its menu to include not just barbeque, but a variety of healthier food products, including salads, soups, and sandwiches.

**c. Mobile Vending in Baltimore**

The City regulates all mobile vendors, including food trucks, under Article 15, Subtitle 17 of the Baltimore City Code, pursuant to the Street Vendor Program Rules and Regulations promulgated by the Baltimore Department of Transportation. The Baltimore City Code, Art. 15 § 17-1, *et seq.*, ("the Code") went into effect on February 28, 2015.

The Code defines a "mobile vendor" as, "any person that sells, distributes, or offers to sell or distribute food products, other merchandise of any kind, or services from a motor vehicle on City streets or private property within the City of Baltimore." Art. 15, § 17-1(e)(1). A "vendor truck" is defined as, "any motor vehicle for the purpose of selling any food product, other merchandise, or service by a mobile vendor." *Id.* § 17-1(k).

Mobile vendors cannot operate: (1) within two blocks of a mobile vending zone (Art. 15 § 17-32); (2) within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or services as that offered by the mobile vendor (Art. 15 § 17-33); (3) within a residential area (Art. 15 § 17-35); (4) within two blocks of a City Market, designated in City Code, Art. 16 § 1-2 (Ar. 15 § 17-37); (5) from the hours of 7:00 am to 8:00 pm, within two blocks of any public or private kindergarten, elementary school, or secondary school or any public transit stop serving a kindergarten, elementary school, or secondary school (Art. 15 § 17-38); and (6) within two blocks of a farmers' market when the market is in operation, except with express permission from the market organizer (Art. 15 § 17-39).

It is important to note that a violation of the 300-foot rule is a crime. Art. 15, Section 17-42 is labeled "Criminal Penalties" and states, "[a] person who violates any provision of this subtitle or of a rule or regulation adopted under this subtitle is guilty of a misdemeanor and, on conviction, is subject to a penalty of $500 for each offense." Additionally, the Code authorizes the City to revoke a mobile vendor's license for violating the 300-foot rule, and it further provides that if a mobile vendor commits three Code violations within a one-year period (including violations of the 300-foot rule) the City is required to revoke that vendor's license. Art. 15, § 17-44(a)-(b).

## IV. CONCLUSIONS OF LAW

### A. PER SE UNCONSTITUTIONAL

Plaintiffs challenge the 300-foot rule on the ground that economic favoritism is an illegitimate, per se unconstitutional government interest. The Plaintiffs assert in their trial memorandum that the Maryland Court of Appeals has established two principles in decisions

striking down similar discriminatory regulations: (1) economic favoritism is per se unconstitutional; and (2) when evaluating an Article 24 challenge to an economic regulation, the Court must apply the "real and substantial test," look past pretextual government interests, and declare invalid any arbitrary regulations that do not meaningfully further a legitimate government interest.

In support of their "per se unconstitutional" argument, the Plaintiffs cite three cases: (1) *Verzi v. Baltimore County*, 333 Md. 411 (1994); (2) *Bruce v. Director, Department of Chesapeake Bay Affairs*, 261 Md. 585 (1971); and (3) *Maryland State Board of Barber Examiners v. Kuhn*, 270 Md. 496 (1973). Each of those cases involved an ordinance or a statute that created a perceived economic favoritism. In each case, however, the Court analyzed the legislation under a "rational basis" review, and did not strike down the legislation as per se unconstitutional, but rather because the legislation could not survive rational basis scrutiny.

The *Verzi* Court reiterated that, although not all discriminatory classifications are per se unconstitutional, "a discriminatory classification may be an unconstitutional breach of the equal protection doctrine under the authority of Article 24 alone." *Verzi*, 333 Md. at 417. The use of the word "may" is significant in this Court's analysis, because the Court of Appeals has made it clear that not every discriminatory classification is per se unconstitutional. Therefore, this Court concludes that the 300-foot rule is not per se unconstitutional.

**B. DUE PROCESS AND EQUAL PROTECTION**

Plaintiffs also challenge the City's 300-foot rule under Article 24 of the Maryland Declaration of Rights, specifically arguing the rule violates Plaintiffs' right to Due Process and Equal Protection.

The Fourteenth Amendment of the Untied Stated Constitution, in pertinent part, provides: "No State shall deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Even though the Maryland Constitution does not contain an express equal protection clause, the Court of Appeals has deemed it "settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights." *Attorney General of Maryland v. Waldron*, 289 Md. 683, 704 (1981).

Article 24 of the Maryland Declaration of Rights provides, "[t]hat no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land." The Court of Appeals has held that since Article 24 "has been interpreted to apply 'in like manner and to the same extent as the fourteenth amendment of the Federal Constitution'," an Article 24 equal protection claim follows the "basic analysis provided by the United States Supreme Court in interpreting the like provision contained in the fourteenth amendment." *Waldron*, 289 Md. at 705, 714.

The Supreme Court has identified two different standards of review for Due Process and Equal Protection Challenges. The first standard of review is "strict scrutiny," and the second standard of review is the "rational basis" test. Strict scrutiny is triggered when a statute creates a distinction based upon clearly "suspect" criteria, or when that enactment infringes upon personal rights or interests deemed to be "fundamental." *Waldron*, 289 Md. at 706.

A "suspect class" has been categorized as a group of "people who have experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Waldron*, 298 Md. at 706. The Supreme Court has placed classifications based on race, ancestry, and national origin in the

suspect category applicable to strict scrutiny. *Id.* Fundamental rights or interests have been defined as those "explicitly or implicitly guaranteed" by the federal constitution, such as, the right to vote, the right of equal access to a criminal appeal, the right to procreate, and the right of interstate travel. *Id.*

Laws subject to strict scrutiny violate the equal protection clause "unless the State can demonstrate that such laws are 'necessary to promote a compelling government interest.'" *Waldron*, 289 Md. at 706. This Court concludes that strict scrutiny review should not be applied to the 300 foot rule since neither a suspect class nor a fundamental right or interest, as outlined above, have been infringed upon by the rule.

The second standard of review is the rational basis test, also known as the fair and substantial relation test. The rational basis test applies when neither a suspect class nor a fundamental right or interest is implicated. *Waldron*, 289 Md. at 707. The rational basis test requires, at a minimum, that a statutory classification bear some 'rational relationship' to a legitimate state purpose. *Maryland State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496, 507 (1973). Under this standard, a statutory classification is struck down only if the means chosen by the legislative body are "wholly irrelevant to the achievement of the State's objective." *Waldron*, 289 Md. at 707. The Supreme Court "has been willing to uphold the constitutionality of an enactment when 'any state of facts reasonably may be conceived to justify it.'" *Id.*

The rigid two tier analysis established by the Supreme Court caused dissatisfaction among various courts for two reasons: (1) strict scrutiny determined beforehand "the invalidation of nearly every classification involving such analysis. . . the Court has thus far declined to expand the group of fundamental interests and suspect classes that will trigger analysis under this standard;" and (2) statutes reviewed under the rational basis test receive "minimal scrutiny in

theory and virtually none in fact." *Waldron*, 289 Md. at 708. Therefore, the Supreme Court identified two general groupings of statutes that would receive a higher level of review than rational review, but not quite as high as strict scrutiny. *Id.* First, "are those enactments which impact upon sensitive, although not necessarily suspect criteria of classification . . . this group clearly encompasses gender discriminations, and probably includes those classifications based on illegitimacy." *Id.* 710-11; *see also* n.17 (illegitimacy refers to illegitimate children). The second category of statutes triggering heightened rational review "are those which affect 'important' personal interests or work a 'significant interference with liberty or a denial of a benefit vital to the individual.'" *Id.* at 711. Thus, "when important personal rights, not yet held to merit strict scrutiny but deserving of more protection than perfunctory review would accord, are affected by a legislative classification, a court should engage in review consonant with the importance of the personal right involved. This latter judicial inquiry does not tolerate random speculation concerning possible justifications for a challenged enactment; rather it pursues the actual purpose of the statute and seriously examines the means chosen to effectuate that purpose." *Id.* at 713. Under this heightened rational review, the statute "must serve an important governmental objective and must be substantially related to the achievement of those objectives." *Murphy v. Edmonds*, 325 Md. 342, 358 (1992).

In order to determine which standard of review applies to the challenged ordinance in this case, this Court must decide whether the Plaintiffs' choice in operating a food truck is a guaranty implicit in Article 24 of the Maryland Declaration of Rights. "Property, within the meaning of Article 24 guaranties, includes the right to engage in those common occupations or callings which involve no threat to the public welfare, to exercise a choice in selection of an occupation, and to pursue that occupation in his own way so long as he does not interfere with the rights of

others." *Waldron*, 289 Md. at 719. Therefore, the right to engage in a chosen calling enjoys a more stringent standard of review. *Id.* at 718. Although the ordinance does not ban food trucks entirely and allows the Plaintiffs to operate food trucks in Baltimore City, due to the layout of the City and the concentration of various types of brick-and-mortar restaurants in high traffic areas, the Plaintiffs argue that this ordinance in essence makes it virtually impossible for them to operate. According to the Plaintiffs, because they are forced to operate in less populated areas of the City, thereby limiting their potential for customers, the ordinance places an unconstitutional burden on their opportunity to earn a livelihood in the City.

The *Waldron* Court applied the following analysis to an enactment burdening the exercise of one's occupation:

> "(T)his general principle emerges with some degree of certainty, that the state may for purposes of revenue, tax any occupation or business, but that, except for revenue, it may not annex any burdensome conditions on the common callings of life or the right of the individual to engage therein, unless such regulation is required for the protection of the public health, safety, or morals, and that where justified on that ground any classification, adopted for the purposes of that regulatory measure, must be reasonable, uniform in its operation within the class, and based upon some legitimate principle of public policy."

*Id.* at 720. Applying the Waldron Court's analysis, this Court concludes that the Plaintiffs' right to operate their business in Baltimore City is encompassed within the guarantees of Article 24 of the Maryland Declaration of Rights and the U.S. Constitution. Therefore, heightened rational review is warranted here and, as directed by *Murphy v. Edmonds*, this Court must determine whether the 300-foot ordinance serves an (1) important governmental objective, and (2) is substantially related to the achievement of that objective.

The Supreme Court and Maryland Court of Appeals decisions indicate that, "where personal interests (other than those impacted by wholly economic regulations) are substantially affected by a statutory classification, courts should not reach out and speculate as to the existence

of possible justifications for the challenged enactment." *Waldron*, 289 Md. at 717. The legislature has the right to regulate "a business, trade, or occupation, where such regulation is required for the protection of the public health, safety, or morals … is settled, it may not exercise that power arbitrarily or capriciously, or in such a manner as to deprive the individual of rights, privileges, immunities, or property to which he is entitled as a matter of natural justice and common usage…" *Id.* at 719. To evaluate this ordinance, this Court must look to the purposes for enacting this ordinance as identified by the Plaintiffs and Defendant.

The Defendant argues that the purpose of the ordinance is to promote the general welfare of Baltimore City. Brick-and-mortar retail establishments contribute to vibrant commercial districts by: (1) preventing vacant properties, (2) generating revenue through property taxes, (3) providing more job opportunities, and (4) promoting long-term real estate investments.

The Defendant's expert witness, Anirban Basu (hereinafter "Mr. Basu"), an expert in applied economics, has researched the economic considerations underlying the 300 foot rule. Mr. Basu explained that the ordinance attempts to maximize commercial activity and commercial investment, thus maximizing customer expendability. Unlike restaurants which are committed to a location, food trucks have the ability to move and do not commit to the city through a lease. The following transpired when the Court questioned Mr. Basu on some of his theories;

Q: - - Doesn't the Royal Farms on the corner that sells a slice of pizza way cheaper than a brick-and-mortar pizza shop does, doesn't that also undercut them and there's no regulations on that.

A: - - You're right that's absolutely true. But the Royal Farms cannot roll up right in front of my restaurant. The Royal Farms is going to be over here and the restaurant is over there. There is a physical separation, that's true Your Honor. The food truck, though, what we're talking about, can roll up right in front of the restaurant.

The hope is that the restaurant will produce a different type of pizza than Royal Farms. But a food truck may have the capacity to produce excellent pizza. It

would not surprise me if the pizza is excellent. We're talking about a commercial kitchen on wheels.

Q: Why should the City concern themselves about what a restaurant is concerned about?

A: -- Because the City cares about its tax base, because the City cares about 15 to 20 to 25 jobs. Because the City wants to avoid commercial vacancies. Because the City wants to attract visitors, and, um, and enhance reputation. . .
Restaurants are a really important element of economic environment. The quality of life environment. So - -

Q: If going to busy areas like Hampden or Harbor East, etc., it is not like that (referring to Little Italy's unique atmosphere). There can be four (4) pizza shops on one (1) block and the City wouldn't say boo about it. Four (4) pizza shops in Harbor East on that one (1) block cannot survive. . . The City is not going to regulate it. If you're going to open a pizza shop there and make sure it's the best on the block, you'll be okay. That's the philosophy. So why is that different? Why are food trucks different?

A: Because in your hypothetical example. It is still the case that those pizza restaurants, four (4) on the same block, which I think is unusual but conceivable, so let's talk about it. They would have similar cost structures. So to the extent that they have similar cost structures, they are renting on the same block, so the rent is not that different. They may be renting more or less space vis-a-vis one another. They're drawn from the same labor pool, asking the same from staff, they have waitstaff, and so on and so forth. And so, there's a similarity there in cost structure. That is different against from food trucks - - and therefore, I would argue to a pizzeria as an example the food truck sitting in front is a greater commercial threat than the pizza shop right next door.

Thus, the Defendant argues that although brick-and-mortar restaurants naturally engage in competition with one another, this competition does not threaten the vitality of brick-and-mortar restaurants in the way that food trucks do. Food trucks siphon away customers through "free-riding," which harms commercial activity and the City's economy as a whole. Mr. Basu summarized the concept of free riding,

> ". . . so one (1) economic actor is engaging in a certain level of investment or expenditure, and, I, am able to free ride on those efforts without having to expend my own resources. And in that sense it is unfair because I'm being subsidized involuntarily by this other economic actor. . ."

Mr. Basu provided the following example of the free rider problem:

> "So an actual restaurant, let's say a pizzeria, creates a reputation. People say, "I wanna go to BOP pizza. I love BOP pizza in Fells Point, I wanna go there." But in the process of making that exquisite pizza that they make, they generate some expense. So, pizza is not inexpensive. And now, a food truck can come in during the busiest hours? That restaurant is essentially paying property taxes all day and night. But, I, as a food truck, can come in to an aggregate part of the day just when the market is hottest, just when BOP pizza can generate the most revenues on a per hour basis. So I'm going to sit in front of BOP pizza at that time. Is that fair? I have created the market as BOP pizza. I've made a commitment over the long-term. I've bought equipment, hired staff, and now I have patrons coming in my direction and they can be siphoned off by a food truck that is going to be gone in two (2) hours. To me, that is not a satisfying outcome. And it doesn't strike me as fair competition, and it very much strikes me as the free rider problem. That food truck is free riding upon the efforts of that pizzeria. And, in my mind, policy makers shouldn't support that."

Mr. Basu continued to describe the free rider impact on commercial activity:

> "Free rider harms commercial activity for the following reason. If I'm a restaurateur, or would be, prospective restaurateur and I know this could happen to me, that a food truck selling primarily the same item can locate right in front of my restaurant, I may not open up the restaurant in the first place. Why would I spend so much capital? Hundreds of thousands of dollars, take on all kinds of liability (there's risks when you operate a business) . . . So why would I do that and spend that money so a food truck that moves right in front of me can be successful for a few hours of the day before they move on to Baltimore County or wherever they are going? That doesn't make sense to me. That's the kind of thing counselor that creates commercial vacancies. That's the kind of thing that produces unemployment and we have enough of that in this City."

The Defendant reiterated that commercial vacancies are harmful to this City's economy, quality of life, and that Baltimore City collects three times as much revenue from property taxes than from income taxes. Vacant properties caused by the threat of food trucks, as laid out by Mr. Basu, invite crime, decrease job opportunities, and decrease the City's collection of property taxes. If restaurateurs are deterred from investing because food trucks have a right to park in front of their restaurant, the City will not receive those long-term commitments guaranteed by leases, and there will be more vacant commercial properties. Mr. Basu stated, "my conclusion very firmly is that [the 300 foot] rule is to the benefit of the people of Baltimore and benefit the

level of commercial transactions that will take place in this City over the long term. That it supports entrepreneurship, and that is supports street level vitality."

