In The
Court of Special Appeals
Of Maryland

September Term, 2017
No. 2411

PIZZA DI JOEY, LLC and MADAME BBQ, LLC,

***Appellants/Cross-Appellees*,**

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

***Appellee/Cross-Appellant*.**

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

BRIEF OF APPELLANTS/CROSS-APPELLEES

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISION

STATUTES

RULE

OTHER AUTHORITIES

STATEMENT OF THE CASE

On May 11, 2016, Appellants/Cross-Appellees Pizza di Joey, LLC and Madame BBQ, LLC ("Plaintiffs") filed this lawsuit. They alleged that Baltimore City Code Article 15, Section 17-33 ("the 300-foot rule"), which states that "[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," violated their rights to equal protection and substantive due process both on its face and as applied. Plaintiffs' complaint asked for a declaratory judgment that the 300-foot rule violates Plaintiffs' rights under Article 24 of the Maryland Declaration of Rights, a permanent injunction, and other miscellaneous relief.

Baltimore moved to dismiss the complaint, which the Circuit Court denied on September 26, 2016. Following amendment of the complaint and discovery, the parties filed cross-motions for summary judgment, argument on which was heard on July 26, 2017. The Circuit Court denied both parties' motions and the matter was set for trial, which took place on September 28–29, 2017.

On December 20, 2017, the Circuit Court issued its decision. It held that Baltimore's justification for the 300-foot rule—protecting brick-and-mortar businesses from mobile competition—was not per se invalid and that the rule did not violate Plaintiffs' rights under Article 24. It did, however, conclude that the rule was unconstitutionally vague. Accordingly, the Circuit Court denied Plaintiffs' request for a declaratory judgment but issued a permanent injunction. To provide Baltimore time to

modify the rule's language if it wished, the Circuit Court stayed that injunction for 60 days. That stay expired on February 19, 2018, and the injunction is now in effect.

Baltimore moved the Circuit Court to reconsider its decision granting injunctive relief, which it denied on February 7, 2018. Baltimore also moved both the Circuit Court and this Court to stay the injunction pending appeal. The Circuit Court denied that motion on February 15, 2018, and this Court did the same on March 13, 2018.

Both parties appealed. Plaintiffs timely noted their appeal on February 5, 2018, and Baltimore timely noted its cross-appeal on February 13, 2018.

QUESTIONS PRESENTED

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?

STATEMENT OF FACTS

Appellants/Cross-Appellees Pizza di Joey, LLC and Madame BBQ, LLC are two closely-held Maryland limited liability companies that own mobile vendor vehicles ("food trucks") that are licensed in the City of Baltimore.

Pizza di Joey is owned by Joseph Salek-Nejad, a military veteran and member of the Naval Reserve. Mr. Salek-Nejad, who operates the food truck under his mother's maiden name of Vanoni, started Pizza di Joey in 2014. Pizza di Joey serves authentic New York-style pizzas, along with meatball subs, pasta salads, and other Italian-American food products. Part of Pizza di Joey's mission is to use its food truck to aid Baltimore-area charities and to create job opportunities for other veterans.

Madame BBQ is owned by Nicole McGowan, who started operating the Madame BBQ food truck in 2014. Originally, Madame BBQ primarily served barbeque fare, such as pulled pork sandwiches. But during this lawsuit, Madame BBQ, LLC rebranded its food truck as "MindGrub Café" and expanded its menu to include a variety of healthier food products such as salads, soups, and sandwiches.

Pizza di Joey and Madame BBQ wished to operate their food trucks on both public and private property in Baltimore with the permission of the property owner. But one

aspect of Baltimore's mobile vending rules greatly limited where they could legally operate. That restriction is Section 17-33 of Article 15 of the Baltimore City Code. Known as the "300-foot rule," that section states that "[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." The 300-foot rule applies to both public and private property throughout Baltimore. And it affects mobile vendors differently based on what they and nearby brick-and-mortar businesses sell. As the owners of Pizza di Joey and Madame BBQ testified at trial, this rule prevented them from operating in numerous neighborhoods throughout the city, thereby causing both to severely curtail their business activities in Baltimore.

When asked why the 300-foot rule existed, Baltimore provided a single, clear answer: To suppress competition between mobile retailers and brick-and-mortar entities, so that such competition could not potentially harm the brick-and-mortars' bottom lines. And the City enforced this prohibition, despite the fact that it failed to establish any standardized definitions or enforcement procedures.

This statement of facts will discuss the 300-foot rule in two parts. First, Part A will describe the 300-foot rule and its administration. Next, Part B will focus on the specific effects of the 300-foot rule on Pizza di Joey and Madame BBQ.

A. THE 300-FOOT RULE

Some version of Baltimore's 300-foot rule has existed since the mid-1970's. Originally focused only on food trucks, in 2014 Baltimore modified the rule's language

so as to expand its prohibition to all mobile vendors regardless of what food, product, or service they happened to sell. Subsection 1 of this Part discusses the substance of the 300-foot rule, including a brief discussion of its purpose, its penalties, and how enforcement of the rule typically proceeded. Subsection 2 addresses how the rule was subjectively interpreted and enforced by City officials.

1. The Intent and Application of the 300-Foot Rule

Baltimore has repeatedly stated that the 300-foot rule's purpose is to discriminate against mobile vendors for the benefit of brick-and-mortar businesses. In both discovery and trial, Baltimore made clear that the rule is "designed to address competition that mobile vendors create for brick-and-mortar retail business establishments." *See* E.719 (Dep. of Gia M. Montgomery dated May 2, 2017 ("Montgomery Dep. Vol. II") 61:17–21). In other words, the rule is meant to "eliminat[e] the harm that direct competition can cause to both mobile vendors and brick-and-mortar establishments." E.498–99 (Def.'s Resp. to Interrog. No. 1). Baltimore's professed fear is that, if vendors and brick-and-mortar entities directly compete, some of the latter may suffer economically.

Baltimore drafted and enforced the 300-foot rule in an effort to eliminate that competition. *See* E.501 (Def.'s Resp. to Interrog. No. 7 (stating that a pizza food truck operating within 300-feet of a pizzeria would be in violation of the 300-foot rule)); E.564 (Dep. of Babila A. Lima ("Lima Dep.") 46:6–16); E.685 (Dep. of Gia M. Montgomery dated April 25, 2017 ("Montgomery Dep. Vol. I") 14:16–21). Numerous Baltimore agencies, including the Department of Transportation, the Department of General Services, the Police Department, and the Health Department, all had enforcement

authority. *See* E.510–11 (Def.'s Suppl. Resp. to Interrog. No. 3). So too did the University of Maryland Police, which, as described more fully below, exercised that jurisdiction by confronting Pizza di Joey and accusing it of violating the rule.

Typically, enforcement commenced when Baltimore received a complaint from a brick-and-mortar establishment. *See* E.688 (Montgomery Dep. Vol. I 27:19–28:2); E.741 (Montgomery Dep. Vol. II 146:3–12); E.577–78 (Lima Dep. 101:17–102:3); E.449 (Lima Dep. Ex. 6) (stating that "[b]rick and mortar stores have complained with both the Mayor's Office and Downtown Partnership regarding the proximity of food vendors"); *see also* E.511–13 (Def.'s Resp. & Suppl. Resp. to Interrogs. Nos. 6, 9). Baltimore would respond to those complaints by ordering mobile vendors to move or cease selling certain items. And Baltimore would issue a citation if a vendor refused. *See* E.511–13 (Def.'s Resp. & Suppl. Resp. to Interrogs. Nos. 6, 9); E.687–89 (Montgomery Dep. Vol. I 25:2–26:17, 27:19–30:15 ("Q: It's fair to say, then, you are enforcing the 300-foot proximity rule, correct? A: Yes.")); E.710 (Montgomery Dep. Vol. II 25:13–16); E.470 (*id*. Ex. 9 (email from Ms. Montgomery's manager, Michelle Abbott-Cole, stating "[w]e do enforce this rule")).

