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)

REPLY BRIEF AND APPENDIX OF APPELLANTS/CROSS-APPELLEES

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INTRODUCTION

In their opening brief, Plaintiffs demonstrated that Baltimore's 300-foot rule violates Article 24 of the Maryland Declaration of Rights. An unusual restriction that prevented Plaintiffs and other vendors from operating in large swaths of the city, the rule worked a significant infringement on Plaintiffs' right to practice their trade.[1] It did this, as the City admits, to shield brick-and-mortar restaurants from competition. The trial court invalidated the rule because it was unconstitutionally vague. But it should have also declared that the rule violates Article 24 since, under longstanding precedent, the City's anti-competitive goal violates the Maryland Constitution, as does the City's implausible attempt to claim the rule furthers the "public welfare."

The City's response brief attempts to reframe its motivation yet again, now as the "regulation of unfair competition," but this, along with the City's argument that the rule preserves the very fiber of Baltimore and its people, is fantasy. It lays out a string of suppositions—that vending competition will shutter restaurants, leading to empty storefronts and a depressed tax base—that rest on nothing but implausible conjecture. And this conjecture stands contrary to the real-world experience of numerous cities, which, despite not having any sort of proximity restriction like the 300-foot rule, possess both vibrant vending ***and*** restaurant industries.

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[1] As written, a mobile food vendor could not operate within 300 feet of a brick-and-mortar restaurant that was "primarily engaged in selling the same type of food product." Baltimore City Code, art. 15, § 17-33.

As cases like *Waldron*, *Verzi*, and *Kuhn* demonstrate, under Article 24 courts do not blindly credit speculation and conjecture. They hold that the government cannot act out of a base desire to benefit one group by harming another, and any benefits that supposedly flow from such anti-competitive animus cannot save it. Accordingly, this Court should declare that the 300-foot rule violates Plaintiffs' rights to due process and equal protection.

The City has appealed two separate issues. First, it complains that the trial court should not have declared the 300-foot rule unconstitutionally vague. But the evidence considered by the trial court showed that the rule's terms had no core meaning, even among City officials, who frequently disagreed as to their scope. The City claims that the trial court lacked jurisdiction to conduct that vagueness inquiry, but numerous Maryland Court of Appeals and United States Supreme Court decisions have entertained pre-enforcement vagueness challenges and even invalidated statutes on their face when they infringed on non-free speech constitutional rights. The City asks this Court to rewrite the rule's terms by including a "reasonable person" standard, but as the trial court recognized, that would fix nothing when even the City's Rule 2-412 designees admitted they had no objective understanding of either term.

The City also appeals the trial court's determination that Plaintiffs' constitutional challenge is ripe. This, too, lacks merit. As the trial court found, violating the 300-foot rule was a crime. The City enforced that rule by telling vendors to move or be cited. Pizza di Joey experienced enforcement under the rule firsthand, and both Pizza di Joey and Madame BBQ greatly altered their business plans to avoid violating it. Joey Vanoni,

Plaintiff Pizza di Joey's owner, largely eschewed operating in Baltimore due to the rule. And now, because the 300-foot rule has been enjoined, both he and Madame BBQ can operate their respective food trucks at previously inaccessible locations. Far from the "academic exercise" the City decries, this lawsuit has had important, real-world effects both for Plaintiffs and Baltimore's larger vending community.

I. THIS COURT SHOULD REVERSE IN PART AND HOLD THAT THE 300-FOOT RULE VIOLATES ARTICLE 24 OF THE MARYLAND DECLARATION OF RIGHTS.

In their opening brief, Plaintiffs Pizza di Joey and Madame BBQ explained why the trial court erred in holding that Baltimore's 300-foot rule did not violate their rights to due process and equal protection under Article 24. They demonstrated that, no matter how the government characterizes its interest, Maryland courts had never upheld a law that, like the 300-foot rule, expressly blocked competition between two businesses to improve one competitor's financial position. This keeps with the holdings of other state courts, which have invalidated similar proximity restrictions. And Plaintiffs showed that even if such protectionism could sometimes be seen as legitimate—which it cannot—the 300-foot rule fails under Maryland's real-and-substantial test because (1) the City's "general welfare" interest is too speculative to credit, (2) the rule is fatally over- and under-inclusive, and (3) the inconsistent manner in which the City interprets and enforces the rule means it furthers no legitimate interest.

In response, the City attempts to avoid any meaningful scrutiny of its anti-competitive ordinance. Despite on-point cases like *Kuhn* and *Verzi*, it suggests that it may label whatever competition it does not like as "unfair" and suppress it. It claims that

only the most fleeting of judicial scrutiny governs its actions, going so far as to forego any substantive argument about how its rule survives the real-and-substantial standard that governs this appeal. And it argues that this Court is duty-bound to accept its post-hoc "general welfare" justification, even though that claim lacks any basis in reality and is belied by the real-world experiences of other cities throughout the country.