The Plaintiffs argue that the 300-foot rule is not protecting the general welfare, and that its purpose is to financially benefit brick-and-mortar retailer by restricting the Plaintiffs' right to conduct their businesses. The Plaintiffs maintain that the 300-foot rule is more clearly anti-competitive because it restricts mobile vendor operations only when they sell the "same type of food product" as a nearby brick-and-mortar retailer.

According to the Plaintiffs, the cases of *Verzi v. Baltimore County*, 333 Md. 411 (1994), *Attorney Gen. v. Waldron*, 289 Md. 683 (1981), and *State Bd. of Barber Examiners v. Kuhn*, 270 Md. 496 (1973), have established the following elements of Maryland's real-and-substantial test (also known as the rational basis test): (1) what the rule accomplishes must be legitimate; (2) the rule's purported objectives must be based in reality, not fantasy, and must not be pretextual; and (3) the facts and circumstances in evidence should allow the Court to reasonably conclude that the rule can be viewed as meaningfully accomplishing something in the real world. The Plaintiffs claim that the 300-foot ordinance violates all of the above listed elements since: (1) its purpose is to confer a financial benefit to a distinct and private interest group; (2) Defendant's hypothesized parade of horribles flowing from mobile vending competition is not reasonably conceivable; and (3) the manner in which the rule is interpreted and enforced means its cannot be viewed as furthering any government interest in a real-and-substantial manner. In sum, Plaintiffs argue that protectionism is not a legitimate government interest, whether as an end in itself or as a means to promote the "general welfare."

Applying the heightened rational standard of review to the 300 foot rule this Court concludes that this provision is not unconstitutional because it (1) protects the contributions

brick-and-mortar retail establishments make to the City's commercial districts; (2) promotes entrepreneurial investments and opportunity by eliminating the potential risk of food trucks; and (3) diversifies the marketplace to maximize positive economic effect by creating meaningful choices for the consumer. The 300-foot rule promotes brick-and-mortar establishments throughout the City by eliminating the threat of mobile vendors, and ensuring brick-and-mortar establishments become a permanent fixture in the City. Promoting brick-and-mortar restaurants provides jobs, property tax revenue, and prevents a growing number of vacant properties. The commercial district of this City is dependent upon these brick-and-mortar establishments' long-term real estate investments. The City's economic vitality is dependent upon the flourishment of its commercial district.

As stated in *Waldron*, a State may enact regulations that may be burdensome on an individual's right to engage in their choice of occupation, as long as that regulation is required for the protection of the public health, safety or morals. This Court agrees that the vitality of commercial districts is dependent upon the success of brick-and-mortar establishments, which promotes a successful economy. The 300-foot rule serves the legitimate purpose of promoting the City's general welfare by establishing a 300-foot distance between brick-and-mortar establishments and mobile vendors. The City is entitled to protect the general welfare by ensuring the vibrancy of commercial districts.

Thus, this Court declares that Baltimore City Code, Article 15, Section 17, *et seq.*, is constitutional and does not infringe on the Plaintiffs Due Process and Equal Protection rights.

**C. VOID FOR VAGUENESS**

The Plaintiffs also challenge Baltimore City Code, Article 15, Section 17, *et seq.*, on "void for vagueness" grounds arguing that the terms and phrases used in the 300-foot rule are

undefined and ambiguous. Art. 15, Section 17-33, of the Code reads as follows, "a mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor."[1] The Plaintiffs challenge this provision on its face and as applied.

The Fifth and Fourteenth Amendments guarantee that "(n)o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *Bowers v. State*, 283 Md. 115, 120 (1978) (citations omitted). The fundamental requirement "is that a penal statute be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Id.*

Generally, two elements must be examined to determine if a statute is unconstitutionally vague: (1) the statute must satisfy fair notice; and (2) the statute must provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation is it to enforce, apply and administer penal laws. *McFarlin v. State*, 409 Md. 391, 410-11 (2009).

The "fair notice" element is required to ensure, "that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly." *McFarlin*, 409 Md. at 411. A statute will not be held vague "under the fair notice principle if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises, or

[1] The method of enforcing the 300-foot rule has been explained as follows; first, enforcement officials receive a complaint from a brick-and-mortar restaurant that mobile vendors are violating the rule. Next, a Baltimore official investigates that complaint and instructs the mobile vendor to either stop selling certain products or move further than 300 feet away from any brick-and-mortar business that sells the same type of food product. If a mobile vendor refuses to comply, officials are permitted to issue a citation.

even the words themselves if they possess a common and generally accepted meaning." *Id.* at 411.

The "fixed standards and adequate guidelines" element is required because "a vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an Ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Bowers*, 409 Md. at 121-22. The Bowers Court emphasizes that, "this is not to say, of course, that a criminal statute is void merely because it allows for the exercise of some discretion on the part of law enforcement and judicial officials. It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional..." *Id.* at 122.

The Plaintiffs have provided this Court with voluminous evidence regarding the ambiguity of the 300-foot rule. The Plaintiffs deposed two city officials, Gia Montgomery and Babila Lima. These depositions were admitted into evidence in their entirety without objection. *See* Pl. Ex. 30-32. Having reviewed all of the evidence, including these depositions, this Court concludes that the 300 foot rule does not satisfy the requirements established in *Bowers* or *McFarlin.*

1. **"Primarily engaged in"**

This Court's void for vagueness analysis begins with an examination of the phrase "primarily engaged in." Applying the fair notice standard to this terminology, this Court concludes that a reasonable person is not provided an opportunity to know what is prohibited since the meaning of "primarily engaged in" is unable to be accurately interpreted. Although these words can be found in a general dictionary, based on the testimony and depositions

admitted at the hearing it is apparent that the meaning of "primarily engaged in " as applied in this ordinance cannot satisfy the *McFarlin* requirement.

When the Plaintiffs questioned Gia Montgomery about the meaning of "primarily engaged in," she agreed that the meaning of "primarily engaged in" is subjective and defined by common sense. *See* Pl. Ex. 32, Depo. of Gia Montgomery, 163:7-20; 184:4-20.

Additionally, when testifying about his understanding of the 300 foot rule Mr. Joey Vanoni stated that he has never been provided with nor seen anything helpful from the City to define "primarily engaged in selling." He explained that he is hesitant to park near a Subway since Subway sells pizzas and meatball subs as well. Mr. Vanoni explained that although his truck sells mainly pizza and occasionally adds meatball subs to the menu, he is uncertain if Subway qualifies as "primarily engaged in selling" pizza and meatball subs since those items are on Subway's menu.

City Official, Babila Lima, admitted that the definition of "primarily engaged in" was subjective:

Q: Would the City agree that the - - whether a brick-and-mortar retail establishment is primarily engaged in selling a certain product has to be made on a case-by-case basis?
A: Yes.
Q: Would the City agree that determining whether a brick-and-mortar retail establishment is primarily engaged in selling a certain product or service is very subjective?
A: I don't know that I would use the words "very subjective."
Q: How about subjective? Is it subjective in determining whether a retail business establishment is primarily engaged in selling a certain product or service?
A: You could describe it as subjective.

*See* Pl. Ex. 30, Depo. of Babila Lima, 190:15-191:9.

The challenged ordinance does not define "primarily engaged in" and therefore, does not provide the clarity or fair notice that is required to avoid arbitrary and discretionary enforcement.

**2. "Same type of food product"**

Similarly, "same type of food product" has never been clearly defined. Babila Lima stated that the definition of "same type of food product" is based on common sense. *See* Pl. Ex. 30, Depo of Babila Lima, 209:15-210:13. On the other hand, Gia Montgomery stated that that there can be multiple interpretations of the "same type of food product" such as (1) a type of cuisine like Italian, (2) a food product like starch or vegetable, or (3) each individual item being sold. *See* Pl. Ex. 32, Depo of Gia Montgomery, 149:4-150:4.

Additionally, Mr. Vanoni testified that he has not been able to decipher the broad terminology of "same type of food product." He is unsure if it refers to food as a category, or a style.

Nicole McGowan (owner of MindGrub Café) testified that her understanding of the 300-foot rule is that you cannot operate within 300 feet of a restaurant selling the "same stuff." Mrs. McGowan evolved her menu to be more health conscience, but this menu change has restricted her food truck even more in Baltimore City. During cross-examination, defense counsel used Mrs. McGowan's slogan "Brain Food for Knowledge Workers" as defining her food as a *type* of food product. As defense counsel questioned Mrs. McGowan about her menu items as compared to Royal Farms or Subway, defense counsel focused on the fact that the food truck is primarily engaged in "brain food" and not all food is "brain food." However, Mrs. McGowan testified that she compares her *specific* menu items to brick-and-mortar restaurant menu items. For example, she testified that she is unsure if she can park near a chick-fil-a since they offer gluten free items and grilled chicken as well.

Again, "same type of food product" are words found in a general dictionary. However, *McFarlin* requires that an individual be afforded a reasonable opportunity to know what is

prohibited. Although the Defendant argues that these words are defined in the dictionary, the testimony and depositions admitted at the hearing clearly show that the meaning of "same type of food product" as it applies in the ordinance cannot be clarified by a dictionary alone.

The lack of clarity in how to interpret "same type of food product" constitutes a failure to provide fair notice and creates the danger of arbitrary and discretionary enforcement.

**3. Measurement of 300 feet**

Article 15, § 17-33 does not provide a definition as to how the 300 foot distance is measured; does it begin at the front door of the restaurant, the sidewalk, or at the edge of the building in which the restaurant is located? This Court finds that the entities enforcing this ordinance do not have guidance as to how to measure the 300 foot distance between brick-and-mortar establishments and food trucks.

Four different entities have authority to enforce the 300-foot rule: the Department of Transportation, the Department of Health, the Baltimore City Police Department, and the University of Maryland Police. These enforcement officials are not provided a uniform standard to measure 300-feet. An official at the Department of Health previously measured the distance by drawing a circle with a 300-foot radius that originates from a complaining restaurant. *See* Pl. Ex. 8. The Department of Transportation has not "coordinated the way in which it enforces or advises mobile vendors about the 300-foot proximity ban with other departments that have similar enforcement authority." Pl. Ex. 31, 38:7-13. Gia Montgomery stated in her deposition that she measures 300-feet by guessing if "someone is parked within two blocks" of a restaurant, using city blocks as her measuring tool. See Pl. Ex. 31, 43:5-44:2. Since the various enforcement officials have not coordinated a uniform method or standard for measuring the 300 foot distance

and the code does not provide any guidance, this provision is clearly susceptible to arbitrary enforcement.

This Court is not particularly concerned with the number of feet that the ordinance established, but rather with the lack of clarity, and therefore the inevitable lack of consistency in how the chosen amount of feet is measured. This Court will resolve the "how to measure" issue by directing that the distance must be measured from the closest point of the space in the building that is occupied by the restaurant- or by the food court in which the restaurant is located (rather than at the closest point of the building in which the restaurant is located) to the closest point of the food truck. So for example, if there is a restaurant within an office building, the measurement must be from the *space* where the restaurant is located, not at the outside of the *building* in which the restaurant is located.

The issue of vagueness in the application of this rule is highlighted in Mr. Vanoni's (owner of Pizza di Joey) testimony. He testified about an encounter with a University of Maryland police officer in June of 2015, when he was operating at 801 West Baltimore Street. He was approached by an officer who advised him that a complaint was lodged that he was in violation of the 300 foot rule. Mr. Vanoni believed he was not in violation, and reviewed the text of the rule with the officer to prove he was not within 300 feet of a brick-and-mortar restaurant primarily engaged in selling the same type of food product. He was able to persuade the officer that the brick-and-mortar establishment was incorrect. Although Mr. Vanoni avoided a citation, this encounter illustrates that Mr. Vanoni, the officer, and the brick-and-mortar restaurant all have their own way of interpreting and applying the 300 foot rule.

The fundamental requirement "is that a penal statute be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties."

*Bowers*, 283 Md. at 120. As shown through the evidence, the terms "primarily engaged in," and "same type of food product" are "so broad as to be susceptible to irrational and selective patterns of enforcement..." *Bowers*, 409 Md. at 122. Overall, the terms contained in, and the lack of standards that should be in Art. 15, § 17-33 prevents enforcement officials, brick-and-mortar restaurants, and food trucks from understanding what constitutes a violation of the rule. The Code simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks.

**D. STANDING**

In this case, it is true that Plaintiffs have never received a ticket, paid a fine, nor had their license revoked. Therefore, they have not, as of yet, been subjected to the criminal penalty of the ordinance. However, this Court concludes that the Plaintiffs do have standing to argue for injunctive relief. "Under Maryland common law, standing to bring a judicial action generally depends on whether one is 'aggrieved,' which means whether a plaintiff has 'an interest such that he [or she] is personally and specifically affected in a way different from . . . the public generally." *Kendall v. Howard County*, 431 Md. 590, 603 (2013). It is clear based on the testimony of the Plaintiffs that this ordinance personally and specifically affects them in a way that it does not affect the public generally. They testified that this ordinance has in effect barred them from doing business in Baltimore City since it limits their ability to practice their chosen profession in areas of the city that can be profitable.

"Moreover, a plaintiff must satisfy the court that 'the interest sought to be protected by the complainant is arguably within the zones of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 604. The Plaintiffs' livelihood depends on

the success of their food truck business. That is the interest they seek to protect and obviously the challenged ordinance directly regulates and limits that industry.

**E. INJUNCTIVE RELIEF**

As stated above, this Court concludes that the 300 foot rule is not per se unconstitutional, but that the terms of the ordinance are so vague that fair notice is not provided and enforcement is likely to be subjective and arbitrary until the ordinance has been clarified by amendments. Therefore, this Court **GRANTS** the Plaintiffs' request for **Injunctive Relief,** in an Order filed with this Opinion, and directs that the injunction be **STAYED** for sixty (60) days from date of this Order.

12/20/17
**DATE**

Judge Karen Friedman
**Judge Karen C. Friedman**

cc: ALL PARTIES AND COUNSEL OF RECORD
**Clerk: Please send copies via U.S. Mail**

TRUE COPY
TEST
Marilyn Bentley
MARILYN BENTLEY, CLERK

CIRCUIT COURT FOR BALTIMORE CITY
1983

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

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

**ORDER**

This matter having come before the Court for trial on September 28th through September 29th, 2017, testimony taken and evidence admitted for the reasons stated in this Court's Memorandum Opinion, it is this 20 **day of December 2017**, by the Circuit Court for Baltimore City, Part 29, hereby:

**ORDERED** that Plaintiffs request to find Baltimore City Code Article 15, Section 17-33 per se unconstitutional is **DENIED**; and it is further

**ORDERED** that Plaintiffs request for declaratory judgment in favor of the Plaintiffs that the City's enforcement of Baltimore City Code Article 15, Section 17-33 violates their constitutional right to Equal Protection and Due Process is **DENIED;** and it is further

**ORDERED** that Plaintiffs request for injunctive relief is **GRANTED;** and it is further

**ORDERED** that this **INJUNCTION** enjoining the City from enforcing Baltimore City Code Article 15, Section 17-33 shall be **STAYED FOR SIXTY (60) DAYS** from the date of this order.

Judge Karen Friedman

**Judge Karen C. Friedman**
**Circuit Court for Baltimore City**

TRUE COPY
TEST

MARILYN BENTLEY, CLERK

cc: ALL PARTIES AND COUNSEL OF RECORD
**Clerk: Please send copies via U.S. Mail**

CIRCUIT COURT FOR BALTIMORE CITY 23 1983

*Pizza di Joey, LLC, et al. v. Mayor and City Council of Baltimore*, No. 2411, September Term, 2017. Opinion by Nazarian, J.

**DECLARATORY JUDGMENT ACT – LIBERAL CONSTRUCTION – JUSTICIABILITY**

The Declaratory Judgment Act is to be liberally construed and administered. When the contours of the underlying controversy are clear, a party is not required to wait until a regulation is enforced against them to seek a declaratory judgment that the regulation is invalid.