Violating the 300-foot rule was a crime. Article 15, Section 17-42 of the Baltimore City Code, entitled "Criminal Penalties," states that "[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." The code also authorizes Baltimore to revoke a mobile vendor's license for violating the 300-foot rule. *Id*. § 17-44(a). And if a mobile vendor commits three violations within a

one-year period, including violations of the 300-foot rule, the code *requires* Baltimore to revoke that mobile vendor's license. *Id*. § 17-44(b). Once revoked, the former licensee may not apply for a new license for at least one year. *Id*. § 17-44(c).

Baltimore recognized that the 300-foot rule may cause entire neighborhoods to be off limits to mobile vendors. *See* E.722 (Montgomery Dep. Vol. II 72:12–73:11 (stating that the 300-foot rule makes it difficult to operate in the downtown areas and business districts, and thus the rule should be revised)). As discussed below, Pizza di Joey and Madame BBQ analyzed the 300-foot rule's effect on their ability to operate in certain Baltimore neighborhoods. The resulting maps showed how the rule effectively prohibited them from operating in viable commercial corridors.

2. Baltimore's Interpretation and Enforcement of the 300-Foot Rule

While the 300-foot rule's purpose is unequivocally clear, its meaning is not. The lower court recognized as much in holding that the rule's phrases, including "primarily engaged in" and "same type of food product," were incapable of ready discernment by either the Court or City officials. E.811–14.

A great deal of evidence demonstrates the rule's lack of clarity. After all, no City employee, department, or agency established a common standard regarding for how to interpret the 300-foot rule or measure its distance. *See* E.737, E.740, E.743 (Montgomery Dep. Vol. II 130:9–14, 142:4–10, 155:1–12). No document or guidance, including Baltimore's own regulations, defines the rule's terms. E.718, E.740, E.743 (*Id*. at 54:3–14, 142:11–19, 155:1–6). And because there are no definitive definitions, Baltimore

testified that enforcement officials may reach different conclusions regarding the rule's reach and effect. E.717 (*Id*. at 50:6–21).

Faced with this indeterminacy, Pizza di Joey and Madame BBQ asked the rule's lead legislative drafter and the City's chief enforcement official—both designated as Baltimore's Rule 2-412(d) representatives—to explain the 300-foot rule's meaning. Both testified that Baltimore used a "commonsense" understanding of the rule's terms. E.750 (Montgomery Dep. Vol. II 182:8–20); *see also* E.745 (*id*. at 163:7–13); E.598 (Lima Dep. 182:1–7 (stating that the City uses a "commonsense" definition)). But when pressed for more detail, those representatives admitted that the actual meaning of a "commonsense" definition could vary from person to person. E.750 (Montgomery Dep. Vol. II 182:8–20); *see also* E.745 (*id*. at 163:7–13). Indeed, Baltimore ultimately testified that it is "fair to say that there's *no objective standard* as to what a business is primarily engaged in selling or not engaged in selling" and that it is "*always a subjective analysis*." E.745 (*Id*. at 163:7–13 (emphases added)); *see also* E.600 (Lima Dep. 191:5–10).

As a result, when Pizza di Joey and Madame BBQ asked if certain food items qualify as the "same type of food product," Baltimore could not answer. *See, e.g.*, E.603 (Lima Dep. 205:1–15 ("Q: As the City representative, does the City have a position as to whether pizza is the same type of food product as flat bread? A: I don't know that the City has ever established a formal position on whether or not those two things are similar or equal. Q: Okay. Is a deli sandwich the same type of food product as a burger? A: The same answer to the previous question. Q: Okay. What about, is a barbeque sandwich the

same type of food product as a burger? A: That's the same answer to the previous question.")). Due to this lack of defined terms, whether a vendor sells the "same type of food product" as a brick-and-mortar retailer is decided by officials on a "case-by-case basis." E.605 (*Id*. at 213:21–214:9 ("Q: So the determination of what is or is not the same type of food product would be made on a case-by-case basis; is that correct? A: You asked that earlier. Yes.")).

For these reasons, Baltimore's enforcement of the 300-foot rule was subjective. Baltimore agencies did not coordinate on how to enforce the rule. *See* E.691 (Montgomery Dep. Vol. I 38:7–13, 39:6–40:2). And because Baltimore admitted having no objective way to decide if a brick-and-mortar business is primarily engaged in selling any given food, product, or service, E.745 (Montgomery Dep. Vol. II 163:7–13), one enforcement official could interpret terms like "primarily engaged in" very broadly, while another could interpret the term more narrowly. *See* E.742 (Montgomery Dep. Vol. II 150:1–9). Baltimore officials predicted this indeterminacy long before the 300-foot rule's passage: In written comments, the General Counsel for the Baltimore Department of Transportation expressed concern that enforcement of the rule would be "very subjective." *See* E.750–51 (*Id*. at 183:5–186:17); E.486–88 (Montgomery Dep. Vol II. Ex. 11 (commenting, for example, that "the Council will expect us to enforce this, and I don't see how we really can")).

Further evidence demonstrated that, because of the 300-foot rule's subjectivity, enforcement officials can and have established their own varied methods for determining if a vendor is violating the rule. One approach focuses on whether any specific items

sold by a vendor are the same as any items sold by nearby brick-and-mortar businesses. E.687 (Montgomery Dep. Vol. I 24:18–25:21); E.742 (Montgomery Dep. Vol. II 152:1–6). But Baltimore's lead enforcement official also testified that a mobile vendor can violate the rule by operating within 300 feet of a restaurant with a similar cuisine or culinary theme. E.742 (Montgomery Dep. Vol. II 150:10–13 ("Q: You use cuisines as one way in which to determine whether or not the 300-foot proximity ban is being violated; is that correct? A: Yes.")). At trial, Baltimore's counsel suggested a third possible approach, which is to analyze how a mobile vendor describes its menu in marketing materials. E.198–202 (Trial Tr. Vol. II 58:14–61:14 (discussing how MindGrub Café's slogan, "Brain Food for Knowledge Workers," may mean it cannot operate within 300 feet of restaurants that also sell "brain food.")). And Baltimore testified that a fourth possible approach would prohibit vendors from selling foods containing starches within 300 feet of a brick-and-mortar that also sells foods containing starches. E.741 (Montgomery Dep. Vol. II 149:12–19 ("Q: Does the rule prevent all mobile vendors that sell starch from operating within 300 feet of restaurants that also sell starch? A: So someone could interpret it just as you just stated . . . .")).