The City is wrong. First, none of the cases the City cites, and no Maryland case that Plaintiffs can find, upholds a law with the express purpose of suppressing competition between two segments of the same industry. Such actions are always constitutionally impermissible, no matter whether judged under strict scrutiny, rational basis, or any other standard of review. Second, despite the City's claim that the 300-foot rule works only a "minor burden," the trial court correctly found that the real-and-substantial test applies because the rule's practical effect is to ban food trucks from hundreds of viable locations throughout the city. The City makes no real attempt to argue why it prevails under that test. And third, even under the "minimal" rational basis standard argued for by the City, the 300-foot rule fails constitutional muster, both because the City's post-hoc "general welfare" justification is not reasonably conceivable and because, as Plaintiffs demonstrated in their opening brief, the 300-foot rule as interpreted and enforced is not a reasonable means of supporting the public's welfare. Accordingly, although the trial court correctly invalidated the 300-foot rule for being unconstitutionally vague, this Court should also declare that the rule violates Plaintiffs' rights under Article 24.

A. THE MARYLAND CONSTITUTION DOES NOT ABIDE BLATANT DISCRIMINATION UNDER ANY STANDARD OF REVIEW, NO MATTER HOW THAT DISCRIMINATION IS DESCRIBED.

The City repeatedly admitted, both in discovery and at trial, that its 300-foot rule was designed to protect brick-and-mortar restaurants at the expense of mobile vendors. *See*, *e.g.*, E.719 (Ex. 32, 61:17–21 (agreeing that "the 300-foot proximity ban is designed to address competition that mobile vendors create for brick and mortar retail business")). Plaintiffs' opening brief showed that, no matter the operative standard of review, Maryland courts have repeatedly rejected laws that discriminate against one competitor for the express purpose of benefitting another. Brief of Appellants/Cross-Appellees ("Br.") 17–22. This blanket rejection has occurred no matter how the government tried to justify its anti-competitive animus.

The City's opposition brief ("Opp'n") deliberately misses the forest for the trees. *Verzi v. Baltimore County* expressly states that attempting to restrict competition to benefit a preferred group "is wholly unrelated to any legitimate government objective," 333 Md. 411, 427 (1994)—a principle Maryland courts have repeatedly announced and defended for decades. *See, e.g.*, *Havre de Grace v. Johnson*, 143 Md. 601, 609 (1923) (invalidating ordinance restricting taxicab operations to only town residents as "discriminatory and unreasonable"). The City ignores that broader point, instead arguing that neither *Verzi*, *Kuhn*, *Johnson*, nor any other case suggests that "the regulation of economic competition i[s] not a legitimate government interest." Opp'n 24.

But *Verzi*, *Kuhn*, and *Johnson* are emblematic of Maryland's broad prohibition on anti-competitive animus. In *Verzi*, for instance, Baltimore County argued that its blatant

discrimination against out-of-county tow-truck operators furthered very general interests in "decreas[ing] traffic congestion and delays in the roadways." 333 Md. at 425. The Court of Appeals saw through that charade, holding that such general assertions "are spurious" where "the 'more reasonable and probable view . . . [is] that the classification was intended to confer the monopoly of a profitable business.'" *Id*. at 426–27 (quoting *Johnson*, 143 Md. at 608). This, said the Court, was improper, since "such distinctions, [which] in effect, confer[] the monopoly of a profitable business upon certain . . . businesses . . . run afoul of the guarantee of equal protection of the laws." *Id*. at 427–28. Likewise, in *Maryland State Board of Barber Examiners v. Kuhn*, the Court of Appeals invalidated a restriction that protected barbers from competition by prohibiting cosmetologists from cutting men's hair, declaring that, given such motivations, "it cannot be seriously argued that . . . the statute bears a real and substantial relation to [a legitimate government] objective." 270 Md. 496, 512 (1973). And in *Johnson*, the Court of Appeals took a dim view of Havre de Grace's taxicab ordinance, holding that the "more reasonable and probable view would be that it was intended to confer the monopoly of a profitable business upon residents of the town." 143 Md. at 608.