**CONSTITUTIONAL LAW – RATIONAL BASIS – THE REAL AND SUBSTANTIAL RELATION TEST**

The "real and substantial relation test" was the standard applied to economic regulations in the era of economic substantive due process in Maryland. That test is now defunct, and the surviving uses of the real and substantial language in Maryland case law refer to traditional rational basis review.

**CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS**

Article 24 rational basis scrutiny is slightly different from its federal counterpart. Unlike the federal rational basis test, Article 24 rational basis delves into the nature of the right infringed by the challenged statute, regardless of whether it has been declared fundamental under the U.S. Constitution. So long as the law doesn't impair important private rights, traditional rational basis scrutiny applies. But when important private rights are implicated, courts apply a higher degree of scrutiny than traditional rational basis.

**CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS**

Article 24 rational basis requires a closer fit between the means and the ends of regulations that affect important personal rights, and it does not permit courts to speculate about the legislature's purpose.

**CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS**

Wholly economic regulations that do not implicate important private rights are subject to traditional rational basis review.

**CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS**

The City's 300-foot rule is a wholly economic regulation subject to traditional rational basis review. The City's legitimate interest in protecting brick-and-mortar restaurants from free-riding mobile vendors is rationally furthered by the 300-foot rule.

**CONSTITUTIONAL LAW – VAGUENESS – FACIAL VAGUENESS CHALLENGE**

Facial vagueness challenges under the Maryland Constitution are permitted only when the challenged statute implicates a fundamental constitutional right.

**CONSTITUTIONAL LAW – VAGUENESS – AS-APPLIED VAGUENESS CHALLENGE**

The constitutionality of a statute attacked based on an as-applied vagueness challenge must be determined solely from the statute's application to the facts presented. When a statute has not been enforced against the party seeking to invalidate it, the court may not consider theoretical applications to determine whether it is unconstitutionally vague.

Circuit Court for Baltimore City
Case No. 24-C-16-002852

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2411

September Term, 2017

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PIZZA DI JOEY, LLC, ET AL.

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

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Nazarian,
Friedman,
Battaglia, Lynne A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Nazarian, J.

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Filed: May 30, 2019

Baltimore is home to over a thousand brick-and-mortar restaurants and about seventy licensed food trucks, including Pizza di Joey and Madame BBQ (collectively "the Food Trucks"). Baltimore City Code, Article 15, § 17-33, known colloquially as the "300-foot rule," prohibits mobile food vendors from conducting business within 300 feet of brick-and-mortar establishments that sell primarily the same kind of food.

In October 2016, the Food Trucks sued the City in the Circuit Court for Baltimore City. They asked the court to declare that the 300-foot rule functionally prohibited them from operating in Baltimore City and, therefore, violated their rights under Article 24 of the Maryland Declaration of Rights. The City countered that the rule did not prevent food trucks from thriving in Baltimore City and that the rule's location restrictions furthered the City's legitimate interest in supporting local brick-and-mortar businesses that had invested in Baltimore's commercial neighborhoods.

After a trial, the circuit court found (using what it called "heightened rational basis review") that the 300-foot rule did not violate the Food Trucks' rights under Article 24, but that the ambiguities in the statutory language rendered it unconstitutionally vague. We hold that the ordinance should have been measured for rational basis, that it does not violate Article 24, and that it is not unconstitutionally vague. We affirm the circuit court's rulings on Article 24 and reverse the judgment enjoining the City from enforcing the rule.

## I. BACKGROUND

### A. The 300-Foot Rule

The Baltimore City Code regulates the places mobile food vendors can operate. One restriction, known as the "300-foot rule," has been around since the 1970s, but in its most

recent form, which took effect on February 28, 2015, prohibits mobile vendors[1] from operating within 300 feet of a business that sells primarily the same food, merchandise, or service:

> A mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor.

Baltimore City Code, Art. 15, § 17-33.[2]

A food truck that violates the 300-foot rule commits a misdemeanor. Baltimore City Code, Article 15, § 17-42. Violators must pay a fine of $500, *id.*, and may also have their mobile vending licenses suspended or revoked. Baltimore City Code, Art. 15 § 17-44(a). If a licensee commits three violations within a one-year period, revocation is mandatory. Baltimore City Code Art. 15 § 17-44(b). And once a mobile vendor's license has been revoked, "the former licensee may not apply for a new license until at least 1 year from the date of revocation." Baltimore City Code, Art. 15, § 17-44(c).

A number of City agencies, including the Department of Transportation, the

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[1] A mobile vendor is defined as "any person that sells, distributes, or offers to sell or distribute food products, other merchandise of any kind, or services from a motor vehicle on City streets or private property within the City of Baltimore." Baltimore City Code, Art. 15, § 17-1(e).

[2] The Code contains six proximity regulations. *See* Baltimore City Code, Art. 15, §§ 17-32 (mobile vendors may not operate within two blocks of a designated mobile vending zone); 17-35 (mobile vendors may not operate in residential neighborhoods); 17-37 (mobile vendors may not operate within two blocks of a City Market); 17-38 (mobile vendors may not operate within two blocks of any public or private school or public transit stop serving a public or private school); 17-39 (mobile vendors may not operate within two blocks of a farmers' market while the market is open without the express permission of the market organizer). Section 17-33 is the only one at issue here.

Department of General Services, the Baltimore City Police Department, and the University of Maryland Police, enforce the 300-foot rule.[3] Aside from the text of the rule itself, no guidelines elaborate on how the rule should be enforced or define the phrases "primarily engaged in" or "same type of food product" with any further precision.

Although these penalties have been on the books since 2015, no vendor has received a citation or had a license suspended for violating the 300-foot rule. Instead, when mobile vendors violate the rule, the City's enforcement authorities ask them to relocate or to alter their menus according to what brick-and-mortar establishments are nearby. Enforcement authorities initiate these measures only in response to a complaint that a food truck is parked too close to a brick-and-mortar business.

**B. The Food Trucks**

Pizza di Joey is a Maryland-based limited liability company and a mobile vendor licensed in Baltimore City. *See* Baltimore City Code, Art. 15, § 17-1. Pizza di Joey is an Italian kitchen on wheels, complete with 4000-pound brick pizza oven, and has sold "authentic New York style brick oven pizza, as well as some Italian pastas and salad" since 2014. The "Joey" of Pizza di Joey is its owner and founder, Joseph Salek-Nejad, known professionally as Joey Vanoni.[4] Pizza di Joey is open for business several afternoons per week. Although Mr. Vanoni had intended his "center for business operation" to be Baltimore City, he now operates in Anne Arundel County the vast majority of the time,

[3] The University of Maryland Police have concurrent jurisdiction with the Baltimore City Police Department in certain areas on and around the University campus.

[4] Vanoni is Mr. Salek-Nejad's mother's maiden name.

purportedly as a result of the prohibitive nature of the 300-foot rule.

Pizza di Joey has never been cited for violating the 300-foot rule, but was approached once by law enforcement in 2015 in response to a brick-and-mortar restaurant's complaint. Pizza di Joey was setting up for lunch service on the 800 block of West Baltimore Street when a University of Maryland Police officer approached and told Mr. Vanoni that a nearby deli had complained that he was parked too close. Mr. Vanoni explained to the officer that because the deli did not serve pizza, he understood that he was permitted to park his truck nearby without violating the 300-foot rule. The officer was not familiar with the particulars of the rule, so Mr. Vanoni pulled up the text of § 17-33 on his laptop and showed it to him. The officer agreed after reviewing the rule that there was no violation and went on his way. Beyond selling the same officer a slice of pizza later that day, that one encounter represented all of Pizza di Joey's interactions with enforcement authorities relating to the 300-foot rule.

Madame BBQ is a Maryland-based limited liability company founded in the summer of 2014. In 2016, Madame BBQ rebranded its food truck as MindGrub Café and shifted from selling barbeque to more health-conscious cuisine, self-described as "brain food for knowledge workers." Madame BBQ is owned by Nicole McGowan, who has worked in the food service industry since she was fifteen. When Ms. McGowan began operating Madame BBQ in 2014, she conducted most of her business in Howard County. At that time, she was not a licensed mobile vendor in Baltimore City and only took her truck there occasionally through one-day permits for block parties and special events. At the time of trial, Ms. McGowan was in the process of relocating "the focus of [her]

operations" to Baltimore City, where she would ideally like to sell lunch from her truck on weekday afternoons. She is now licensed in Baltimore City.

Madame BBQ has never been cited for violating the 300-foot rule and has never had any encounter with enforcement agencies. But the rule is so prohibitive, Ms. McGowan claims, that she does not take her truck out in Baltimore City because there is nowhere she feels she can serve lunch that doesn't "make [her] afraid to get a citation or lose [her] license."

**C. The Lawsuit**

Pizza di Joey and Madame BBQ filed this action in the Circuit Court for Baltimore City on May 11, 2016. They alleged that the 300-foot rule violated their rights to equal protection and due process under Article 24 of the Maryland Declaration of Rights, both on its face and as applied. The Food Trucks sought a declaratory judgment stating the 300-foot rule was unconstitutional and a permanent injunction against its enforcement. The City filed a Motion to Dismiss the complaint, which was denied. The parties' cross-motions for summary judgment were also denied and the case was set for trial.

The trial lasted two days and included testimony from Mr. Vanoni, Ms. McGowan, and Anirban Basu, an expert witness offered by the City who testified about the impact of food trucks on brick-and-mortar businesses and the economic viability of commercial neighborhoods. The Food Trucks' owners' depositions also were admitted into evidence, along with the depositions of two City employees deposed as its representatives—Gia Montgomery of the Department of Transportation, who testified that she was the person most qualified to speak authoritatively on mobile vending licensure and regulation

enforcement, and Babila Lima of the Department of General Services ("DGS"), who drafted both the 300-foot rule and the materials posted to the DGS website offering guidance on the mechanics of mobile vending regulations.

Mr. Vanoni testified that the 300-foot rule has essentially driven him out of Baltimore City, contrary to his original intention to make Baltimore the center of his business. He explained that the rule is "extremely limiting on my business' ability to successfully operate. . . . I've been compelled to operate outside the City which is not what I intended. I'd like to operate [in Baltimore]." He claimed that the 300-foot rule prohibited him from operating in the Baltimore neighborhoods where his business was most likely to succeed, such as Hampden:

> MR. VANONI: It's a great area. It's [an] up and coming neighborhood here in Baltimore. I've got some friends that live up there. They bought some homes there and it's kind of like a culinary incubator. . . . It's upbeat. It's fun. And it's a cool place to hang out.
>
> PIZZA DI JOEY'S COUNSEL: What steps did you take to analyze the effect of the 300-foot rule and your ability to operate in the Hampden area?
>
> MR. VANONI: I got a list of all the restaurants in the area and I took evaluation of their menus and compared their menus trying to look for any conflicts with regards to this 300-foot rule. Then I shortened my list, went to Hampden and walked the streets verifying their locations with a map I had and the list I created.
>
> PIZZA DI JOEY'S COUNSEL: And about how many restaurants did you identify that concerned you?
>
> MR. VANONI: Hampden, it was 12.
>
> PIZZA DI JOEY'S COUNSEL: And in identifying those 12 what conclusions did you draw about your ability to operate in Hampden?

MR. VANONI: I couldn't operate there successfully.

In addition to Hampden, Mr. Vanoni expressed concern about taking his truck to Federal Hill, Harbor East, Canton, and Fells Point.

Mr. Vanoni also testified about his encounter with the University of Maryland Police, and explained that it caused him to reevaluate and ultimately change his business plan:

> PIZZA DI JOEY'S COUNSEL: What were the lessons you drew from your experience with the University of Maryland police officer?
>
> MR. VANONI: That this law's enforced, that on any given day I could be approached and, you know, I don't want to sound like I'm so important, but I operate my business and I'm on the truck. So when somebody's occupying my time I can't prep. It gave me great pause and concern for operating because I can go here and, you know, even though I could be completely in the right I have to sit here and argue my case every day with an enforcement officer whatever uniform they're wearing or out of uniform and that takes up time from operating. I start off the day normally by myself until my staff arrives, so it's kind of precious time.
>
> ***
>
> PIZZA DI JOEY'S COUNSEL: Were you more concerned about the 300-foot rule after this incident?
>
> MR. VANONI: Absolutely. I realized it wasn't[,] not that I took it lightly[,] but it definitely wasn't a law to take lightly or an order to take lightly not that I really do take laws lightly, but I realize that it was enforced and kind of like, you know, just kind of reiterating what I said before on any given day I could go out there and try to operate and potentially be approached by somebody who is trying to just call on a complaint. They're doing their job. I get that. I'm not in the habit of, you know, getting into argument with law enforcement officers. So yeah, it definitely raised my level of concern.

Ms. McGowan expressed similar concerns in her testimony. She said that the 300-

foot rule placed entire neighborhoods off limits to MindGrub Cafe, particularly Federal Hill, Hampden, Harbor East, Downtown, Locust Point, and Woodberry. She also shared Mr. Vanoni's concerns about profits she lost as result of time spent justifying her truck's presence to law enforcement:

> MADAME BBQ'S COUNSEL: [D]oes your concern about the 300 foot rule influence where you decide to set up?
>
> MS. MCGOWAN: Yes, it does.
>
> MADAME BBQ'S COUNSEL: How so?
>
> MS. MCGOWAN: I definitely don't take my truck out very often, because I'm fearful of where I can park. I haven't found any places that are not--that don't make me afraid to get a citation or lose my license.
>
> ***
>
> [A]s we heard from Joey, you know, all of this takes time. And to try to have to, you know, prove your case, you know, whenever you go out, and the fear of having to prove your case – you know, if someone comes up and says, "[y]ou need to prove you are not in violation." That all takes time. I mean, lunch service is not very long.

The City's expert, Anirban Basu, testified at length about the problems food trucks present to brick-and-mortar eateries and how the 300-foot rule might address those concerns. Mr. Basu is CEO of an economic and policy consultancy that has represented many Baltimore businesses, developers, and agencies. He co-authored an economic development strategy for Baltimore City, and was consultant for the developers of Harbor East, Harbor Point, and Port Covington. Mr. Basu testified that vacancies in commercial neighborhoods affect both public safety and the commercial viability of Baltimore neighborhoods:

> MR. BASU: I really believe that commercial vacancies are

> very injurious in terms of creating an environment not conducive to public safety. . . . If [people] see a lot of vacant space they see a lot of hopelessness. Often vacant space associated with deteriorating physical conditions of buildings. That also sends out signals to people. And people often respond with their behaviors to those signals. So what you want is very vibrant commercial districts . . . low vacancy rate. . . .
>
> CITY'S COUNSEL: And based on your economic knowledge . . . do vacancies make it more difficult to attract new businesses to those areas?
>
> MR. BASU: Oh yes, they do. And [] that's because again it sends a signal to potential tenants that this may not be the place for them. . . . [O]ne of the things you tend to see in commercial real estate is that an area that has suffered high vacancy often continues to suffer high vacancy. . . . So vacancy breeds vacancy. And it's very difficult once a commercial area stops being vibrant to bring that vibrancy back. And we see that throughout Baltimore.

Mr. Basu described the different contributions that brick-and-mortar restaurants and food trucks make to the City:

> CITY'S COUNSEL: How are [food trucks'] contributions to a commercial district different from the contributions that you testified that restaurants contribute to a commercial district?
>
> MR. BASU: Restaurants are semi-permanent members of their community. . . . Food trucks by definition are mobile. They're not affixed to a particular community. They're not necessarily pillars of their community. And of course they're not in brick and mortar context. And so they're not generating property taxes, directly or indirectly, the way that a restaurant would.

He also addressed the disparity in financial investment, and the corresponding disparity in risk, between brick-and-mortar restaurants and food trucks:

> MR. BASU: . . . based on the parameters I found from various industry publications, [] it's reasonable to conclude that a typical restaurant entrepreneur is investing and, therefore, risking about four times as much money as is a food truck entrepreneur. Both are taking risks. Both are to be respected

> for taking those risks. It's wonderful. But the restaurateur on average is making a much larger gamble financially than is a typical food truck entrepreneur.