B. IMPACTS OF THE 300-FOOT RULE ON PLAINTIFFS

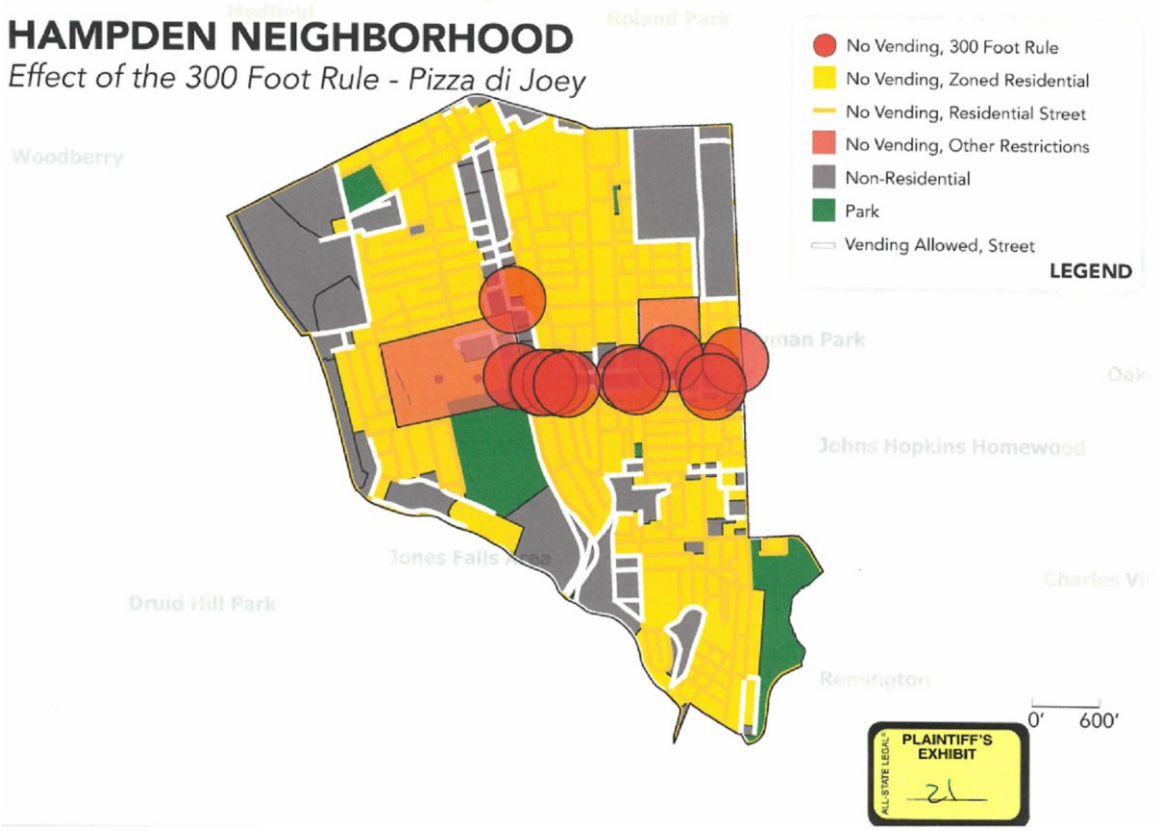
1. Effect of the 300-foot Rule on Pizza di Joey

When Pizza di Joey first began operating, it attempted to operate on public streets. But it was difficult for Pizza di Joey to find a lawful location from which to operate due to the 300-foot rule, particularly due to the prevalence of pizzerias and other businesses that sell pizza throughout Baltimore.

Pizza di Joey has firsthand experience with enforcement of the rule. At trial, Mr. Salek-Nejad testified that in June 2015, he was operating at the 800 block of West Baltimore Street when he was approached by a University of Maryland police officer. E.79–80 (Trial Tr. Vol. I 64:12–65:13). That officer had jurisdiction to enforce Baltimore law, including the 300-foot rule, at that location. *See* E.517–32 (Concurrent Jurisdiction Authorization and Agreement). The officer advised Mr. Salek-Nejad that he was in violation of the 300-foot rule. Mr. Salek-Nejad avoided receiving a citation only by opening his laptop, pulling up Section 17-33, reviewing the rule's text, and persuading the officer that he was not selling the same type of food product as a nearby brick-and-mortar establishment. E.80–81 (Trial Tr. Vol. I 64:12–67:4).

Yet that enforcement incident caused Mr. Salek-Nejad to grow more concerned about the 300-foot rule's effect. For trial, Mr. Salek-Nejad analyzed how the 300-foot rule affected Pizza di Joey's ability to operate in two Baltimore neighborhoods: Hampden and Federal Hill. E.86–94 (Hampden); E.96–104 (Federal Hill). This research demonstrated that 12 restaurants in Hampden and 15 in Federal Hill triggered the 300-foot rule for Pizza di Joey. E.533 (Hampden); E.535 (Federal Hill). Maps reflecting these restaurants displayed the 300-foot rule's cumulative effect in Hampden (displayed below) and Federal Hill. As Mr. Salek-Nejad testified, and the map of Hampden below shows, the 300-foot rule prevented Pizza di Joey from operating near any of the main commercial thoroughfares in the neighborhood, including 36th Street. E.534. The same, Mr. Salek-Nejad testified, was true in Federal Hill. E.536. The rule's cumulative effect was to prevent Pizza di Joey from operating successfully in either neighborhood. E.94

(Trial Tr. Vol. I 79:10–12 (testifying that he "wouldn't be able to [operate in Hampden] successfully")); E.103 (*id*. at 89:7–9 (testifying that he would "likely lose money" in Federal Hill because he would be "kept out of the areas where [his] customers would be")).



The rule also affected Pizza di Joey's ability to operate on private property. For instance, Mr. Salek-Nejad testified that he wanted to operate Pizza di Joey in a private parking lot off of East Fort Avenue near Key Highway. But as he noted, he could not do so because the shopping center that that parking lot services contains several restaurants that sell the same type of food products as Pizza di Joey. E.123–26 (Trial Tr. Vol. I 108:18–111:12).

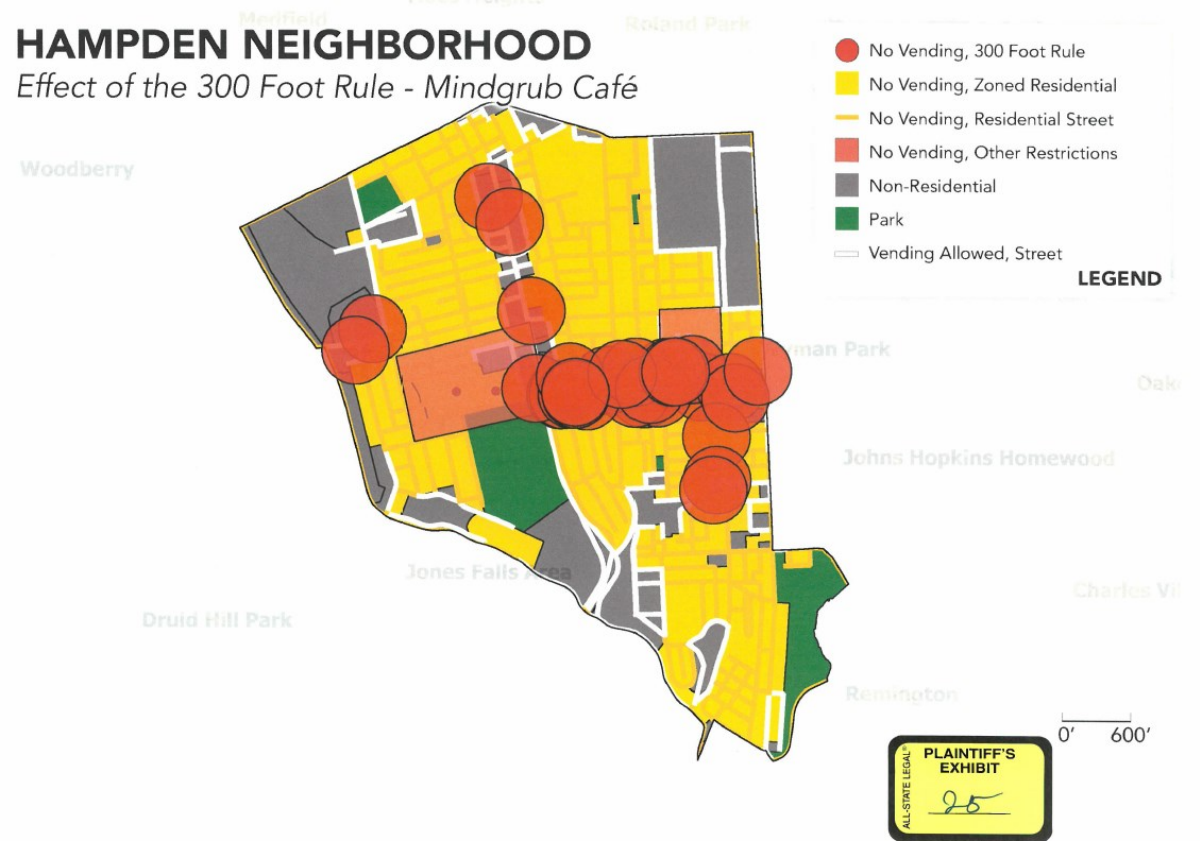
Due to the rule, Mr. Salek-Nejad changed the way Pizza di Joey conducted business, severely decreasing Pizza di Joey's operations inside Baltimore. E.85 (*id*. at 70:16–71:7 (testifying that he is essentially stopped operating in numerous Baltimore neighborhoods)). As a result, Mr. Salek-Nejad ended up primarily operating the Pizza di Joey food truck in Anne Arundel County, which he estimated accounts for 80%–90% of all his business activity. E.75 (*id*. at 60:7–17).