The City also tries to distinguish this string of unfavorable cases by asserting that "[m]any of these cases, including *Verzi*," were only constitutionally problematic because they "involved . . . the use of suspect classifications in the course of such regulation." Opp'n 26. That is simply wrong. *See, e.g.*, *Davidson v. Miller*, 276 Md. 54, 68 (1975) (collecting cases identifying that suspect classes are generally those based on race, nationality, and alienage). *Verzi*, for example, involves a distinction based on business

residency, which is not a "suspect" classification. And the Court's opinion in *Kuhn* expressly refutes the City's characterization of that case, explicitly holding that its decision addressed economic protectionism, *not* gender discrimination. *Compare* Opp'n 26 (arguing that *Kuhn* held there was a "discriminatory distinction *only because* the law at issue created a discriminatory, gender-based "'suspect class'") *with Kuhn*, 270 Md. at 506–07 ("*[T]his is not a case of discrimination based on sex*. . . Thus, the statutory classification under attack here is not subjected to the 'stricter scrutiny' which must be exercised in cases involving 'suspect classifications.'") (emphasis added).

Faced with these difficulties, the City attempts to reframe its anti-competitive animus as "preventing unfair competition" and "protecting the general welfare." But neither gambit is successful. First, despite what the City would have this Court believe, "unfair competition" is an actual term in the law that means something other than "competition that the City does not like." Instead, as the Court of Appeals has said, "the doctrine of unfair competition . . . was to prevent dealings based on deceit and dishonesty." *Baltimore Bedding Corp. v. Moses*, 182 Md. 229, 236 (1943). For instance, "[f]alse and misleading advertising . . . amounts to unfair competition." *Id*. at 242. So does misrepresenting who made an item, *Edmondson Vill. Theatre v. Einbinder*, 208 Md. 38, 44 (1955), or making "sales below cost with intent to injure competitors and to destroy competition." *Blum v. Engelman*, 190 Md. 109, 115 (1948).

None of those situations exists here. No one suggests that food trucks are being dishonest, passing off others' products as their own, or selling their wares below cost. Instead, the City's argument is that letting food trucks compete with restaurants is unfair

simply because the former may have lower costs than the latter. But in virtually every industry, participants with higher and lower costs compete with one another. To say that the City could blatantly discriminate against lower-cost operators in any such instance would turn the doctrine of "unfair competition" on its head. After all, as *Blum* makes clear, the whole point of the "unfair competition" doctrine is to *preserve* market competition, not stifle it. *Id*. Moreover, as the City's expert admitted, suppressing competition hurts consumers, who suffer when they have fewer options from which to choose. E.262 (24:5-7, 14-16 ("[P]eople want variety . . . We want variety . . . They want variety. And . . . it's probably healthy for them to have variety. . . .")).

The City's "public welfare" argument suffers from the same flaw. As discussed in more detail below, this theory rests on nothing more than conjecture from the City's expert witness, conjecture belied by the real-world experience of numerous other cities. And while that expert's testimony at trial tends to undermine the City's "general welfare" assertion,[2] it is ultimately irrelevant. Under Maryland precedent, the City may not regulate—under the pretense of ensuring fair play or anything else—when its express, stated goal is to confer a benefit to a preferred segment of a given industry. *See Aspen Hill Venture v. Montgomery Cty. Council*, 265 Md. 303, 314 n.3 (1972) ("When economic impact standing alone becomes a sufficient basis for such discriminatory

[2] The City's expert, applied economist Anirban Basu, referred to his own experience when testifying that anticompetitive animus, rather than a desire to promote competition or the general welfare, explains restrictions like the 300-foot rule. E.270 (32:8-13 ("I certainly don't want other economic consultancies opening up . . . in Baltimore . . . I'm supposed to say I want it because competition brings out the best in me**. I don't want the best of me. I don't want to have to compete."**)) (emphasis added).

legislation it will mark the extinction of the last vestige of the economic system under which this government operates.") (internal quotation marks and citation omitted).

The City asks this Court to ignore *Verzi*, *Kuhn*, and the entire body of case law cited in Plaintiffs' opening brief in favor of one case, *Salisbury Beauty Schools v. State Board of Cosmetologists*, 268 Md. 32 (1973). But the purpose of the regulation in *Salisbury*, which prohibited beauty schools from charging above-cost, was not to affect competition between cosmetology schools and beauty salons. *Id*. at 50, 54–55, 59. Instead, the restriction was meant to ensure that beauty schools effectively trained their students. *Id*. at 50. The concern was that, should clients pay more than the cost of materials, instructors would be fearful of criticizing a student's work in front of the client, thereby impairing the school's educational mission. *Id*. Because the legislature sought to address only this specific concern—and because the Court recognized that the law, unlike the 300-foot rule, only had an incidental "effect of . . . limit[ing] competition," 268 Md. at 59—it is no wonder why, in the same year the Court upheld that educational regulation, it struck down the blatantly discriminatory restriction at play in *Kuhn*.