He explained that in addition to the greater financial investment and corresponding impact on the local economy, brick-and-mortar entrepreneurs make a long-term commitment to the communities in which they operate. They provide tenancy, which increases property values, enter long-term leases, provide employment in greater numbers, and, most importantly, cannot pack up and leave easily. Food trucks, conversely, are able to "cherry pick" hours and locations to optimize profits without committing to any particular neighborhood. If a neighborhood they frequent experiences crime or heavy construction, or anything else that might deter customers from returning, food trucks can drive their business to a more desirable location. And by setting up directly beside a brick-and-mortar competitor, food trucks take advantage of the environment created by the restauranteurs' investments while siphoning off a portion of the business that their competitors have worked to generate. Mr. Basu testified that these dynamics did not "strike [him] as fair competition and it very much [struck him] as a free rider problem." Mr. Basu opined that the 300-foot rule addressed the problem of unfair competition between the two business types "very strongly":

> My conclusion is very firmly that [the 300-foot] rule enures to the benefit of the people of Baltimore and to the benefit of the level of commercial transactions that will take place in this city over the long term that it supports entrepreneurship and that it supports street-level vitality.

After the trial concluded, the court took the case under advisement, then issued a written Memorandum and Order on December 20, 2017. After finding that the 300-foot

rule was not unconstitutional *per se*, the court considered the appropriate standard for measuring the Food Trucks' Article 24 claims. The court applied "heightened rational basis" scrutiny and found that the rule was not unconstitutional under that standard:

> Applying the heightened rational standard of review to the 300 foot rule this Court concludes that this provision is not unconstitutional because it (1) protects the contributions brick-and-mortar retail establishments make to the City's commercial districts; (2) promotes entrepreneurial investments and opportunity by eliminating the potential risks of food trucks; and (3) diversifies the marketplace to maximize positive economic effect by creating meaningful choices for the consumer. The 300-foot rule promotes brick-and-mortar establishments throughout the City by eliminating the threat of mobile vendors, and ensuring brick-and-mortar establishments become a permanent fixture in the City. Promoting brick-and-mortar restaurants provides jobs, property tax revenues, and prevents a growing number of vacant properties. The commercial district of this City is dependent on these brick-and-mortar establishments' long-term real estate investments. The City's economic vitality is dependent upon the flourishment of its commercial district.
>
> As stated in [*Attorney General v.*] *Waldron*, [289 Md. 683 (1981)], a State may enact regulations that may be burdensome on an individual's right to engage in their choice of occupation, as long as that regulation is required for the protection of the public health, safety, and morals. This Court agrees that the vitality of commercial districts is dependent upon the success of brick-and-mortar establishments, which promotes a successful economy. The 300-foot rule serves the legitimate purpose of promoting the City's general welfare by establishing a 300-foot distance between brick-and-mortar establishments and mobile vendors. The City is entitled to protect the general welfare by ensuring the vibrancy of commercial districts.
>
> Thus, this Court declares that Baltimore City Code, Article 15, Section 17, *et seq.*, is constitutional and does not infringe on the [Food Trucks'] Due Process and Equal Protection rights.

Although there was some uncertainty about whether the Food Trucks had

challenged the rule on vagueness grounds—as we detail later, their complaint didn't include a vagueness claim, and they alternately disclaimed and embraced the theory at different times during the trial and closing arguments—the court determined that they had raised both a facial and as-applied vagueness challenge and concluded that the 300-foot rule was unconstitutionally vague in two ways. *First*, the court found that the phrases "primarily engaged in" and "same type of food product" left the parties without fair notice of the rule's scope and how the City would enforce it. *Second*, the court found that "the entities enforcing this ordinance do not have guidance as to how to measure the 300-foot distance between bricks-and-mortar establishments and food trucks." As a result, the court granted the Food Trucks' request for injunctive relief and enjoined the City from enforcing the 300-foot rule. The order stayed the injunction for sixty days, but the stay expired on February 19, 2018, and the injunction went into effect.

The circuit court denied motions to reconsider and to stay, and this Court denied a motion to stay the injunction as well. The Food Trucks, notwithstanding their victory, appealed the circuit court's decision finding no violation of their due process or equal protection rights, and the City cross-appealed.

## II. DISCUSSION

At the threshold, we consider, and reject, the City's contention that the Food Trucks have not presented a justiciable controversy under the Declaratory Judgment Act. From there, we move to the merits: we hold that rational basis is the appropriate level of constitutional scrutiny to apply in reviewing the 300-foot rule, we find that standard met, and we hold that the circuit court erred in finding the rule void for vagueness.

### A. The Food Trucks Presented A Justiciable Controversy Under The Declaratory Judgment Act.

The Mayor and City Council argue that the Food Trucks "failed to present an action that was ripe under the meaning of the declaratory judgments act." Because neither of the Food Trucks has been cited for violating the 300-foot rule, and because there is no guarantee that they ever will be, the City reasons that the Food Trucks "have merely presented an issue that exists in the abstract," and the circuit court should have dismissed the case. We disagree and find that the Food Trucks have alleged a justiciable controversy under the declaratory judgment act.[5]

The declaratory judgment act provides that "a court may grant a declaratory judgment or decree in a civil case, if it will serve to terminate the uncertainty or controversy giving rise to the proceedings, and if an actual controversy exists between contending parties." Md. Code (1974, 2013 Repl. Vol.) § 3-409(a)(1) of the Courts and Judicial Proceedings Article ("CJ").[6] But a court cannot consider a declaratory judgment action unless the underlying controversy is justiciable. *State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591 (2014); *Hatt v. Anderson*, 297 Md. 42, 45 (1983) ("the existence of a justiciable controversy is an absolute prerequisite to the maintenance of a declaratory judgment action").

Among the "numerous hurdles" to justiciability is ripeness. *State Center*, 438 Md.

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[5] There are additional justiciability concerns related to the circuit court's vagueness findings. We address those in Section C, below.

[6] CJ § 3-409 provides an exception not applicable in this case for divorce and annulment of marriage.

at 591 (*quoting Boyds Civic Ass'n v. Montgomery Cty. Council*, 309 Md. 683, 690 (1987)). "Under the ripeness doctrine as applied to actions for declaratory relief, a case ordinarily is not ripe if it involves a request that the court declare the rights of parties upon a state of facts which has not yet arisen or upon a matter which is future contingent and uncertain." *Stevenson v. Lanham*, 127 Md. App. 597, 612 (1999) (cleaned up). But because one of the primary purposes of the declaratory judgment act is to "relieve litigants of the rule of the common law that no declaration of rights may be judicially adjudged unless a right has been violated," ripeness in this context "can become an elusive concept." *Boyds Civic Ass'n*, 309 Md. at 691 (*quoting Davis v. State*, 183 Md. 385, 388 (1944).

The City argues that the Food Trucks had not "allege[d] and prove[n] that they have been prosecuted . . . or that there is a credible threat of prosecution under [the] contested statute." *State v. G. & C Gulf, Inc.*, 442 Md. 716, 732 (2015). And a credible threat of prosecution is ordinarily a prerequisite to a declaratory judgment action challenging a penal statute. The mere existence of a criminal statute does not generally create "such a threat as to present a justiciable controversy." *Id.* at 731. And it's true that neither Pizza di Joey nor Madame BBQ faced imminent prosecution when they brought this case before the circuit court. But if the Food Trucks' only opportunity to challenge the 300-foot rule's constitutionality arises when they are issued a citation, that opportunity is unlikely ever to arise because the City and its enforcement agencies do not enforce the 300-foot rule by pursuing any of the penal consequences authorized by the Baltimore City Code. Violations of the 300-foot rule are misdemeanors, but the rule doesn't operate like a typical penal statute.

When considering a statute's constitutionality, we are more concerned with its substance than its label, and so too when we assess the ripeness of the Food Trucks' challenge here. Although designated a misdemeanor, the 300-foot rule is, in substance and application, a local economic regulation. The primary injury the Food Trucks allege is not the possibility of prosecution, which the Court of Appeals has rejected as non-justiciable, *see, e.g., G. & C Gulf, Inc.*, 442 Md. at 732, but the loss of their right to pursue a business opportunity in their chosen profession, an interest that qualifies readily as a basis for a declaratory judgment. *See, e.g., Bruce v. Dir., Dep't. of Chesapeake Bay Affairs*, 261 Md. 585, 595 (1971) (*quoting Davis*, 183 Md. at 389) ("[I]n this case complainant is affected by the [statute] and he is entitled to apply for declaratory judgment under the uniform act, rather than run the risk of being subjected to criminal prosecution."); *Oyarzo v. Md. Dep't of Health and Mental Hygiene*, 187 Md. App. 264, 275 (2009) ("[T]he right [the challenger] seeks to protect is the right to pursue a business opportunity. . . . There is no need for [him] to violate the challenged regulation in order for us to consider whether it was within the scope of the Department's authority to adopt [the regulation at issue].").

As licensed mobile vendors in Baltimore City, Pizza di Joey and Madame BBQ are indisputably limited in their business if the 300-foot rule survives. The rule restricts where they can sell and affects their potential profitability. Although the City characterizes this controversy as purely abstract and theoretical, its contours are visible: the 300-foot rule requires mobile vendors to keep their distance from direct brick-and-mortar competitors, in ways we can measure and draw on maps (as the parties have). The Food Trucks abided by the restrictions while they were in effect, but they contend that the rule violates their

rights under Article 24 of the Maryland Declaration of Rights and injures their business interests. Given the remedial nature of the declaratory judgment act and the general principle that it is to be "liberally construed and administered," *Boyds Civic Ass'n*, 309 Md. at 688, we find the Food Trucks' claims sufficiently "concrete and specific" to generate a controversy that is ripe for review. *Hatt*, 297 Md. at 46.

### B. The 300-Foot Rule Is A Constitutional Exercise Of The City's Police Power.

The Food Trucks argue that the 300-foot rule "violated their rights to equal protection and substantive due process both on its face and as applied" under Article 24 of the Maryland Declaration of Rights.[7] Article 24 of the Maryland Declaration of Rights encompasses both of these protections:

> That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.

Although Article 24 does not contain an express equal protection clause, our courts long have recognized that "the concept of equal protection nevertheless is embodied in the Article." *Renko v. McLean*, 346 Md. 464, 482 (1997); *see also Tyler v. City of Coll. Park*, 415 Md. 475, 499 (2010). Article 24 equal protection doctrine and federal equal protection

[7] The Food Trucks identified the following Questions Presented in their brief:

1. Does using the police power for the express purpose of stifling one class of businesses so as to financially enrich another class constitute a valid government interest under the Maryland Constitution?
2. Does Article 15, Section 17-33 of the Baltimore City Code, as interpreted and enforced, fail Maryland's real-and-substantial test?

doctrine are "complementary but independent." *Verzi v. Balt. Cty.*, 333 Md. 411, 417 (1994). We consider U.S. Supreme Court decisions interpreting the federal equal protection clause persuasive but not controlling, and we may find a discriminatory classification unconstitutional for failing to provide equal protection under Article 24 alone. *Attorney Gen. of Md. v. Waldron*, 289 Md. 683, 715 (1981).

The Food Trucks characterize the 300-foot rule as a baseless and discriminatory restriction on mobile vendors in Baltimore City, one that functionally prohibits them from operating their businesses in some of Baltimore's most commercially desirable neighborhoods. As they seek to frame it, the rule infringes on their important personal right to practice their chosen trade, and they urge us to find that the 300-foot rule is invalid on its face and in its application to mobile vendors in Baltimore City.

In reality, the 300-foot rule is classic economic regulation, one with a fairly narrow scope grounded in an entirely rational basis. The rule doesn't prohibit mobile vendors from operating in any particular area of Baltimore City. It simply requires each vendor to maintain a distance of 300 feet (roughly one Baltimore block) from its direct brick-and-mortar competitors. The rule is designed, according to the City and its trial witnesses, to address the "free-rider"[8] problem that arises when mobile vendors set up shop near brick-

[8] The city defines "free-riders" as follows:

> [A] food truck that is primarily engaged in selling the same type of food as a restaurant can benefit from the latter's greater investment in creating a market at a particular location by siphoning away customers, which carries the possibility of threatening the vitality of the restaurant.

and-mortar restaurants that have made a comparatively greater economic investment, and attract the customer base that mobile vendors then solicit (and, ideally, convert).

With these dual framings in mind, we assess the Food Trucks' arguments, apply rational basis review, and hold that the 300-foot rule passes constitutional muster under Article 24.

**1. The 300-Foot Rule is not *per se* unconstitutional.**

A facial constitutional challenge attacks the legislation in question as unconstitutional *per se.* To prevail on a facial challenge, the "party challenging the facial validity of a statute 'must establish that no set of circumstances exist under which the Act would be valid.'" *Koshko v. Haining*, 398 Md. 404, 426 (2007) (*quoting U.S. v. Salerno*, 481 U.S. 739 (1987)). An as-applied challenge, conversely, "claim[s] that a statute is unconstitutional on the facts of a particular case or in its application to a particular party." *Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 181 (2016) (*citing As-Applied Challenge*, BLACK'S LAW DICTIONARY (10th ed. 2014)). Facial constitutional challenges are generally disfavored because they carry the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri*, 541 U.S. at 609 (cleaned up).

The Food Trucks argue that the 300-foot rule is unconstitutional on its face because the rule's "anti-competitive ends and [] economic favoritism" misuse the City's police power. They claim that "[f]or almost a century, the Court of Appeals has invalidated discriminatory laws that use public power to generate private gain" and has "repeatedly held that the police power should not be used for such anti-competitive ends, and that economic favoritism is wholly illegitimate." But they cite no cases, and we have not found

any, in which this Court or the Court of Appeals struck down an economic regulation based on a facial challenge. The cases on which they rely for these propositions were all decided on a review of the challenged statutes as applied to the plaintiffs in each case. *See Verzi*, 333 Md. at 411; *Bruce*, 261 Md. at 585 (1971); *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496 (1973). Moreover, there *is* support in Maryland case law for constitutionally valid economic regulations targeted at curbing unfair competition. *See, e.g.*, *Salisbury Beauty Schools v. State Bd. of Cosmetologists*, 268 Md. 32, 56 (1973). We agree with the circuit court that the 300-foot rule is not unconstitutional *per se*.

**2. The 300-foot rule is subject to Article 24 rational basis review.**

"[W]hen a statute creates a distinction based upon clearly 'suspect' criteria, or when [it] infringes upon personal rights or interests deemed to be 'fundamental,'" that statute is subject to strict scrutiny. *Waldron*, 289 Md. at 705. A statute that triggers strict scrutiny is presumptively unconstitutional and survives only if the government can demonstrate that the challenged statute is "necessary to promote a compelling government interest." *Waldron*, 289 Md. at 705–06 (*quoting Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (*quoting Shapiro v. Thompson*, 394 U.S. 618, 634 (1969))); *Koshko*, 398 Md. at 438. But where, as here, the statute doesn't discriminate based on a suspect classification, *i.e.*, when the statute does not differentiate based on race, religion, alienage, or national origin, and when no fundamental, enumerated constitutional right is implicated, it is subject to highly deferential, rational basis review.[9] *Frey v. Comptroller of Treasury*, 422 Md. 111, 163

[9] That said, rational basis review is not purely perfunctory or "toothless." The Court of Appeals "has not hesitated to strike down discriminatory economic regulation that lacked

(2011).

Both sides seem to agree that we should apply rational basis review to the 300-foot rule—and so do we—but they articulate significantly different visions of what that scrutiny entails. The City advocates for "deferential rational basis review" that recognizes the City's "wide discretion in determining what the public welfare requires and is free to adopt economic regulations so long as it has a ***rational basis to believe*** those regulations are appropriate to protect and promote that welfare." The City recognizes correctly (as we explain below) that under certain circumstances, a more searching inquiry is required, but argues that the 300-foot rule does not call for anything more than the most deferential standard.