2. Effect of the 300-foot Rule on Madame BBQ

Nicole McGowan, owner of the MindGrub Café food truck, likewise avoided operating in Baltimore out of concern of violating the 300-foot rule. That concern only increased when Ms. McGowan rebranded her food truck from Madame BBQ to MindGrub Café and expanded its menu to include salads, soups, and sandwiches, which expanded the number of brick-and-mortar businesses that could potentially trigger the rule. E.157 (Trial Tr. Vol. II 17:9–19 (testifying that menu change "actually made it so that there were more places that I could not park without fear of being ticketed")).

As a result, Ms. McGowan rarely took the MindGrub Café truck out into Baltimore. E.157 (*id*. at 17:1–8). For trial, Madame BBQ analyzed how the 300-foot rule affects MindGrub Café's ability to operate in viable locations in the Hampden, Federal Hill, and greater Downtown areas. E.159–72 (*id*. at 19:19–32:9) (Hampden); E.172–80 (*id*. at 32:21–40:23) (Federal Hill); E. 181–91 (*id*. at 41:10–51:5) (Downtown). This research demonstrated that, for MindGrub Café, 31 restaurants triggered the 300-foot rule in Hampden, 50 in Federal Hill, and 113 in the Downtown area. E.537–47 (*id*. Ex. 24) (Hampden); E.539–42 (*id*. Ex. 26) (Federal Hill); E.543–47 (*id*. Ex. 28)

(Downtown). Maps revealing the cumulative effect of the 300-foot rule in Hampden (displayed below) and Federal Hill show that, due to the breadth of MindGrub Café's menu, the rule prevents MindGrub Café from operating at viable locations in those areas.



E.538 (*id*. Ex. 25).

Moreover, this research demonstrated that the rule cut off most commercially viable locations for MindGrub Café in the Downtown area, E.551 (*id*. Ex. 29) (Map of Downtown). Although a few parts of Downtown remained open, many of those locations were either economically unviable or posed safety concerns. E.189–90 (Trial Tr. Vol. II 49:25–50:9).

The 300-foot rule also limited Madame BBQ's ability to operate on private property. Ms. McGowan wanted to operate MindGrub Café in the rear parking lot of

Waverly Brewing Company, located at 1625 Union Avenue, but could not do so because it is within 300 feet of Blue Pit BBQ, a restaurant that sells the same type of food product as MindGrub Café's pulled pork sandwiches. E.161–63 (Trial Tr. Vol. II 21:18–23:11). Likewise, Ms. McGowan operates Share Kitchen, a commissary located in Locust Point that she and other food trucks use. But Ms. McGowan expressed concern about operating MindGrub Café even in Share Kitchen's parking lot due to the presence of a nearby restaurant named Barracuda's. E.196–97 (*id*. at 56:23–57:18). These concerns caused Ms. McGowan to largely refrain from operating in Baltimore.

STANDARD OF REVIEW

This action was subject to a bench trial. Pursuant to Maryland Rule 8-131(c), this Court shall "review the case on both the law and the evidence." Although the Circuit Court's factual determinations are afforded deference, its legal determinations are not. Accordingly, the lower court's factual findings should be upheld unless clearly erroneous and its legal conclusions are subject to de novo review.

ARGUMENT

The Maryland Constitution recognizes that Plaintiffs Pizza di Joey and Madame BBQ have a constitutional right to ply their trade. *Attorney Gen. v. Waldron*, 289 Md. 683, 722 (1981) (holding that the right to pursue one's calling is a significant liberty and property interest protected by Article 24). But Baltimore has made it a crime for Plaintiffs to operate their food trucks within 300 feet of brick-and-mortar businesses that sell similar items. The rule's cumulative effect is to prevent Plaintiffs from operating in numerous commercial areas throughout Baltimore.

When asked what motivated the 300-foot rule, Baltimore responded with a single reason: To "eliminat[e] the harm that direct competition can cause to both mobile vendors and brick-and-mortar establishments." E.498–99 (Def.'s Resp. to Interrog. No. 1). Its fear was that such competition might cause consumers to stop patronizing brick-and-mortar establishments, possibly hurting those establishments' bottom lines or causing some to go out of business. And that, said Baltimore, could potentially threaten the public welfare by reducing tax rolls and employment. The trial court uncritically accepted this view, holding that to "ensur[e] the vibrancy of commercial districts," E.809, Baltimore could interfere with consumers' choices to financially benefit a preferred constituency.

This is wrong. For almost a century, the Court of Appeals has invalidated discriminatory laws that use public power to generate private gain. In so doing, it has repeatedly held that the police power should not be used for such anti-competitive ends, and that economic favoritism is wholly illegitimate. Indeed, no Maryland decision has upheld a law that, like the 300-foot rule, had the express purpose of suppressing competition for the financial benefit of a would-be competitor. This is true no matter whether such suppression was an end in itself or a means to further the "general welfare." In concluding otherwise, the Circuit Court set Maryland apart from nearby states that have held that protecting shop owners from vending competition is illegitimate.

Even if the anticompetitive impulse behind the 300-foot rule were not illegitimate, it would still fail under Maryland's real-and-substantial test. As case law demonstrates, Baltimore's abstract, post-hoc articulation of promoting the "public welfare" is too

nebulous to credit. Its argument that, absent the rule, competition between food trucks and restaurants serving the same fare will somehow imperil that welfare is too illogical and speculative to be countenanced. The rule's contours make it impermissibly under- and overinclusive. And the vague manner in which the rule is interpreted and enforced means that it cannot be seen as substantially furthering *any* government interest whatsoever.

Because Baltimore's 300-foot rule attempts to impose economic burdens on mobile vendors in order to favor brick-and-mortar retailers, this Court should reverse and hold that the rule violates Plaintiffs' Article 24 rights. This argument will proceed in two parts. In Part I, Plaintiffs demonstrate that the 300-foot rule's admitted purpose violates Maryland courts' historical—and unequivocal—rejection of economic protectionism and is per se unconstitutional on those grounds alone. And in Part II, Plaintiffs demonstrate that even if directly legislating economic protection were legitimate—which it is not—the rule still fails under Maryland's real-and-substantial test.

I. BECAUSE LEGISLATING TO SUPPRESS COMPETITION AND ENRICH EXISTING BUSINESSES IS AN ILLEGITIMATE USE OF THE POLICE POWER, THE 300-FOOT RULE VIOLATES ARTICLE 24.

Baltimore has not hidden the 300-foot rule's purpose. It admitted it designed the rule to "address competition that mobile vendors create for brick-and-mortar retail business establishments." E.719 (Montgomery Dep. Vol. II 61:17–21). It hoped the rule would "eliminat[e] the harm that direct competition can cause to both mobile vendors and brick-and-mortar establishments." E.498–99 (Def.'s Resp. to Interrog. No. 1). And it said the rule's purpose is to "eliminate[] harmful direct competition" and "protect[]

restaurants" from mobile vendors. E.906, 908 (Def.'s Mem. Law in Supp. Mot. for Summ. J. 13, 15). In other words, Baltimore made it a crime for vendors to operate near brick-and-mortar eateries so that those eateries will financially benefit.

But designing laws to discriminate against a business to improve the bottom line of its would-be competitors violates the Maryland Constitution. Such laws fail at the outset for the simple reason that the police power may be used only when "the interest of the public generally as distinguished from those of a particular class must require the regulatory interference." *Bureau of Mines of Md. v. George's Creek Coal & Land Co.*, 272 Md. 143, 175 (1974). A fixed light of Maryland's constitutional system, this principle is why the Court of Appeals has not "hesitated to strike down discriminatory economic regulation[s]" that "impose[] economic burdens, in a manner tending to favor [some Maryland] residents . . . over [other Maryland] residents." *Frankel v. Bd. of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 315 (2000).

Numerous cases illustrate this principle, but none as squarely as *Verzi v. Baltimore County*, 333 Md. 411 (1994). *Verzi* concerned Baltimore County's discrimination against Douglas Verzi, a Harford County tow-truck operator. *Id.* at 414–15. Specifically, because Mr. Verzi's business was not located in Baltimore County, the police refused to assign it a towing area. *Id.* This meant that while Mr. Verzi could freely operate throughout Baltimore County, police would not call on him to service vehicles disabled in accidents. *Id.* at 413, 426.

The Court of Appeals struck down Baltimore County's towing restriction. After the Court considered and rejected the County's non-protectionist justifications, which

included minimizing congestion and preventing fraud, it invalidated the restriction because its purpose was to "confer[] the monopoly of a profitable business upon" in-county operators, a goal the Court said was "wholly unrelated to any legitimate government objective." *Id*. at 427; *see also Mayor & City Council of Havre de Grace v. Johnson*, 143 Md. 601 (1923) (invalidating taxicab restriction after concluding that restriction's purpose was to "confer the monopoly of a profitable business upon residents of the town"); *State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496, 508–09, 512 (1973); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 603–05 (1971).

The 300-foot rule is even more blatantly anti-competitive than the restriction the Court of Appeals struck down in *Verzi*. First, although the restriction in *Verzi* did not facially discriminate against out-of-county towers, *see* 333 Md. at 415, the 300-foot rule's terms limit where mobile vendors can operate vis-à-vis brick-and-mortar businesses that sell the same thing. Second, Baltimore City has admitted that the rule was meant to protect preferred businesses from competition, an assertion Baltimore County never uttered in *Verzi*. *See* 333 Md. at 425–26. And although in-county towers in *Verzi* did not affirmatively invoke the towing rule to squeeze out competition, *see id*. at 415, the evidence here demonstrates that Baltimore *only* enforced the 300-foot rule in response to complaints from brick-and-mortar businesses.

The crippling effect of the 300-foot rule further highlights its unconstitutionality. The restriction in *Verzi* was modest and only prevented Mr. Verzi from being hailed by county police in one particular circumstance. *Id*. at 415. But as the evidence demonstrates, the 300-foot rule made it impossible for Plaintiffs to operate in viable

commercial areas throughout Baltimore. Indeed, the City *itself* testified that the rule makes entire neighborhoods off-limits to vendors. E.722 (Montgomery Dep. Vol. II 72:6–73:11). The Court of Appeals invalidated the towing restriction in *Verzi* after it concluded that it was nothing more than economic protectionism. This Court should do the same here.

A. POINTING TO THE PURPORTED BENEFITS THAT FLOW FROM THE 300-FOOT RULE'S BLATANT DISCRIMINATION CANNOT SAVE IT.

The trial court pushed the reasoning of *Verzi* and other cases aside, however, concluding that even a blatantly discriminatory law like the 300-foot rule could survive if the court could somehow conclude that it conceivably furthered the public welfare. E.809. But case law rejects this rationale for two separate reasons.

First, no matter the justification put forward, no case decided by either this Court or the Court of Appeals has upheld a law that discriminated against one business for the express purpose of benefitting another. In striking down Baltimore County's towing rule in *Verzi*, for instance, the Court of Appeals noted that in some other cases it had upheld legislation that treated some entities differently than others. 333 Md. at 421–22 (citing *Supermarkets Gen. Corp. v. State*, 286 Md. 611 (1979); *Dept. of Transp. v. Armacost*, 299 Md. 392 (1984); *Donnelly Advert. Corp. v. City of Baltimore*, 279 Md. 660 (1977)). But the Court pointed out that, in all of those cases, it upheld the differential treatment because "the primary legislative purpose of the classification was *other than economic.*" *Verzi*, 333 Md. at 422 (emphasis added). In other words, although a law may incidentally affect competition in furtherance of a legitimate non-economic purpose, suppressing

competition may not be the purpose itself. *See also Salisbury Beauty Schs. v. State Bd. of Cosmetologists*, 268 Md. 32, 59–60 (1973) (upholding restriction on beauty schools charging above-cost where purpose was to ensure that beauty schools effectively trained their students, not to financially benefit licensed cosmetologists).

Second, other Court of Appeals decisions demonstrate that a blatantly anticompetitive rule cannot be saved by refocusing, post-hoc, on the supposed public benefits it engenders. In *Waldron*, for instance, the Court of Appeals evaluated a statute mandating that retired judges lose their pension if they practice law for compensation. 289 Md. 683, 682 (1981). Although the statute reduced competition in the legal field, the Attorney General argued that the restriction saved the public money. *Id*. at 724. But the Court of Appeals rejected that argument, noting that "[a]lmost every enactment, no matter how invidious, can be justified on the grounds of fiscal restraint." *Id*.; *see also Kirsch v. Prince George's Cty.*, 331 Md. 89, 102 (1993) ("If we accept the State's view here, then any discriminatory tax would be valid if the State could show it reasonably was intended to benefit domestic business." (quoting *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 882 (1985))).

Indeed, if reciting protectionism's purported benefits could save an ordinance like the 300-foot rule, then the Court of Appeals would never invalidate an economic regulation, no matter how blatantly discriminatory. Consider, for example, *Verzi*. If pointing to a discriminatory restriction's purported benefits to the public could save it, then Baltimore County could have saved its towing rule by arguing that discriminating against certain disfavored businesses helped promote the county's "general welfare."