The Food Trucks advocate for a version of rational basis that they call "the real-and-substantial test," a test that is "far more probing than the cursory examination called for by the City." But the Food Trucks don't provide a clean definition or a single origin for their proposed standard, and after a thorough review of our case law, we can understand why—over many years of Maryland Constitutional jurisprudence, the standards of scrutiny and the language used to describe those standards have become muddled. The lack of clarity is a natural side effect of doctrinal evolution. As courts apply constitutional standards to novel situations in changing times and incorporate, to varying degrees, federal constitutional

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any reasonable justification." *See, e.g., Frankel v. Board of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 315 (2000) (*quoting Maryland Aggregates v. State*, 337 Md. 658, 673 (1995)) (striking down a university policy that precluded students with out of state financial support from seeking in-state tuition as arbitrary and irrational).

principles into our State law, language that once seemed clear can become a source of confusion and disagreement. It has in this case.

Our review of the law on which the Food Trucks rely reveals that their proposed "real-and-substantial test" derives from two theories of enhanced Article 24 scrutiny. The Food Trucks rely *first* on a standard derived from a now-defunct theory of economic substantive due process,[10] and *second* from the still-valid-but-not-applicable-here Article 24 standard that applies to statutes that implicate important but non-fundamental constitutional rights.

*a. Substantive due process and the "real and substantial relation test"*

"Substantive due process involves judicial scrutiny of legislative ends rather than the means used to reach those ends." Michael Carlton Tolley, *State Constitutionalism in Maryland* 113 (1992). In the *Lochner* era, roughly from 1905–1937, the Supreme Court invalidated a series of federal and state economic regulations on the theory that they interfered with private economic liberty and contract rights. *See, e.g.*, *Lochner v. N.Y.*, 198 U.S. 45 (1905) (statute limiting the number of hours bakery employees were permitted to work violated the due process clause); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (statute fixing a minimum wage for women unconstitutional for violating women's liberty of contract) (*overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937)). The

[10] For a more thorough history of the doctrine and its application in Maryland, *see* Michael Carlton Tolley, *State Constitutionalism in Maryland* 111–23 (1992) and Dan Friedman, *The Maryland State Constitution* 58–59 (2011).

Court of Appeals adopted a similar standard back then, and articulated it in the way the Food Trucks articulate it now:

> At common law the right of the individual to dispose of his property or his services at such price as he and the purchaser may agree upon is firmly established, and inasmuch as the [challenged statute] is in derogation of that common right, it must be strictly construed. In other words, we are not to infer that the Legislature intended to change common law principles beyond what is clearly expressed by the statute. . . . Freedom of contract is not absolute. It is subject to reasonable legislative regulation in the interest of public health, safety, and moral . . . . But restraints upon such freedom must not be arbitrary or unreasonable. **Freedom is the general rule and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. The guaranty of due process simply demands that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.**

*Daniel Loughran Co. v. Lord Baltimore Candy & Tobacco Co.*, 178 Md. 38, 44 (1940) (emphasis added) (internal quotation omitted) (*citing Nebbia v. N.Y.*, 291 U.S. 502 (1934)).

The Supreme Court "repudiated substantive due process theory at least as it applies to economic rights" long ago. Dan Friedman, *The Maryland State Constitution* 58 (2011); *see West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). But for some time, our Court of Appeals explicitly declined to follow suit:

> [I]t is readily apparent that whatever may be the current direction taken by the Supreme Court in the area of economic regulation . . . Maryland . . . adhere[s] to the more traditional test formulated by the Supreme Court [in the *Lochner* era].

*Md. Bd. of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 120 (1973). Maryland constitutional scholars refer to this standard for economic regulations, held over in our State law long

after the *Lochner* era had ended, as the "real and substantial relation test."[11] It is from that bygone era that the Food Trucks pulled many of the decisions that, they say, render the 300-foot rule unconstitutional under Article 24. *See, e.g.*, *Kuhn*, 270 Md. at 496; *Bruce*, 261 Md. at 585.

In 1977, though, the Court of Appeals abandoned the "real and substantial relation test" and brought Article 24's notion of substantive due process (back) in line with the United States Constitution's:

> Judicial deference to legislative judgment is appropriate when reviewing legislation dealing with economic problems. . . . **We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies**, who are elected to pass laws. . . . We are not concerned [] with the wisdom, need, or appropriateness of the legislation**. Legislative bodies have broad scope to experiment with economic problems** . . . . We refuse to sit as a superlegislature to weigh the wisdom of legislation . . . . **[T]he wisdom of [the challenged statute] is not for us to judge as 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.**

*Governor of Md. v. Exxon*, 279 Md. 410, 424–26 (1977) (emphasis added) (internal quotation and citation omitted). Even so, the "real and substantial" language appears occasionally in our case law. But this vestige of the *Lochner*-like substantive due process standard does not carry any of its old meaning. Where it survives, the phrase "real and

[11] *See* Friedman, *supra*, at 58–59; Charles A. Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299, 313 (1978). One scholar goes so far as to characterize the standard as "intermediate scrutiny." Michael Carlton Tolley, *State Constitutionalism in Maryland* 111 (1992).

substantial" has meant, and has been applied the same way as, traditional rational basis scrutiny. *See, e.g.*, *Baddock v. Balt. Cty.*, 239 Md. App. 467, 477 (2018) ("[W]hen determining whether an ordinance satisfies Article 24 of the Maryland Declaration of Rights, we ask rhetorically whether the legislative enactment, as an exercise of the legislature's police power, bears a *real and substantial relation* to the public health, morals, safety, and welfare of the citizens of the State or municipality. *The rational basis test is highly deferential; it presumes a statute is constitutional and should be struck down only if the reviewing court concludes that the Legislature enacted the statute irrationally or interferes with a fundamental right*.") (cleaned up) (emphasis added)). And when applying the traditional rational basis test under Article 24, courts "perform a very limited function, resisting interference unless it is shown that the legislature exercised its police power arbitrarily, oppressively, or unreasonably." *Tyler*, 415 Md. at 500.

*b. Article 24 rational basis*

The Food Trucks ground their argument for less deferential rational basis scrutiny in two Court of Appeals decisions. Those cases invalidated legislation that impaired important, but non-fundamental, constitutional rights. *See Waldron*, 289 Md. at 683; *Verzi*, 333 Md. at 411. Both are still good law, both applied Article 24 rational basis scrutiny to legislation implicating important personal rights, and neither supports the application of less deferential scrutiny here.

Article 24 rational basis scrutiny differs from its federal counterpart. Both begin with a strong presumption that laws are constitutional, and both require courts to determine only whether the challenged legislation relates rationally to a legitimate government

interest. *See, e.g.*, *McGowan v. Md.*, 366 U.S. 420 (1961); *Kirsch v. Prince George's Cty.*, 331 Md. 89, 98 (1993). Under the Fourteenth Amendment, this highly deferential standard applies unless the legislation designates a suspect (or quasi-suspect) class or implicates a fundamental right. In the absence of a legislative designation that triggers strict or intermediate scrutiny, federal courts do not delve into the nature or extent of the claimed infringement, and "[a] statutory discrimination will not be set aside if *any state of facts reasonably may be conceived to justify it.*" *McGowan*, 366 U.S. at 426 (emphasis added).[12]

Legislation that passes federal constitutional muster can fail Article 24 rational basis review, however. *Verzi*, 333 Md. at 417. Under Article 24, Maryland courts look at the nature of the right infringed by a challenged statute, regardless of whether the right at issue has been declared fundamental under the U.S. Constitution. So long as the law doesn't impair important private rights, traditional rational basis applies. But when important private rights are implicated, we conduct a more searching inquiry into the *rationality* of the challenged legislation. The Court of Appeals has described this Article 24 standard as "a higher degree of scrutiny than the traditional rational basis test[:]"

> Finally, there are classifications which have been subjected to a higher degree of scrutiny than the traditional and deferential rational basis test, but which have not been deemed to involve suspect classes or fundamental rights and thus have not been subjected to the strict scrutiny test. Included among these have been classifications based on gender, discrimination against illegitimate children under some circumstances, a

[12] Although the Supreme Court itself does not recognize it, U.S. Constitutional scholars have noted that, at times, the Court seems to employ a more searching review under the guise of traditional rational basis review. *See, e.g.*, *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

> classification between children of legal residents and children of illegal aliens with regard to a free public education, and a classification under which certain persons were denied the right to practice for compensation the profession for which they were qualified and licensed.

*Murphy v. Edmonds*, 325 Md. 342, 357 (1992) (internal citations omitted).[13] That said, it's still rational basis scrutiny—we just look more closely at the rationale.

When a statute implicates important personal rights, Maryland courts "have not hesitated to carefully examine [the] statute and declare it invalid" when its distinctions do not further its objectives rationally. *Verzi*, 333 Md. at 419. Article 24 rationality depends on context—a legislative distinction that might be rational in some circumstances may be irrational in others, depending on the nature of the right infringed and the extent of the infringement. *Waldron*, 289 Md. at 722 ("[O]ne cannot evaluate the reasonableness of a legislative classification without comparing it to the purpose of the law."). When important personal rights are at stake, the margin of legislative error is thinner, and courts "will not ride the vast range of conceivable purposes [for the challenged statute]. Rather, we must evaluate [] those statutory purposes which are readily discernible[,] . . . . those purposes that are obvious from the text or legislative history of the enactment, those plausibly identified by the litigants, or those provided by some other authoritative source." *Id.* In other words, Article 24 requires a closer fit between the means and the ends of a regulation that affects important personal rights, and it does not permit courts to speculate about the legislature's purpose. *Id.* at 713.

[13] The final classification the Court lists is a reference to *Waldron*.

The Food Trucks attempt to analogize to *Waldron* and *Verzi*, the only two cases they cite—and the only ones we have found—that applied Article 24 rational basis to invalidate legislation affecting important personal rights. In *Verzi*, the Court of Appeals struck down a county regulation that required towing operators to be located within Baltimore County as a condition of obtaining a license to operate there. The Court found that the legislation's locational preference failed Article 24 rational basis review because it wasn't related to the county's interest in regulating towing services:

> Because we can find no rational basis for the distinction between in-county and out-of-county towers, we are led to the more reasonable and probable view that the classification was intended to confer the monopoly of a profitable business upon the residents of the [county]. . . . Baltimore County has comprehensively regulated the towing business such that it effectively controls which towers will receive business and which will not. By requiring all of its towers to be located within the county boundaries, Baltimore County has, in effect, conferred the monopoly of a profitable business upon certain Baltimore County businesses.

*Id.* at 427 (cleaned up).

The Food Trucks suggest that the 300-foot rule is "even more blatantly anti-competitive than the restrictions the Court of Appeals struck down in *Verzi*." To be sure, the Court of Appeals said in *Verzi* that "in areas of economic regulation . . . this Court has been particularly distrustful of classifications which are based solely on geography, *i.e.*, treating residents of one county or city differently from residents of the remainder of the State." *Id.* at 423.[14] And we agree that "the power of the Legislature to restrict the

[14] *But see Supermarkets Gen. Corp. v. State*, 286 Md. 611 (1979) (upholding a legislative distinction, based on county location, among types of businesses subject to Sunday closing

application of statutes to localities less in extent than the State . . . cannot be used to deprive the citizens of one part of the State of the rights and privileges which they enjoy in common with the citizens of all other parts of the State . . . ." *Id.* at 424 (*quoting Maryland Coal and Realty Co. v. Bureau of Mines*, 193 Md. 627, 642 (1949)).

But the Food Trucks have the analysis backwards. *Verzi* does not stand for the blanket proposition that legislation favoring one set of businesses over another is categorically impermissible—only that a Dormant Commerce Clause-esque preference grounded in geography or residence is. *Verzi*, 333 Md. at 423 ("Although we have not yet expressly stated so, it is evident that elements of our Article 24 equal protection jurisprudence are analogous to those found in the Commerce Clause and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution."). Put another way, the holding in *Verzi* would preclude the City from conditioning mobile vendor licenses on City residence. This case doesn't present that form of regulation: the 300-foot rule regulates the places *all* City-licensed mobile vendors can operate in Baltimore City, wherever those food trucks are parked at idle. That is classic economic regulation subject to the most deferential review.

The Food Trucks point as well to *Attorney General v. Waldron*, 289 Md. 683 (1981), and the circuit court found it persuasive, "[a]pplying the Waldron Court's analysis" and concluding that the Trucks' "right to operate their business in Baltimore City is encompassed within the guarantees of Article 24 of the Maryland Declaration of

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laws).

Rights . . . . [and that] [t]herefore, heightened rational basis review is warranted here." But like *Verzi*, *Waldron* featured an altogether different kind of regulation than we have here. *Waldron* involved a statute that prohibited retired judges from practicing law for profit. 289 Md. at 683. The Court held that the statute "effectively denie[d] persons the ability to pursue their chosen vocation," *id.* at 727, and that it merited more vigorous review:

> [W]hen important personal rights, not yet held to merit strict scrutiny but deserving of more protection than a perfunctory review would accord, are affected by a legislative classification, a court should engage in a review consonant with the importance of the personal right involved. This [] judicial inquiry does not tolerate random speculation concerning possible justifications for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose.

*Id.* at 713. Using that standard, the Court found the statute both over- and under-inclusive, found that it failed to further its stated objective, and struck it down. *Id.* at 724.

We see important distinctions between the 300-foot rule and the statute challenged in *Waldron*. Again, "unequal treatment, in and of itself, [doesn't] necessarily [violate] equal protection, for the inequality resulting from legislative line-drawing in pursuit of legitimate state interests must be weighed against the *right which is deprived* [for] those who are treated differently." *Waldron*, 289 Md. at 727 (emphasis added). The statute at issue in *Waldron* was "not . . . an economic regulation . . . rather, it flatly denie[d] [retired judges] the right to engage in the practice of the profession for which [they are] otherwise qualified." *Id.* at 717. And the 300-foot rule does not deny the Food Trucks the opportunity to engage in their chosen vocation. *Id.* Their right to be mobile vendors isn't threatened, only their right to park and sell in certain places within Baltimore City. This purely

economic regulation gets the highest level of legislative deference under traditional rational basis review. *Waldron*, 289 Md. at 717 ("where vital personal interests (*other than those impacted by wholly economic regulations*) are substantially affected by a statutory classification" courts employ a more searching review) (emphasis added).

**3. The 300-foot rule is rationally related to a legitimate government interest.**

Under Article 24, our assessment of equal protection and due process challenges to an economic regulation like the 300-foot rule are "nearly identical . . . . In such a case, we employ the least exacting and most deferential standard of constitutional review, namely, rational basis review, under which a legislative classification will pass constitutional muster so long as it is rationally related to a legitimate government interest." *Tyler*, 415 Md. at 501. Against that deferential standard, we hold that the 300-foot rule rationally furthers the City's legitimate interest in addressing the free-rider problem that arises when mobile vendors set up within a block of direct brick-and-mortar competitors.

The City's broad police power includes the power to legislate in the general welfare. *Salisbury Beauty Schools*, 268 Md. at 47. The City's legislative decisions enjoy a strong presumption of constitutionality, and that presumption remains intact when the challenged legislation distinguishes based on non-suspect criteria, *Baddock*, 239 Md. App. at 481, "despite the fact that, in practice, [the] laws result in some inequality." *Supermarkets Gen. Corp.*, 286 Md. at 617 (*quoting McGowan*, 366 U.S. at 425–26). "Legislative bodies are permitted to make commercial classifications that distinguish between entities," and we won't strike down such a statute unless its challenger can demonstrate that the City used its power arbitrarily, oppressively, or unreasonably. *Baddock*, 239 Md. App. at 480–81;

*Salisbury Beauty Schools*, 268 Md. at 47.

The restrictions the 300-foot rule imposes are not arbitrary, oppressive, or unreasonable, and are directly relevant to the policy adopted to promote the general welfare. *Salisbury Beauty Schools*, 268 Md. at 57 (*citing Nebbia v. N.Y.*, 291 U.S. 502, 537 (1934)). The City enacted the 300-foot rule to address "the potential for pecuniary harm arising from food trucks acting as 'free-riders' on the economic investments that brick-and-mortar restaurants make in their specific and fixed locations." According to the Food Trucks' own business plans, they wish to park and sell in neighborhoods with vibrant streets populated by brick-and-mortar restaurants. The character of those neighborhoods is inseparable from the presence of the resident businesses. It is, in fact, *because of* brick-and-mortar businesses that Pizza di Joey and Madame BBQ wish to park and sell in neighborhoods like Hampden, Mt. Vernon, Harbor East, and Federal Hill. And requiring mobile vendors to keep a 300-foot distance rationally addresses the City's concerns that their business will harm their brick-and-mortar counterparts.