Just like the City points to the specter of declining tax revenue and empty storefronts, so Baltimore County could have said its rule helped ensure that towing jobs were plentiful, storage lots remained highly utilized, and tax coffers remained full. Havre de Grace likewise could have defended its prohibition on nonresidents driving a taxicab on the grounds that such protectionism furthered the city's "general welfare" by promoting jobs and increasing local tax revenue. *See Mayor & City Council of Havre de Grace v. Johnson*, 143 Md. 601 (1923). But, of course, in both instances the Court of Appeals struck the anticompetitive rule down. *Verzi*, 333 Md. at 422, 426–28; *Johnson*, 143 Md. at 601.

In the end, the 300-foot rule significantly restricts Plaintiffs' right to practice their trade. And it imposes that restriction in order to financially benefit Plaintiffs' perceived brick-and-mortar competitors. Simply put, such protectionism does not amount to a legitimate government interest under the Maryland Constitution, whether as an end in itself or as a means to promote the "general welfare." The 300-foot rule therefore violates the due process and equal protection guarantees of Article 24, and this Court should reverse the trial court's contrary ruling on this point.[1]

[1] Baltimore's argument—that it may regulate one segment of an industry to benefit another—becomes even more concerning when taken to its logical endpoint. For example, under the reasoning of Baltimore's general welfare argument, it could prohibit Amazon from delivering packages to anyone in the city so as to promote Baltimore's retail businesses. Or if Baltimore thought eliminating small businesses in favor of high-end big box stores would increase its tax base and employment, it could do that as well. While these examples might seem absurd, this is precisely the sort of protectionism in which the City is engaging here.

B. THE TRIAL COURT'S DECISION THAT BALTIMORE COULD LEGITIMATELY DISCRIMINATE AGAINST VENDORS MAKES MARYLAND A CONSTITUTIONAL OUTLIER.

In holding that the 300-foot rule did not violate Plaintiffs' Article 24 rights, the trial court broke with a long line of Maryland precedent that demonstrates that blatant economic discrimination is illegitimate. Its decision also conflicts with decisions by the highest courts of two nearby states that invalidated ordinances that suppressed vending competition for the benefit of brick-and-mortar entities.

The New York Court of Appeals, for example, has squarely rejected the idea that the government may blatantly discriminate against vendors because brick-and-mortar entities may pay more in taxes. In *Good Humor Corp. v. City of New York*, it 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." 290 N.Y. 312, 317 (1943).[2] Applying this principle, New York courts have invalidated a rule requiring vendors to stay 100 feet away from brick-and-mortar businesses selling similar goods (or 250 feet away if the business complained). *Duchein v. Lindsay*, 345 N.Y.S.2d 53, 55–57 (App. Div. 1973) (per curiam).

The New Jersey Supreme Court likewise has rejected the idea that cities may discriminate against vendors in order to financially benefit brick-and-mortar businesses.

[2] And of course, vendors in Baltimore do pay taxes and license fees to Baltimore, as well as rent or own property at which they service their vending vehicles. E.152–54 (Trial Tr. Vol. II 12:13–14:4 (discussing Share Kitchen, a commissary and shared cooking space that Ms. McGowan runs for mobile vendors)).

In *Fanelli v. City of Trenton*, 135 N.J. 582, 589 (1994), it stated that "a municipal prohibition on peddling that serves no purpose other than to protect local businesses from competition is an invalid exercise of a municipality's police power." *See also Moyant v. Borough of Paramus*, 30 N.J. 528, 545 (1959) (holding in vending case that police "power cannot . . . be exercised for a purpose to shield the local shopkeepers from lawful competition" (internal quotations and citations omitted)). In applying that longstanding principle, New Jersey courts struck down a law preventing vending within 200 feet of businesses with similar merchandise, declaring that "a regulation patently for the benefit of local shopkeepers to prevent competition . . . will not be permitted under the mask of a police regulation." *Mister Softee v. Mayor & Council of the City of Hoboken*, 77 N.J. Super. 354, 366–67 (Super. Ct. Law Div. 1962), *overruled on other grounds by Brown v. City of Newark*, 113 N.J. 565, 578 (1989).

The opinion below stands in tension with these decisions. It finds no support in Maryland case law. And, as discussed below, the 300-foot rule's terms, scope, and the method by which it is interpreted and enforced violate Plaintiffs' rights under Article 24.

II. THE 300-FOOT RULE IS UNCONSTITUTIONAL UNDER MARYLAND'S REAL-AND-SUBSTANTIAL TEST.

As the trial court recognized, and as the maps produced by Plaintiffs demonstrate, Baltimore's 300-foot rule greatly restricted Pizza di Joey and Madame BBQ's rights to practice their trade. It prevented them from operating in viable public and private-property locations throughout Baltimore; indeed, it even caused Madame BBQ to eschew

operating in her own parking lot. And both Plaintiffs testified that the rule caused them to largely stop operating in Baltimore altogether.

As Plaintiffs demonstrated in Part I, this burdensome restriction violates Article 24 because its stated purpose—to restrict competition so as to enrich a preferred private constituency—is illegitimate. But Baltimore claims that its blatant discrimination in favor of restaurants is meant not to enrich restaurants so much as safeguard the economic fortunes of the entire city. Even were it not just a post-hoc imagination, and the Maryland Constitution tolerated the use of blatantly discriminatory laws for such ends, the 300-foot rule still fails constitutional muster under Maryland's rational-basis test, also known as the real-and-substantial test. In Section A, Plaintiffs demonstrate that the Court of Appeals has held that when a law imposes a substantial restriction on one's right to practice his or her trade, the real-and-substantial test demands that that law bear a close fit to the government's purported interest. And in Section B, Plaintiffs demonstrate that the 300-foot rule fails real-and-substantial review for three distinct reasons: it rests on a string of increasingly implausible suppositions, it arbitrarily exempts some food trucks that would presumably implicate Baltimore's "general welfare" interest while restricting others that do not, and it is so vaguely interpreted and enforced that it cannot be reasonably viewed as furthering *any* legitimate interest.

A. AS EXPLAINED BY THE COURT OF APPEALS, THE RATIONAL-BASIS TEST IS A MEANINGFUL STANDARD OF REVIEW.

The history of Maryland jurisprudence is replete with instances where the Court of Appeals has invalidated laws that prohibit or severely restrict one's constitutional right to

practice his or her trade. *See, e.g.*, *Verzi v. Baltimore Cty.*, 333 Md. 411, 427–28 (1994); *St. Bd. of Barber Exam'rs. v. Kuhn*, 270 Md. 496, 509–10 (1973); *Bruce v. Dir., Dept. of Chesapeake Bay Affairs*, 261 Md. 585, 600 (1971); *Md. Coal & Realty Co. v. Bureau of Mines*, 193 Md. 627, 643 (1949); *Dasch v. Jackson*, 170 Md. 251, 268 (1936); *Mayor & City Council of Havre de Grace v. Johnson*, 143 Md. 601 (1923). This, as best explained by *Attorney General v. Waldron*, is because Maryland courts closely scrutinize laws that, like the 300-foot rule, "impinge[] on privileges cherished by our citizens." 289 Md. 683, 715 (1981).

The Court's task in *Waldron* was to evaluate the constitutionality of a restriction that prohibited retired judges who took a pension from practicing law for compensation. Just like the trial court found that the 300-foot rule shut Plaintiffs out of Baltimore's marketplace, the Court of Appeals found that the "prohibition against the practice of law [by retired judges] . . . flatly denies one the right to engage in the practice of the profession for which he is otherwise qualified." *Id*. at 717. It held that because "[t]he right to engage in a chosen calling . . . has long been recognized to enjoy a preferred status," *id*. at 718, its review "should engage in a review consonant with the importance of the personal right involved." *Id*. at 713.