It overstates the impact of the 300-foot rule to say, as the Food Trucks do, that it "effectively prohibited them from operating in viable commercial corridors." To the contrary, the severity of the rule's limitations depends on the restaurants in each neighborhood and the type of food a mobile vendor sells. The Food Trucks themselves illustrate the point—Pizza di Joey will undoubtedly be restricted more than MindGrub Café because the ubiquity of brick-and-mortar pizzerias means there is less area in which a mobile pizzeria can operate outside of the 300-foot zone surrounding each one. In a neighborhood like Hampden, with at least five pizza-focused restaurants on its busiest

commercial street, Pizza di Joey may well be unable to operate altogether on the most popular blocks. But MindGrub Café has fewer competitors and, therefore, fewer blocks that are off-limits. And that makes sense, given the rule's aim to protect brick-and-mortars from direct competition. The varying effects track the 300-foot rule's legitimate purpose directly, and those effects are neither arbitrary nor irrational. *See Tyler*, 415 Md. at 501 ("[w]e will uphold a statute subject to rational basis review against an equal protection challenge unless the varying treatment of different groups or persons is so unrelated to the achievement . . . of [a] legitimate purpose[] that the court may conclude only that the governmental actions were arbitrary or irrational.").

We offer no views on the wisdom or the economic efficacy of the 300-foot rule. Our role is not to screen for bad policy, but for unconstitutional legislation, and with respect to economic regulation in particular, "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *Cleburne*, 473 U.S. at 440. So long as "there are plausible reasons for the legislative action, the court's inquiry is at an end." *Tyler*, 415 Md. at 502. And because the 300-foot rule rationally furthers the legitimate government interest of protecting brick-and-mortar establishments from free-riding mobile vendors by requiring them to keep their distance from direct competitors, it doesn't violate Article 24.

**C. The 300-foot rule is not unconstitutionally vague.**

Despite finding that the 300-foot rule "is constitutional and does not infringe on the [Food Trucks'] Due Process and Equal Protection rights," the circuit court granted the Food Trucks' request for an injunction after finding the rule void for vagueness. The circuit court

specifically found objectionable the phrases "primarily engaged in," "same type of food product," and "300 feet."[15] We reverse the circuit court's void for vagueness finding because (1) the Food Trucks never pled, then expressly disclaimed, a void for vagueness challenge and (2) even if pled, neither a facial nor as-applied vagueness challenge can properly be considered in this case.

A finding that a statute is void for vagueness is a finding that the statute is unconstitutional. *Galloway v. State*, 365 Md. 599, 611 (2001). Vagueness is another way of stating the due process principle that statutes must provide "persons of ordinary intelligence and experience . . . a reasonable opportunity to know what is prohibited so that they may govern their behavior accordingly." *Id.* at 615–16 (*quoting Williams*, 329 Md. at 8). A statute must also provide "legally fixed standards and adequate guidelines for police . . . and others whose obligation it is to enforce, apply, and administer [it]." *Id.* (cleaned up). "To survive [void for vagueness] analysis, a statute must eschew arbitrary enforcement in addition to being intelligible to the reasonable person." *Id.* (cleaned up). A statute is not unconstitutionally vague "if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, *if* they possess a common and generally accepted meaning." *Id.* Nor is a statute void for vagueness "merely because it allows for the exercise of some discretion" in its enforcement. *Bowers v. State*, 283 Md. 115, 122 (1978).

[15] The circuit court resolved the issue of how to measure 300 feet "by directing that the distance must be measured from the closest point of the space in the building that is occupied by the restaurant . . . to the closest point of the food truck."

The Food Trucks did not include a vagueness challenge in their initial pleading. Through discovery and trial, though, they seemed often to be arguing vagueness indirectly. For example, when they deposed Ms. Montgomery and Mr. Lima, the Food Trucks made much of the witnesses' inconsistent and subjective interpretations of the rule, and especially of the language "primarily engaged in" and "same type of food product." And in their arguments in the trial court, the Food Trucks frequently mentioned that the inconsistencies in interpretation created a problem with arbitrary enforcement.

The trial court picked up on this, and during closing arguments, interrupted counsel for the Food Trucks to clarify the contours of their arguments:

> THE COURT: So am I hearing you say that--that it's really it's a two fold argument? That on the one hand it's an argument that the regulation . . . in general is unconstitutional? . . . But even if the Court would not find that to be the case the way--you're saying that the way this regulation was set up, because of the vagueness, because of the--you know, the ability to interpret in different ways this specific regulation is an issue?
>
> FOOD TRUCK'S COUNSEL: That's exactly--there's two points, Your Honor. And I think you summarized it pretty accurately there.

After the Food Trucks appeared to embrace a void for vagueness argument, the City responded that a vagueness challenge would not be appropriate in this case because (a) a facial challenge is impermissible (more on that below), and (b) there are no acts of enforcement against Pizza di Joey or Madame BBQ through which to measure the fairness of the rule as applied. The Food Trucks replied in no uncertain terms that "*we didn't raise a void for vagueness challenge*." So the total absence of vagueness allegations in their complaint and the Food Trucks' unambiguous waiver of the claim during closing

arguments should have ended the inquiry, and the circuit court erred by invalidating the 300-foot rule on a theory that the Food Trucks never raised and then disavowed.

Preservation aside, the fact that the 300-foot rule has never been enforced against the Food Trucks deprived the circuit court of a record on which to assess the 300-foot rule's vagueness as applied. *Bowers*, 283 Md. at 122 ("[T]he constitutionality of a statutory provision under attack on void-for-vagueness grounds must be determined strictly on the basis of the statute's application to the particular facts at hand."); *Galloway*, 365 Md. at 616 (cleaned up) (Except in the First Amendment context, it is "immaterial that the statute is of questionable applicability in foreseeable marginal situations . . . ."). Instead, the circuit court made its vagueness finding based on "voluminous evidence regarding the ambiguity of the 300-foot rule" that came out in the testimony of Mr. Vanoni, Ms. McGowan, Mr. Lima, and Ms. Montgomery. Because it was not based on any particular set of facts, the circuit court's decision amounted to finding the 300-foot rule unconstitutionally vague on its face. And a facial vagueness challenge can be made only when the challenged statute implicates a fundamental constitutional right. *Galloway*, 365 Md. at 616; *see also Ayers v. State*, 335 Md. 602, 624 (1994). In Maryland, we have only ever entertained a facial vagueness challenge when the challenged statute implicated the First Amendment, out of concern for the chilling effect a vague statute might have on free speech. *Galloway*, 365 Md. at 616 n. 11; *Ayers*, 335 Md. at 624. Federal courts have drawn an even harder line: "[f]acial vagueness challenges to criminal statutes are allowed *only* when the statute implicates First Amendment rights." *U.S. v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003), *overruled on other grounds by McFadden v. U.S.*, 135 S.Ct. 2298 (2015) (emphasis added).

There is no dispute that the Food Trucks have not alleged a violation of any fundamental constitutional right, and for that reason their claims should not have been analyzed as a facial challenge.

There may well be close questions about the scope of the 300-foot rule as food trucks grow and spread in Baltimore. We can imagine, for example, that a hot dog truck might dispute that a brick-and-mortar deli is "primarily engaged in" selling the "same type of food product," while the deli might claim that it is.[16] But the City need not resolve the hot dog/sandwich conundrum to the satisfaction of all in order to avoid a vagueness challenge. The City could reduce the possibility of confusion or vagueness by promulgating regulations or providing guidance about how it plans to enforce the rule—perhaps by adopting the Cube Rule of Food Identification[17] or some other set of guidelines. But even

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[16] *See, e.g.*, *To Chew On: 10 Kinds of Sandwiches*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/to-chew-on-10-kinds-of-sandwiches/hot-dog (Merriam-Webster dictionary definition of sandwich includes hot dog when served on a roll); Allison Shoemaker, *So is a hot dog a sandwich? The results so far*, THE TAKEOUT (November 25, 2018), https://thetakeout.com/so-is-a-hot-dog-a-sandwich-the-results-so-far-1830643902 (opining, based on survey of thirty-four actors, writers, athletes, journalists, and radio personalities that a hot dog is not a sandwich); Erica Chayes Wida, *People are furious that Oscar Mayer said a hot dog is a sandwich*, TODAY (November 2, 2018), https://www.today.com/food/oscar-mayer-said-hot-dog-sandwich-internet-divided-t141146; *Stephen Works Out With Ruth Bader Ginsburg*, THE LATE SHOW WITH STEPHEN COLBERT (March 21, 2018), https://www.youtube.com/watch?v=0oBodJHX1Vg (hot dog is a sandwich according to Colbert's definition); *Is a Hot Dog a Sandwich*, NATIONAL HOT DOG AND SAUSAGE COUNCIL (November 6, 2015), http://www.hot-dog.org/press/national-hot-dog-and-sausage-council-announces-official-policy-hot-dog-sandwich-controversy ("a hot dog is an exclamation of joy, a food, a verb describing one 'showing off' and even an emoji. It is truly a category unto its own.").

[17] *See The Cube Rule of Identification*, http://cuberule.com/. The Cube Rule "identif[ies] any food purely by the location of the structural starch. Imagine a cube, then the starch

without a formal food taxonomy in hand, City enforcement authorities are allowed to exercise reasonable discretion in applying the 300-foot rule. And the absence of any enforcement activity against Pizza di Joey or Madame BBQ left the parties and the circuit court only to speculate about where those margins might be. Courts can only evaluate the as-applied vagueness of a statute in context, against a record in which the City has, in fact, exercised its discretion. Courts cannot evaluate the application of a statute in a vacuum, though, and the circuit court erred in evaluating this statute for vagueness on this record, even if the Food Trucks had postured a vagueness claim in the first place. *See Bowers*, 283 Md. at 122.

**JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND REVERSED IN PART. APPELLANTS/CROSS-APPELLEES TO PAY COSTS.**

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item (bread, wrap, crust). A food item with starch on the bottom (pizza, pumpkin pie) is *toast*; starch on the top and bottom (lasagna, quesadillas, sandwiches) is a *sandwich*; starch on three sides (hot dogs, subs, a slice of pie) is a *taco*; starch on four sides (wraps, enchiladas, pigs in blankets) is *sushi*; starch on five sides with the top open (cheesecake, bread bowls with soup, falafel pitas, deep dish pizza) is *quiche*; and items fully enclosed in starch (burritos, corn dogs, covered pies, dumplings) is a *calzone*. Anything not encased in starch (steak, mashed potatoes, spaghetti, poutine) is a *salad*. This Rule hardly can be said to yield uniformly satisfying answers, but it certainly isn't vague.

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

| | | |
|---|---|---|
| Pizza Di Joey, LLC, et al. | * | |
| Appellant | * | No. 02411, September Term 2017 |
| v. | * | CSA-REG-02411-2017 |
| | * | Circuit Court No. 24C16002852 |
| Mayor and City Council of Baltimore, | * | |
| Appellee | * | |
| | * | |
| | * | |

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

**MANDATE**

On the 30th day of May, 2019, it was ordered and adjudged by the Court of Special Appeals:

Judgment of the Circuit Court for Baltimore City affirmed in part and reversed in part. Appellants/Cross-Appellees to pay costs.

*STATE OF MARYLAND, Sct.:*
I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this 2nd day of July, 2019.

Gregory Hilton

Gregory Hilton, Clerk
Court of Special Appeals

# MANDATE - STATEMENT OF COSTS
## Court of Special Appeals of Maryland

**CSA-REG-02411-2017**

**Pizza Di Joey, LLC, et al. v. Mayor and City Council of Baltimore**

| | | | |
|---|---|---|---|
| **Appellant** | | | |
| | PIZZA DI JOEY, LLC | Notice of Appeal | 50.00 |
| | | Filing Fee - Lower Court | 60.00 |
| | | Brief | 162.00 |
| | | Reply Brief | 262.80 |
| | | Record Extract | 2,707.20 |
| | | Transcript/Stenographer Costs | 735.75 |
| | | RPIF | 11.00 |
| | | **Appellant Total** | **3,988.75** |
| **Appellee** | | | |
| | MAYOR AND CITY COUCIL OF BALTIMORE | Brief | 237.60 |
| | | Reply Brief | 57.60 |
| | | **Appellee Total** | **295.20** |
| | | **Total Costs** | **4,283.95** |

*STATE OF MARYLAND, ss:*

*I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.*

*In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals this 2nd day of July, 2019.*

*Greg Hilton*
*Clerk of the Court of Special Appeals of Maryland*

**Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE.**

CIRCUIT COURT FOR BALTIMORE CITY
Marilyn Bentley
Clerk of the Circuit Court
Courthouse East
111 North Calvert Street
Room 462
Baltimore, MD 21202-
(410)-333-3722, TTY for Deaf: (410)-333-4389

5/5

03/29/18

Case Number: 24-C-16-002852 OG DJ
Date Filed: 05/11/2016
Status: Open/Inactive
Judge Assigned: To Be Assigned,
Location :
CTS Start : 05/11/16 Target : 11/07/17

Pizza DI Joey LLC, et al vs Mayor And City Council Of Baltimore

## C A S E  H I S T O R Y

### OTHER REFERENCE NUMBERS

| Description | Number |
|---|---|
| Case Folder ID | C16002852V06 |

### INVOLVED PARTIES

| Type | Num | Name(Last,First,Mid,Title) | Addr Str/End | Pty. Disp. / Addr Update | Entered |
|---|---|---|---|---|---|
| PLT | 001 | Pizza DI Joey LLC | Party ID: 5210434 | | 05/11/16 |
| | | Mail: 1165 Carroll Street<br>Baltimore, MD 21230 | 05/11/16 | | 05/13/16 TP |
| | | Attorney: 0822541 Reed, Gregory R<br>901 North Glebe Road<br>Suite 900<br>Arlington, VA 22203<br>(703)682-9320 | | Appear: 05/17/2016 | 05/17/16 |
| | | 0000860 Bushel, Glenn E<br>Tydings & Rosenberg, ,LLP<br>One East Pratt Street<br>Suite 901<br>Baltimore, MD 21202 | | Appear: 07/25/2016 | 07/26/16 |

(410)752-9718

0822688 Frommer, Robert P — Appear: 09/05/2017 — 09/05/17
Institute Of Justice
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703)682-9320

0824201 Bargil, Ari S — Appear: 09/12/2017 — 09/21/17
Institute For Justice
2 South Bescayne Blvd
Suite 3180
Miami, FL 33131
(305)721-1600

| Type | Num | Name(Last,First,Mid,Title) | Addr Str/End | Pty. Disp. / Addr Update | Entered |
|---|---|---|---|---|---|
| PLT | 002 | Madame BBQ LLC | Party ID: 5210435 | | 05/11/16 |
| Mail: | | 2610 Westchester Ave<br>Ellicott City, MD 21043 | 05/11/16 | | 05/13/16 TP |
| Attorney: | | 0000860 Bushel, Glenn E<br>Tydings & Rosenberg, ,LLP<br>One East Pratt Street<br>Suite 901<br>Baltimore, MD 21202<br>(410)752-9718 | | Appear: 07/25/2016 | 07/26/16 |
| | | 0822541 Reed, Gregory R<br>901 North Glebe Road<br>Suite 900<br>Arlington, VA 22203<br>(703)682-9320 | | Appear: 06/21/2017 | 06/22/17 |
| | | 0822688 Frommer, Robert P<br>Institute Of Justice<br>901 North Glebe Road<br>Suite 900<br>Arlington, VA 22203<br>(703)682-9320 | | Appear: 09/05/2017 | 09/05/17 |
| | | 0824201 Bargil, Ari S<br>Institute For Justice<br>2 South Bescayne Blvd<br>Suite 3180<br>Miami, FL 33131<br>(305)721-1600 | | Appear: 09/12/2017 | 09/21/17 |

| Type Num | Name(Last,First,Mid,Title) | Addr Str/End | Pty. Disp. / Addr Update | Entered |
|---|---|---|---|---|
| DEF | 001 Mayor And City Council Of Baltimore | Party ID: 5210437 | | 05/11/16 |
| Mail: | Baltimore City Law Department<br>100 North Holliday Street Suite 101<br>Baltimore, MD 21202<br>Serve On: George Nilson, City Solicitor | 05/11/16 | | 05/13/16 TP |
| Attorney: | 0822751 Allen, Glen K | | Appear: 07/05/2016 Removed:08/22/16 | 07/11/16 |
| | 0817550 Dimenna, Mark J<br>Baltimore City Law Department<br>100 N Holliday St<br>Room 101<br>Baltimore, MD 21201<br>(410)396-3926 | | Appear: 07/05/2016 | 07/06/16 |
| | 0821213 Hochstetler, Jeffrey P<br>Baltimore City Law Department<br>100 N Holliday Street<br>Baltimore, MD 21201<br>(410)396-8186 | | Appear: 09/30/2016 | 10/03/16 |

## CALENDAR EVENTS

| Date | Time | Fac | Event Description | Text Rec | SA | Jdg Day | Of Notice | User ID |
|---|---|---|---|---|---|---|---|---|
| Result | | | ResultDt By Result Judge | | | | | |
| 08/05/16 | 11:30A | 420 | Motion Hearing (Civil) | | CHJ | 01 /01 | 07/25/16 | ST |
| Held/Concluded | | | 07/10/17 C C.Jones | N | | | | |
| 05/19/17 | 11:00A | 511 | Pre-Trial Conference | | TBA | 01 /01 | 12/19/16 | JWI AS |
| Postponed | | | 02/03/17 C A.Handy | | | | | |
| 06/29/17 | 09:30A | 403T | Civil Trial | | TBA | 01 /01 | | JWI AS |
| Postponed | | | 02/03/17 C A.Handy | | | | | |
| 07/26/17 | 11:30A | 438 | Motion Hearing (Civil) | | YAT | 01 /01 | 07/13/17 | KA AAW |
| Cancelled/Vacated | | | 03/01/18 C | | | | | |
| 08/18/17 | 10:00A | 511 | Pre-Trial Conference | | TBA | 01 /01 | 02/03/17 | AS |
| Held/Concluded | | | 08/23/17 C M.Mediator | N | | | | |
| 09/28/17 | 09:30A | 403T | Civil Trial | | TBA | 01 /01 | 02/03/17 | AS AAW |
| Cancelled/Vacated | | | 03/01/18 C | | | | | |

## JUDGE HISTORY

| JUDGE ASSIGNED | Type | Assign Date | Removal RSN |
|---|---|---|---|
| TBA To Be Assigned. | J | 05/13/16 | |

## DOCUMENT TRACKING

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00001000 | Complaint For Declaratory Judgment and Injunctive Relief<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 05/11/16 | 05/13/16 | PLT001 | TBA | | | TP |
| 00002000 | Return of Service - Served<br>WRIT OF SUMMONS (Private Process) served 05/19/16 | 05/27/16 | 05/27/16 | DEF001 | TBA | Moot | 05/27/16 | AAW |
| 00003000 | Motion for Special Admission Pro Hac Vic of atty Robert P. Frommer | 05/31/16 | 06/01/16 | PLT001 | PSJ | Granted | 06/07/16 | DB TP |
| 00003001 | Order of Court<br>ORDERED that Robert P Frommeris hereby admitted for the limited purpose of appearing and Participating in the above captioned matter as co-Counsel for Gregory R Reed on Behalf of the plt's.<br>Judge P Jackson | 06/09/16 | 06/09/16 | 000 | PSJ | | | TP |
| 00003002 | Copies Mailed | 06/09/16 | 06/09/16 | 000 | TBA | | | TP |
| 00004000 | The Mayor and City Council of Baltimore's Motion to Dismiss w/Memorandum | 07/05/16 | 07/06/16 | DEF001 | CHJ | Denied | 09/16/16 | AAW VB |
| 00004001 | Request for Hearing on Selected Motion | 07/05/16 | 07/06/16 | DEF001 | TBA | | | AAW AAW |
| 00004002 | Plaintiff's Oppositon To Defendant's Motion to Dismiss<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 07/25/16 | 07/26/16 | PLT001 | TBA | | | AAW |
| 00004003 | The MCC of Baltimore's Reply to Pltff's Response & Opposition To The City's Mot. To Dismiss | 08/05/16 | 08/05/16 | DEF001 | TBA | | | AAW |
| 00004004 | Order of Court<br>Ordered that the deft's Motion to Dismiss is Denied. Judge Jones | 09/26/16 | 09/26/16 | 000 | CHJ | | | VB |
| 00004005 | Copies Mailed | 09/26/16 | 09/26/16 | 000 | TBA | | | VB |
| 00005000 | Notice Motion Hearing Sent<br>Event: MOTN Block Date: 08/05/16 Facility: 420<br>PARTIES : | 07/12/16 | 07/12/16 | 000 | TBA | Moot | 07/12/16 | ST |

Allen, Glen 100 North Holliday Street Baltimore City Law Dept, Baltimore, MD, 21202
Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201
Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203
Madame BBQ LLC, 2610 Westchester Ave , Ellicott City, MD, 21043

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00006000 | Notice Motion Hearing Sent<br>Event: MOTN Block Date: 08/05/16 Facility: 420<br>PARTIES :<br>Allen, Glen 100 North Holliday Street Baltimore City Law Dept, Baltimore, MD, 21202<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Madame BBQ LLC, 2610 Westchester Ave , Ellicott City, MD, 21043 | 07/25/16 | 07/25/16 | 000 | TBA | Moot | 07/25/16 | TLW |
| 00007000 | Open Court Proceeding<br>8/5/16 Case submitted to the court for determination without the aid of a jury. Jones, J.<br>8/5/16 Defendant's motion to dismiss heard and held subcuria pending written ruling. Order to be filed. Jones, J. | 08/05/16 | 08/05/16 | 000 | TBA | | | CMH CMH |
| 00008000 | Line To Clerk | 08/22/16 | 08/23/16 | DEF001 | TBA | Moot | 08/23/16 | AAW |
| 00009000 | Attorney Appearance Removed<br>Mark J Dimenna | 08/23/16 | 08/23/16 | DEF001 | TBA | Moot | 08/22/16 | AAW |
| 00010000 | Attorney Appearance Removed<br>Glen K Allen | 08/30/16 | 08/30/16 | DEF001 | TBA | Moot | 08/22/16 | AAW |
| 00011000 | Line | 09/30/16 | 10/03/16 | DEF001 | TBA | Moot | 10/03/16 | AAW |
| 00012000 | Amended Complaint For Declaratory Judgment & Injunctive Relief<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 10/17/16 | 10/18/16 | PLT001 | TBA | | | AJ |
| 00012001 | Answer to Amended Complaint | 11/15/16 | 11/18/16 | DEF001 | TBA | | | AJ AJ |
| 00013000 | Standard Short Track Scheduling Order Se | 11/21/16 | 11/21/16 | 000 | TBA | Moot | 11/21/16 | JWI |
| 00014000 | Notice of Service of Discovery Material (2) | 11/23/16 | 11/30/16 | PLT001 | TBA | | | PW |
| 00015000 | Joint Motion to Modify Pre-Trial Scheduling Order<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC, DEF001-Mayor And City Council Of Baltimore | 12/09/16 | 12/12/16 | PLT001 | AMH | Denied | 12/21/16 | HK AJ |
| 00015001 | Order of Court<br>Hereby, Ordered that the Joint Motion to Modify Pre-Trial | 12/21/16 | 12/27/16 | 000 | TBA | | | AJ |

Scheduling Order (Docket Entry #15000) is Denied.

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00015002 | Copies Mailed | 12/21/16 | 12/27/16 | 000 | TBA | | | AJ |
| 00016000 | Batch Hearing Notice Sent<br>Event: PTC Block Date: 05/19/17 Facility: 403C<br>PARTIES :<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Hochstetler, Jeffrey 100 N Holliday Street , Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Bushel, Glenn 100 E Pratt Street 26th Floor, Baltimore, MD, 21202 | 12/19/16 | 12/19/16 | 000 | TBA | Moot | 12/19/16 | AAW |
| 00017000 | Joint Motion To Extend Schduling Order | 01/12/17 | 01/13/17 | DEF001 | AMH | Approved | 02/02/17 | AS DG |
| 00017001 | Pretrial Scheduling Order | 02/02/17 | 02/02/17 | 000 | AMH | | | DG |
| 00017002 | Copies Mailed | 02/02/17 | 02/02/17 | 000 | TBA | | | DG |
| 00018000 | Notice of Service of Discovery Material | 01/13/17 | 01/18/17 | PLT001 | TBA | | | GI |
| 00019000 | Notice of Service of Discovery Material | 01/24/17 | 01/25/17 | DEF001 | TBA | | | PW |
| 00020000 | Civil Postponement Approved | 02/02/17 | 02/02/17 | 000 | AMH | Approved | 02/02/17 | DG |
| 00021000 | Hearing/Trial Notice Sent<br>Event: PTC Block Date: 08/18/17 Facility: 511<br>PARTIES :<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Hochstetler, Jeffrey 100 N Holliday Street , Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Bushel, Glenn 100 E Pratt Street 26th Floor, Baltimore, MD, 21202 | 02/03/17 | 02/03/17 | 000 | TBA | Moot | 02/03/17 | AS |
| 00022000 | Batch Hearing Notice Sent<br>Event: CIVI Block Date: 09/28/17 Facility: 403T<br>PARTIES :<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Hochstetler, Jeffrey 100 N Holliday Street , Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Bushel, Glenn 100 E Pratt Street 26th Floor, Baltimore, MD, 21202 | 02/03/17 | 02/03/17 | 000 | TBA | Moot | 02/03/17 | AS |
| 00023000 | Notice of Service of Discovery Material | 03/16/17 | 03/17/17 | PLT001 | TBA | | | GI |
| 00024000 | Notice of Service of Discovery Material | 03/16/17 | 03/17/17 | PLT001 | TBA | | | GI |
| 00025000 | Joint Motion to Modify Dispositive | 05/31/17 | 06/01/17 | DEF001 | AMH | Denied | 06/08/17 | AS VT |

Motion Filing Date

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00025001 | Order of Court<br>It is this 8th day of June 2017 Ordered that the motion is denied<br>Handy, J | 06/13/17 | 06/13/17 | 000 | AMH | | | VT |
| 00025002 | Copies Mailed | 06/13/17 | 06/13/17 | 000 | TBA | | | VT |
| 00026000 | clerical error | 05/31/17 | 06/01/17 | DEF001 | TBA | | | BE VT |
| 00027000 | Return of Service - Served Subpoena upon Arnirban Basu<br>received 5/31/17 | 05/31/17 | 06/05/17 | 000 | TBA | | | BE |
| 00028000 | Notice of Service of Discovery Material | 06/05/17 | 06/06/17 | DEF001 | TBA | | | DL |
| 00029000 | Reminder Notice Sent | 06/22/17 | 06/22/17 | 000 | TBA | Moot | 06/22/17 | KFS |
| 00030000 | Motion for Summary Judgment<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 06/21/17 | 06/22/17 | PLT001 | YAT | Denied | 08/11/17 | AS VT |
| 00030001 | Request for Hearing on Selected Motion<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 06/21/17 | 06/22/17 | PLT001 | TBA | | | AS AS |
| 00030002 | Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, with Affidavits and Request for Hearing (The pleading and the Exhibits Are in the Blue Accordion Folder, Volume Number 2)<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 06/21/17 | 06/22/17 | PLT001 | TBA | | | AS AS |
| 00030003 | Opposition to Plaintiffs' Motion for Summary Judgment, with Exhibits | 07/10/17 | 07/11/17 | DEF001 | TBA | | | AS AS |
| 00030004 | Reply Memorandum of Law in Support of Plaintiff's Motion for Summary Judgement | 07/24/17 | 07/25/17 | PLT001 | TBA | | | DL |
| 00030005 | Order of Court<br>It is this 11th day of August 2017 Ordered that the motion is denied Tanner, J | 08/15/17 | 08/15/17 | 000 | YAT | | | VT |
| 00030006 | Copies Mailed | 08/15/17 | 08/15/17 | 000 | TBA | | | VT |
| 00031000 | Motion for Summary Judgment, with Memorandum and Exhibits | 06/21/17 | 06/22/17 | DEF001 | YAT | Denied | 08/11/17 | AS VT |
| 00031001 | Request for Hearing on Selected Motion | 06/21/17 | 06/22/17 | DEF001 | TBA | | | AS |
| 00031002 | Memorandum of Law in Response to Defendant's Motion for Summary Judgment<br>Filed by PLT002-Madame BBQ LLC, PLT001-Pizza DI Joey LLC | 07/10/17 | 07/11/17 | PLT002 | TBA | | | AS |

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00031003 | Reply to Plaintiffs' Memorandum of Law in Response to Defendant's Motion for Summary Judgement, with Exhibits | 07/21/17 | 07/24/17 | DEF001 | TBA | | | DL |
| 00031004 | Order of Court<br>It is this 11th day of Aug 2017 Ordered that the motion is denied<br>Tanner, J | 08/15/17 | 08/15/17 | 000 | YAT | | | VT |
| 00031005 | Copies Mailed | 08/15/17 | 08/15/17 | 000 | TBA | | | VT |
| 00032000 | Plaintiffs' Motion to Exclude Anirban Basu as an Expert Witness | 06/21/17 | 06/22/17 | PLT001 | YAT | Denied | 08/11/17 | XAW VT |
| 00032001 | Opposition to Plaintiffs' Motion to Exclude Anirban Basu as an Expert Witness | 07/10/17 | 07/11/17 | DEF001 | TBA | | | AS |
| 00032002 | Plt's Reply to Deft's Opposition to plt's Motion to exclude Anirban as an expert witness<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 07/24/17 | 07/25/17 | PLT001 | TBA | | | TP |
| 00032003 | Order of Court<br>It is this 11th day of August 2017 Ordered that the motion is denied Tanner, J | 08/15/17 | 08/15/17 | 000 | YAT | | | VT |
| 00032004 | Copies Mailed | 08/15/17 | 08/15/17 | 000 | TBA | | | VT |
| 00033000 | Notice Motion Hearing Sent<br>Event: MOTN Block Date: 07/26/17 Facility: 438<br>PARTIES :<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Hochstetler, Jeffrey 100 N Holliday Street , Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Bushel, Glenn One East Pratt Street Suite 901, Baltimore, MD, 21202 | 06/27/17 | 06/27/17 | 000 | TBA | Moot | 06/27/17 | KA |
| 00034000 | Notice Motion Hearing Sent<br>Event: MOTN Block Date: 07/26/17 Facility: 438<br>PARTIES :<br>Dimenna, Mark 100 N Holliday St Room 101, Baltimore, MD, 21201<br>Hochstetler, Jeffrey 100 N Holliday Street , Baltimore, MD, 21201<br>Reed, Gregory 901 North Glebe Road Suite 900, Arlington, VA, 22203<br>Bushel, Glenn One East Pratt Street Suite 901, Baltimore, MD, 21202 | 07/13/17 | 07/13/17 | 000 | TBA | Moot | 07/13/17 | KFS |
| 00035000 | Change of Address<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 07/12/17 | 07/13/17 | PLT001 | TBA | Moot | 07/13/17 | AS |