That review is far more probing than the cursory examination called for by the City and employed by the trial court, as it would "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*. Such serious examination means the restriction must exist "for the protection of some

real and substantial public interest." *Id*. at 719. Moreover, the Court must conclude that there is a close "fit between the legislative ends and the means chosen to accomplish those goals." *Id*. at 713. The restriction must neither leave "a significant measure of similarly situated persons unaffected by the enactment," *id*., nor sweep into its scope "individuals . . . who are not afflicted with the evil the statute seeks to remedy." *Id*. at 713–14.

The Court of Appeals, applying these principles, concluded that restricting judicial pensioners from the paid practice of law violated the Maryland Constitution. It held that one of the government's claims—that denying former judges their pensions if they practice law for compensation would save the state money—was too all-consuming to credit. *Id*. at 724. And when the state argued that the restriction avoided ethical problems caused by former judges appearing before current ones, the Court examined the evidence and found the restriction to be both under- and overinclusive. *Id*. at 725–27. It was underinclusive, in part, because former judges could practice law and appear in court so long as they did so without compensation. *Id*. at 725. And it was overinclusive in that it forbade former judges from practicing law for pay even when their practice would not involve any interactions with the judiciary. *Id*. at 726–27. Because the law "visit[ed] "differential treatment on a chosen few bearing no real and substantial relation" to the state's purported interest, it violated Article 24. *Id*. at 728.

B. UNDER A PROPER APPLICATION OF THE REAL-AND-SUBSTANTIAL TEST, THE 300-FOOT RULE IS UNCONSTITUTIONAL.

The trial court failed to perform the inquiry *Waldron* demands. Had it done so, it would have concluded that the 300-foot rule violates Article 24 for the same reasons that the Court of Appeals invalidated the state's restriction on retired judges. First, the City's claim that the rule guards against declining tax revenues and empty storefronts rests on too implausible a series of suppositions and inferences to abide. Second, the rule lacks a close fit to the City's "general welfare" interest in that it, like the law in *Waldron*, is both under- and overinclusive. And lastly, because the rule's interpretation and enforcement is vague and arbitrary, it cannot be reasonably seen as furthering any legitimate interest.

1. The City's "General Welfare" Justification Is Too Speculative to Credit.

To be clear, Baltimore did not actually argue that food trucks pose a direct or meaningful threat to the *public*. Nor could it have. Rather, Baltimore argued that food trucks pose a threat to *restaurants*. To claim that this threat imperiled all of Baltimore, the City had to suggest that mobile vending competition would, if left unchecked, result in empty commercial corridors, significant job losses, and a deteriorated tax base. The trial court credited this fact-free argument in upholding the rule.

As *Waldron*, *Verzi*, and other cases demonstrate, the trial court erred in upholding the rule on such a thin reed. As the Court of Appeals held in *Waldron*, courts should not "not ride the vast range of conceivable purposes" when a legislative classification like the 300-foot rule impinges on "important private rights" like the right to practice one's trade.

289 Md. at 722. And in *Verzi*, the Court of Appeals demonstrated how rational-basis review in Maryland requires serious scrutiny of the government's post-hoc justifications. 333 Md. at 419.

Waldron shows how Maryland courts analyze restrictions like the 300-foot rule. In that case, the state of Maryland argued that eliminating pensions for former judges helped save the state money. 289 Md. at 724. But the Court of Appeals rejected such a generic interest, holding that "[w]e refuse to accept this type of post hoc rationalization . . . for to do so would represent virtual abdication from our duty to exercise judicial review. Almost every enactment, no matter how invidious, can be justified on the grounds of fiscal restraint." *Id*. In other words, crediting such a standard would eviscerate the protections of Article 24, and the fact that Maryland's restriction would admittedly save the public fisc was insufficient grounds to restrict Waldron's right to work. *See id.*

Baltimore's justification for the 300-foot rule is little different from the fiscal argument the Court of Appeals rejected in *Waldron*. And, when looking at the facts, it rests on even weaker footing. Everyone readily admitted that the restriction in *Waldron* had, in fact, caused seven former judges to disclaim their pensions. *Id*. at 724. By contrast, Baltimore's argument relies on a series of inferences: First, it rests on the notion that a brick-and-mortar business, which has a host of unique advantages over vendors—including indoor seating, climate control, and alcohol sales—would be financially harmed if mobile vendors selling similar items operated nearby. Second, it presumes that such competition would be so financially harmful that it would cause

brick-and-mortar establishments to go out of business. And lastly, it requires a court to further assume that such occurrences would reoccur so frequently—and that other, more competitive businesses would not enter the market to replace those that failed—such that economic depression and a reduced tax base were the result.

This chain of suppositions requires a degree of speculation that the real-and-substantial test does not abide. *Verzi* demonstrates why. In that case, the government posited that its towing rule may decrease traffic congestion and protect against fraud. *Verzi*, 333 Md. at 425. But rather than blindly accepting these justifications, the Court of Appeals seriously analyzed the reasonableness of each and found both wanting. As to congestion, the Court found that Mr. Verzi was in fact closer to his preferred service area than in-county towers. *Id*. at 425–26. And with regard to fraud, the Court noted that Baltimore County had a comprehensive regulatory scheme in place to deal with such concerns. *Id*. at 426.

Placed under similar scrutiny, Baltimore's justification for the 300-foot rule fail just like the county's justifications did in *Verzi*. Baltimore's ruminations about decimated city finances and shuttered storefronts are not reasonably conceivable as a logical matter. No evidence suggested that a similar phenomenon had either occurred elsewhere or was likely to occur in Baltimore. Indeed, there is no reason to expect such an outcome. Neither of the two largest cities near Baltimore—Washington D.C. and

Philadelphia—has a "proximity restriction" like the 300-foot rule on their law books. Yet both cities continue to have vibrant restaurant industries.[3]

The real-and-substantial test does not empower courts to stack inference upon inference just to accept a scenario in which the government's speculative rationale *might* be true. Yet, once Baltimore's cascade of inferences is stripped away, all that is left is the City's position, wholly unsupported by logic or evidence, that the 300-foot rule might somehow avert disaster. In accepting this assertion at face value, the trial court deviated from the fact-based review required by the real-and-substantial test.

2. The 300-Foot Rule Fails Under the Real-and-Substantial Test Because Its Under- and Overinclusiveness Demonstrate Its Poor Fit.

Even if Baltimore's parade of horribles was reasonably conceivable, it would still not justify the 300-foot rule. That is because, as *Waldron* commands, the real-and-substantial test does not tolerate a "loose fit between the legislative ends and the means chosen to accomplish those goals." 289 Md. at 713. And an examination of the rule reveals that it, like the restriction invalidated in *Waldron*, is both under- and over-inclusive.