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00036000 | Open Court Proceeding<br>7/26/17 Plaintiff's motion for summary judgment heard and held "Subcuria", pending written ruling. File in chambers. (Tanner,j)<br>7/26/17 Defendant's motion for summary judgment heard and held "Subcuria", pending written ruling. File in chambers. (Tanner,j)<br>7/26/17 Plaintiff's motion to exclude Mr. Basu's testimony, heard and held "Subcuria", pending written ruling. File in chambers. (Tanner,j) | 07/26/17 | 07/26/17 | 000 | TBA | | | DF AEK |
| 00037000 | Pre-Trial Statement | 08/15/17 | 08/16/17 | DEF001 | TBA | | | PW |
| 00038000 | Joint Motion to Excuse Plaintiffs and Defendant from Attending the Pre-Trial Conference<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC, DEF001-Mayor And City Council Of Baltimore | 08/16/17 | 08/17/17 | PLT001 | JRR | Granted | 08/16/17 | AS AJ |
| 00038001 | Order of Court<br>Ordered that the Joint Motion to Excuse Palntiffs and Defendant from Attending the Pre-Trial Conference be and is hereby Granted; and It is Further Ordered that the parties are permitted to appear telephonically at the pre-trial conference scheduled for August 18, 2017 in the above captioned matter; and further it is Ordered that the parties should they elect to appear via telephone instread of in person, shall participate via telephone for the entire duration of the pre-trial conference (not merely to be available by telephone to participate if and when called); and further it is Ordered that counsel who will try the case be physically/personally present for all parties. | 08/16/17 | 08/21/17 | 000 | JRR | | | AJ |
| 00038002 | Copies Mailed | 08/16/17 | 08/21/17 | 000 | JRR | | | AJ |
| 00039000 | Civil Postponement Approved | 08/29/17 | 08/30/17 | 000 | AMH | Denied | 08/29/17 | AS |
| 00040000 | Entry of Appearance for Robert P. Frommer | 08/31/17 | 09/05/17 | 000 | TBA | | | VB |
| 00041000 | Motion for Special Admission of Out-of-State Attorney Under Rule 14 of the Rules Governing Admission to the Bar of Maryland<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/05/17 | 09/07/17 | PLT001 | BGW | Granted | 09/12/17 | AS AS |
| 00041001 | Order of Court<br>Ordered that pltff's Motion for Special Admission of Out-Of-state Attorney (#41) is hereby Granted and that Ari S. Bargil of the Institute for Justice is hereby admitted as counsel for the limited purpose of appearing and participating as co-counsel for pltffs in the above-captioned case; and it is further Ordered that pursuant to Rule 19-214(d) of the Rules governing Admission | 09/19/17 | 09/19/17 | 000 | BGW | Granted | 09/14/17 | VB |

to the Bar of Maryland the presence of a Maryland Lawyer is not waived; and it is further Ordered that pursuant to rule 19-214 (c) of the rules Governing Admission to the Bar of Maryland, a copy of this order shall be forwarded by the Clerk of this Court to the State Court Administrator. Judge Williams

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00041002 | Copies Mailed | 09/19/17 | 09/19/17 | 000 | TBA | | | VB |
| 00041003 | Order of Court<br>ORDERED that Plaintiffs' Motion for Special Admission of out-of-state attorney (#41), is hereby GRANTED. The presence of a Maryland lawyer is not waived. Judge Barry G. Williams. | 09/21/17 | 09/21/17 | 000 | BGW | Granted | 09/12/17 | AS AS |
| 00041004 | Copies Mailed | 09/21/17 | 09/21/17 | 000 | TBA | | | AS |
| 00042000 | Motion in Limine, with Memorandum, Affidavit and Exhibits<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/15/17 | 09/20/17 | PLT001 | TBA | | | AS |
| 00042001 | Response/Opposition to Motion In Limine To Exclude Anirban Basu As an Expert Witness At Trial. | 09/27/17 | 10/03/17 | DEF001 | TBA | | | AJ |
| 00043000 | Entry of Appearance for Ari S. Bargil<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/22/17 | 09/25/17 | PLT001 | TBA | | | AS |
| 00044000 | Pre-Trial Joint Stipulations<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC, DEF001-Mayor And City Council Of Baltimore | 09/22/17 | 09/26/17 | PLT001 | TBA | | | KM |
| 00045000 | Attorney Appearance Filed<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/22/17 | 09/27/17 | PLT001 | TBA | | | AJ |
| 00046000 | Motion in Limine To Exclude Deposition Transcripts | 09/27/17 | 09/28/17 | DEF001 | TBA | | | AJ |
| 00046001 | Response/Opposition to Motion In Limine To Exclude Deposition Transcripts<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/27/17 | 09/28/17 | PLT001 | TBA | | | AJ |
| 00047000 | Motion in Limine To Exclude Documents Produced On September 22, 2017 with exhibits. | 09/27/17 | 09/28/17 | DEF001 | TBA | | | AJ |
| 00047001 | Response/Opposition to Motion In Limine To Exclude Documents Produced on September 22, 2017.<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/28/17 | 09/28/17 | PLT001 | TBA | | | AJ |
| 00048000 | Open Court Proceeding | 09/28/17 | 09/28/17 | 000 | TBA | | | DF ELJ |

9/28/17 Case submitted to the court for determination without the aid of a jury. (Friedman,J)
9/28/17 Defendant's motion in limine to exclude documents produced on September 22nd, heard and is hereby "Denied". (Friedman,j)
9/28/17 Defendant's motion in limine to exclude the deposition transcripts heard and was withdrawn on the record. (Friedman,j)
9/28/17 Plaintiff's motion in limine to exclude the testimony of Anirban Basu, heard and is hereby "Denied". (Friedman,j)
9/28/17 Defendant renewed motion for summary judgment, heard and is hereby "Denied". (Friedman,j)
9/28/17 Case not concluded. Case continued on 9/29/17 pt.29 @ 9:00a.m.

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00049000 | Trial Memorandum<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 09/27/17 | 09/28/17 | PLT001 | TBA | Moot | 09/28/17 | AJ |
| 00050000 | Open Court Proceeding<br>9/29/17 Plaintiff's renewed motion to strike Anirban Basu's testimony, heard and "Denied". (Friedman,J)<br>9/29/17 Case held "Subcuria", pending written ruling. Order to be filed. File in chambers. (Friedman,J)<br>9/29/17 Exhibits filed in court. | 09/29/17 | 09/29/17 | 000 | KF | | | DF DG |
| 00050001 | Memorandum Opinion and Order of Court (dated 12/20/17)<br>ORDERED that Pltffs request to find Baltimore City Code Article 15, Section 17-33 per se unconstitutional is DENIED, and it is further<br>ORDERED that Pltffs request for declaratory judgment in favor of the Pltffs that the City's enforcement of Baltimore City Code Article 15, Section 17-33 violates their constitutional right to Equal Protection and Due Process is DENIED; and it is further<br>ORDERED that Pltffs request for injunctive relief is GRANTED; and it is further<br>ORDERED that this INJUNCTION enjoining the City from enforcing Baltimore City Code Article 15, Section 17-33 shall be STAYED FOR SIXTY (60) DAYS from the date of this order, Friedman Judge | 01/11/18 | 01/11/18 | 000 | KF | | | DG DG |
| 00050002 | Copies Mailed | 01/11/18 | 01/11/18 | 000 | TBA | | | DG |
| 00051000 | Proposed Findings of Fact and Conclusions of Law | 10/12/17 | 10/13/17 | DEF001 | TBA | | | AS |
| 00052000 | Motion to Alter or Amend the court's Judgment granting Plaintiffs' request for Injuctive Relief | 01/05/18 | 01/09/18 | DEF001 | KF | Denied | 02/07/18 | BE VT |

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00052001 | Memorandum in Law Support of Motion | 01/05/18 | 01/09/18 | DEF001 | TBA | | | BE |
| 00052002 | Pltffs' Opposition to deft's Motion to Alter or Amend<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 01/23/18 | 01/24/18 | PLT001 | TBA | | | VB |
| 00052003 | Order of Court and Memorandum<br>It is this 7th day of February 2018 Ordered that the motion is hereby denied. Friedman, J | 02/09/18 | 02/09/18 | 000 | KF | | | VT |
| 00052004 | Copies Mailed | 02/09/18 | 02/09/18 | 000 | TBA | | | VT |
| 00053000 | Memorandum Opinion & Order<br>Filed by PLT001-Pizza DI Joey LLC, PLT002-Madame BBQ LLC | 01/18/18 | 01/18/18 | 000 | TBA | Moot | 01/18/18 | AJ GRG |
| 00053001 | Order of Court<br>Hereby:<br>Ordered that Plantiffs request to find Baltimore City Code Article 15, Section 17-33 per se unconsitutional is Denied; and it is further<br>Ordered that Plantiff's request for declaratory judgment in favor of the Plantiffs that the City's enforcement of Baltimore City Code Article 15, Section 17-33 violates their constitutional right to Equal Protection and Due Process is Denied; and itis further<br>Ordered that Plantiffs request for injunctive relief is Granted; and it is further<br>Ordered that this Injunction enjoying the City from enforcing Baltimore City Code Article 15, Section 17-33 shall be Stayed For Sixty (60) Days from the date of this order .<br>Friedman Judge | 01/18/18 | 01/18/18 | 000 | KF | | | AJ |
| 00053002 | Copies Mailed | 01/18/18 | 01/18/18 | 000 | KF | | | AJ |
| 00054000 | Plaintiffs' Notice of Appeal | 02/05/18 | 02/05/18 | PLT001 | TBA | | | WZ |
| 00055000 | Emergency Motion to Stay the Injunctive Relief that Enjoins the City from Enforcing Baltimore City Code, Article 15, 17-33 | 02/13/18 | 02/14/18 | DEF001 | LFH | Denied | 02/15/18 | AS VT |
| 00055001 | Order of Court<br>It is this 15th day of Feb 2018 Ordered that the motion is denied Fletcher-Hill, J | 02/15/18 | 02/15/18 | 000 | LFH | | | VT |
| 00055002 | Copies Mailed | 02/15/18 | 02/15/18 | 000 | TBA | | | VT |
| 00056000 | Notice of Appeal | 02/13/18 | 02/14/18 | DEF001 | TBA | | | WZ |
| 00057000 | Transcript of Testimony<br>Heard by Hon. Karen C. Friedman<br>September 28, 2017 | 02/16/18 | 02/20/18 | 000 | TBA | | | JF |

$73.50

| Num/Seq | Description | Filed | Entered | Party | Jdg | Ruling | Closed | User ID |
|---|---|---|---|---|---|---|---|---|
| 00058000 | Finling of Written Order for Appeal Transcript | 02/28/18 | 03/01/18 | DEF001 | TBA | Moot | 03/01/18 | WZ |
| 00059000 | Order of COSA to Proceed<br>No. 2411, September Term, 2017<br>Due date: 05/05/18<br>Assigned to W. Huth | 03/09/18 | 03/09/18 | 000 | TBA | | | WZ WZ |
| 00060000 | Order of Court of Special Appeals<br>ORDERED, that the Motion to Stay the Injunctive Relief That Enjoins the City From Enforcing Baltimore City Code, Article 15, & 17-33, be, and is hereby, denied | 03/13/18 | 03/15/18 | 000 | TBA | | | WZ |
| 00061000 | Transcript of Testimony<br>Heard by Hon. Karen C. Friedman<br>September 28, 2017<br>$98.00 | 03/20/18 | 03/20/18 | 000 | TBA | | | JF |
| 00062000 | Transcript of Testimony<br>Heard by Hon. Karen C. Friedman<br>September 28, 2017<br>$127.00 | 03/27/18 | 03/27/18 | 000 | TBA | | | JF JF |
| 00063000 | Transcript of Testimony<br>Heard by Hon. Karen C. Friedman<br>September 29, 2017<br>$ 156.00 | 03/27/18 | 03/27/18 | 000 | TBA | | | JF |

## SERVICE

| Form Name | Issued | Response | Served | Returned | Agency |
|---|---|---|---|---|---|
| WRIT OF SUMMONS (Private Process)<br>DEF001 Mayor And City Council Of Baltimo | 05/13/16 | 06/18/16 | 05/19/16 | | Private Process |

## TICKLE

| Code | Tickle Name | Status | Expires | #Days | AutoExpire | GoAhead | From | Type | Num | Seq |
|---|---|---|---|---|---|---|---|---|---|---|
| 1ANS | 1st Answer Tickle | CANCEL | 11/15/16 | 0 | no | no | DAAC | D | 12 | 001 |
| COSA | Preparation Of Recor | OPEN | 04/24/18 | 46 | yes | no | DPHC | D | 59 | 000 |
| DCML | DCM Information List | CANCEL | 11/15/16 | 0 | no | no | 1ANS | T | 12 | 001 |
| LSRV | 120 Days Lack Of Jur | CANCEL | 09/16/16 | 126 | no | no | | | 0 | 000 |

| Code | Tickle Name | Status | Expires | #Days | AutoExpire | GoAhead | From | Type | Num | Seq |
|---|---|---|---|---|---|---|---|---|---|---|
| SLJR | Set List - JIC Rulin | CANCEL | 03/06/18 | 21 | no | no | MSTA | D | 55 | 000 |
| SLMH | Set List For Motions | CANCEL | 07/10/16 | 5 | no | no | DHRR | D | 4 | 001 |
| SLMH | Set List For Motions | CANCEL | 06/26/17 | 5 | no | no | DHRR | D | 30 | 001 |
| SLMR | Set List For Motions | CANCEL | 06/21/16 | 21 | yes | no | MOSA | D | 3 | 000 |
| SLMR | Set List For Motions | CANCEL | 07/26/16 | 21 | yes | no | DHRR | T | 4 | 000 |
| SLMR | Set List For Motions | CANCEL | 07/12/17 | 21 | yes | no | DHRR | T | 30 | 000 |
| SLMR | Set List For Motions | CANCEL | 07/12/17 | 21 | yes | no | MJSM | D | 31 | 000 |
| SLMR | Set List For Motions | CANCEL | 07/12/17 | 21 | yes | no | | | 0 | 000 |
| SLMR | Set List For Motions | CANCEL | 08/01/17 | 21 | yes | no | | | 0 | 000 |
| SLMR | Set List For Motions | CANCEL | 09/26/17 | 21 | yes | no | MOSA | D | 41 | 000 |
| SLMR | Set List For Motions | CANCEL | 01/26/18 | 21 | yes | no | MJAA | D | 52 | 000 |
| TIME | Motion To Extend/Sho | CANCEL | 12/10/16 | 1 | yes | no | MJNT | D | 15 | 000 |
| TIME | Motion To Extend/Sho | CANCEL | 01/13/17 | 1 | yes | no | MJNT | D | 17 | 000 |
| TIME | Motion To Extend/Sho | CANCEL | 06/01/17 | 1 | yes | no | MJNT | D | 25 | 000 |
| TIME | Motion To Extend/Sho | CANCEL | 08/17/17 | 1 | yes | no | MJNT | D | 38 | 000 |

## DIFFERENTIATED CASE MANAGEMENT

## TRACKS AND MILESTONES

Track : BS Description: SHORT TRACK Custom: No
Assign Date: 11/21/16 Order Date : 11/21/16
Start Date : 11/21/16 Remove Date:

| Milestone | Scheduled | Target | Actual | Status |
|---|---|---|---|---|
| Plaintiff(s) shall designate experts by | | 01/05/17 | | OPEN |
| Defendant(s) shall designate experts by | | 02/19/17 | | OPEN |
| Any additional parties must be joined by | | 02/21/17 | | OPEN |
| All discovery must be completed by | | 03/23/17 | | OPEN |
| Any Motion for Summary Judgment must be | | 04/22/17 | 06/21/17 | REACHED |
| Alternate dispute resolution process com | | 04/22/17 | | OPEN |
| Pretrial Conference Date | 08/18/17 | 08/29/17 | 08/23/17 | REACHED |
| Any Motions in Limine shall be filed by | | 09/13/17 | | OPEN |

| Milestone | Scheduled Target | Actual | Status |
|---|---|---|---|
| TRIAL DATE is | 06/22/17 | | OPEN |

## PUBLIC NOTE TITLES

1) 9/16/16 #4/3 SENT TO J. JONES WITHOUT THE FILE
2) 07/11/17 Sent #32/1 To Judge Tanner's Chamber on red card
3) 08/16/17 sendind in red card to Jeff
4) 8/17/17 #38 PUT IN JEFF TRUEMAN'S BASKET WITH HISTORY

## CASE FOLDER HISTORY

| Date | Time | Type | User | Location | Clerk | Reason |
|---|---|---|---|---|---|---|
| 03/13/18 | 11:12 AM | CheckOut | WZ | Civil Div., Room 462 East | ADH | |
| 03/13/18 | 11:12 AM | CheckOut | WZ | Civil Div., Room 462 East | ADH | |
| 03/13/18 | 11:12 AM | CheckOut | WZ | Civil Div., Room 462 East | ADH | |
| 03/13/18 | 11:12 AM | CheckOut | WZ | Civil Div., Room 462 East | ADH | |
| 03/13/18 | 11:12 AM | CheckOut | WZ | Civil Div., Room 462 East | ADH | |