Baltimore claims that the 300-foot rule suppresses competition between mobile vendors and brick-and-mortar eateries so that the latter do not suffer financially. Of

[3] *See, e.g.*, Andrew Knowlton, "Washington D.C. Is the Restaurant City of the Year," *Bon Appétit*, Aug. 10, 2016, https://www.bonappetit.com/story/washington-dc-restaurant-city-of-the-year; Ashley Primis, "Philly's Third Restaurant Renaissance Has Arrived," *Phila. Mag.*, Jan. 6, 2018, https://www.phillymag.com/foobooz/2018/01/06/philadelphia-restaurant-renaissance/.

course, such protectionist practices violate the Maryland Constitution. But moreover, the rule is just as underinclusive as the prohibition in *Waldron*. As the Court of Appeals recognized in that case, if the concern was having retired judges appear before their former colleagues, then it made no sense to allow such interactions so long as the retired judge was not compensated. 289 Md. at 725. Here, Baltimore's reasoning suggests that food trucks of all stripes pose a competitive threat. Yet while the rule blocked Pizza di Joey from parking within 300 feet of a pizzeria, MindGrub Café— not to mention a taco, burger, or Asian truck—could have parked *immediately* outside. Prohibiting only those trucks that sell the same food as nearby restaurants, while allowing similarly situated trucks that would presumably raise identical concerns, makes little sense.

Moreover, Baltimore's 300-foot rule is fatally overinclusive. In *Waldron*, the Court of Appeals noted that Maryland's retiree rule prevented former judges "who seldom, if ever, see the inside of a courtroom" from practicing law, 289 Md. at 726, even though they would not implicate Maryland's supposed ethical concerns. Likewise, Baltimore's rule prohibits a vendor from even *parking* his or her truck within 300 feet of a business that happens to sell similar food. This means the rule would block a food truck from providing prepaid catering services, or from giving food away at a charitable event, neither of which implicates Baltimore's competitive concerns. Because Baltimore has "drawn distinctions between persons which simply bear no relationship to the provision's objective," *id*. at 727, the rule fails Maryland's real-and-substantial test.

3. The 300-foot Rule Violates the Real-and-Substantial Test Because Its Terms Are Vague and Arbitrarily Enforced.

As demonstrated above, Baltimore's 300-foot rule lacks any real-and-substantial connection to Baltimore's professed "general welfare" interest both because mobile vending competition cannot be reasonably seen as imperiling Baltimore's retail economy and because it is impermissibly under- and overinclusive. But beyond those flaws, the vague and inconsistent manner Baltimore officials interpreted and enforced the rule means that, in practice, it could not be reasonably viewed as materially furthering *any* legitimate interest.

The constitutionality of an ordinance turns not just on its form, but on its practical effect. *See, e.g., Frey v. Comptroller of Treasury*, 422 Md. 111, 170 (2011) ("To determine whether the law in question effectuates the requisite equal treatment, we do not examine merely the form of the law in question but instead . . . we consider whether the practical operation and effect of the challenged tax."). In other words, what matters is whether a law's application violates the constitution in the real world. And here, two aspects of Baltimore's rule causes that real-world application to be fatally flawed:

(1) Baltimore has no consistent interpretation of the 300-foot rule's terms; and

(2) Baltimore's enforcement of the rule lacks is entirely subjective.

As the trial court correctly found, the rule's terms are ambiguous, with phrases like "primarily engaged in," "same type," "food product," "merchandise," or "service" left undefined. Plaintiffs repeatedly asked Baltimore what those terms meant, but Baltimore would only say that they should be read with a "commonsense" understanding.

E.500 (Def.'s Resp. to Interrog. Nos. 4 & 5); E.557 (Lima Dep. 19:13–20:3); E.598 (*id*. at 182:1–7); E.604 (id. at 207:4–10); E.714 (Montgomery Dep. Vol. II 41:4–9); E.743 (*id*. at 156:4–15); E.749–50 (*id*. at 181:18–182:20).[4] But when Plaintiffs asked what that "commonsense" understanding actually was, Baltimore refused to clarify further. In the end, Baltimore admitted these terms lacked any agreed, objective meaning, with the result that each official could decide for his or herself what they prohibited. E.745 (Montgomery Dep. Vol. II 163:7–13); E.749 (*id*. at 181:18–182:20); E.598 (Lima Dep. 182:1–7); E.600 (*id*. at 191:5–10).

It is therefore unsurprising that Baltimore admitted that this lack of common standards meant that different departments, in fact, had interpreted and enforced the rule however they saw fit. As a result, Plaintiffs' rights to ply their trade under Article 24 largely turned on which Baltimore official happened to cross their path. *See* E.738 (Montgomery Dep. Vol. II 137:20–138:10).

Such an arbitrary scheme results in a 300-foot rule that, when viewed as a practical matter, does not further any legitimate government interest in a real-and-substantial manner. The lack of uniform standards means that Plaintiffs and other mobile vendors lack any fair notice about where they can and cannot operate. Moreover, because enforcement is wholly haphazard, the rule in essence calls upon each enforcement agent to act as a law unto him or herself. This empowers officials to enforce the rule in a manner contrary to Baltimore's stated policy objectives. And it allows those

[4] Baltimore could not even define what the rule meant by "park." E.590–91 (Lima Dep. 152:15–155:5).

officials to take impermissible factors into consideration when deciding who to punish and who to ignore. The practical effect of this standardless regime is not that Plaintiffs and other vendors would comport their behavior to align with Baltimore's stated policy goals, but instead to discourage vendors from operating in Baltimore whatsoever. Indeed, as both Plaintiffs testified, the rule's indeterminacy was a large reason each chose to largely stop operating in Baltimore. E.75; E.159–91.

This confusion underscores the arbitrary nature of the 300-foot rule. Although the trial court was correct in concluding that the law was unconstitutionally vague, it erred in failing to recognize that this indeterminacy meant that the rule's practical application violated Plaintiffs' rights under Article 24.

CONCLUSION

Baltimore's 300-foot rule violates Plaintiffs' rights to equal protection and substantive due process under Article 24. It is nothing more than economic protectionism that is per se unconstitutional under Article 24's well-established jurisprudence. And even if such protectionism were legitimate, the rule fails under Maryland's real-and-substantial test. Accordingly, this Court should grant Appellants/Cross-Appellees' request for a declaratory judgment, state that the 300-foot rule fails to satisfy the guarantees of Article 24 of the Maryland Declaration of Rights, and maintain the Circuit Court's entry of a permanent injunction.

Respectfully submitted this 28th day of June, 2018.

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Statement as to Typeface: The font used in this Brief is Times New Roman and the type size is 13 point.

TEXT OF CITED STATUTES & RULES

Maryland Constitution, Declaration of Rights, Article 24

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.

Baltimore City Code, Article 15, § 17–33: Mobile vendors – Near retail store

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, Article 15, § 17–42: Criminal Penalties

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.

Baltimore City Code, Article 15, § 17–44: Revocations and suspensions

(a) Authorized suspension or revocation.

The Department of General Services may suspend or revoke a license if the licensee violates any provision of:

(1) this subtitle;
(2) the rules and regulations adopted under this subtitle; or
(3) any other applicable law of the State or City.

(b) Mandatory revocation.

On a street vendor's 3rd violation of any provision of Part III of this subtitle within any 1-year period, the Department must revoke that street vendor's license.

(c) Application following revocation.

If a license is revoked, the former licensee may not apply for a new license until at least 1 year from the date of revocation.

(d) Stay of operations.

The Department's issuance of a denial, suspension, or revocation of a license is effective immediately, and any operations previously allowed by the denied, suspended, or revoked license must cease immediately and may not resume until the Board of Municipal and Zoning Appeals issues a written decision reversing the Department's decision.

Maryland Rules, Rule 8–131: Scope of Review

(c) Action Tried Without a Jury. When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 9,042 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.

Robert P. Frommer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2018, two copies of the Brief of Appellants/Cross-Appellees Pizza Di Joey, LLC and Madame BBQ, LLC and Record Extract were served, via UPS Ground Transportation, to:

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