This Court should do the same here. As the City has repeatedly admitted, protectionism is not a secondary *effect* of the 300-foot rule; it is the *goal*. *Cf. Verzi*, 333 Md. at 422 (distinguishing cases wherein challenged laws were upheld because "the primary legislative purpose of the classification was *other than economic*") (emphasis added). Under longstanding Maryland case law, that difference is dispositive, and the trial court erred in failing to invalidate the 300-foot rule on that basis.

B. EVEN IF THE 300-FOOT RULE'S ANTI-COMPETITIVE PURPOSE IS NOT CONSTITUTIONALLY DISQUALIFYING, IT FAILS UNDER MARYLAND'S REAL-AND-SUBSTANTIAL TEST.

Plaintiffs explained in their opening brief how the 300-foot rule effectively banned them from operating in Baltimore. Br. 10–15. Based on evidence credited by the trial court, each Plaintiff showed that the rule prevented it from operating in hundreds of viable and legal vending locations across the city, even pushing Plaintiffs entirely out of certain neighborhoods. Upon weighing that evidence, the trial court held that "real and substantial" review was appropriate, since the rule greatly restricted Plaintiffs' right to practice their trade. E.804 (Memorandum Opinion of Karen C. Friedman ("Opinion") 9 ("Therefore, the right to engage in a chosen calling enjoys a more stringent standard of review.") (citing *Attorney Gen. of Md. v. Waldron*, 289 Md. 683, 720 (1981) (holding that the state may not enact "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"))).

In response, the City claims that only the most deferential standard of review, rational basis, should govern this case. As Plaintiffs demonstrate below, *infra* Part I.C, they prevail even under that standard. But real-and-substantial review is appropriate here: In Section 1, Plaintiffs explain that the 300-foot rule is not "a minimal burden," as the City describes it, but an effective ban on Plaintiffs operating throughout much of Baltimore. As such, it works a significant infringement on Plaintiffs' constitutional rights and should be judged under the standard laid out in *Waldron*. In Section 2, Plaintiffs

discuss the City's failure to meaningfully respond to their arguments about why the rule fails real-and-substantial review. This Court, applying that standard, should reverse.

1. Because the 300-Foot Rule Worked a Significant Restriction on Plaintiffs' Right to Practice Their Trade, *Waldron*'s Real-and-Substantial Review Applies.

Plaintiffs presented significant evidence about how the rule prevented them from operating in numerous neighborhoods throughout Baltimore, including the words of the City itself. *See* E.722 (Ex. 32, 72:12–73:11 (stating that the 300-foot rule makes it difficult to operate in the downtown areas and business districts)). In response, the City attacks this evidence, claiming that the rule does not have the reach credited by the trial court and is really just a "minimal burden." Opp'n 21. In support, though, the City's attorneys offer nothing objective. They provide no authoritative definitions for the 300-foot rule's terms or any actual evidence that the rule does not have the reach Plaintiffs describe. Instead they, like all other Baltimore officials, *see infra* Part II.A, put forward their own subjective interpretations of the rule, Opp'n 22, while simultaneously chiding Plaintiffs' reading as "absurdist" and "counter-textual." Opp'n 22. But, as discussed more fully below, City officials can and have read the rule differently. In fact, the City testified that some officials could apply the rule to ban any vendor selling a product containing starch from operating near any restaurant selling starches. E.741 (Ex. 32, 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. . . .**") (emphasis added)). Due to this indeterminacy, *any* vending within 300 feet of *any* restaurant could have resulted in criminal penalties.

In the end, the City's claim that "the 300-foot rule is a minimal burden on the mobile vending industry" because it only bars trucks "from the specific areas within certain neighborhoods with the highest concentration of brick-and-mortar restaurants," Opp'n 21, 23, takes a blinkered view of the rule's practical effect. It is not any single brick-and-mortar location, but the 600-foot wide, overlapping circles created by all of those locations that together reveal the rule's burdensomeness. And that burden, as the City testified, is significant. E.722. It led Plaintiffs to largely cease operating in Baltimore, and in fact Plaintiff Madame BBQ feared operating her Mindgrub Café food truck *in her own parking lot* because a restaurant selling similar items was within 300 feet of her location. E.196–97.

These facts put the 300-foot rule on all fours with the restriction challenged in *Waldron*. The rule prevents food trucks that have satisfied all health-and-safety requirements from operating in hundreds of viable locations throughout Baltimore. This is little different than the restriction in *Waldron*, which prevented retired and pensioned judges who had "satisfied the educational and character prerequisites" from the paid practice of law. 289 Md. at 716. Accordingly, this Court, like the trial court below, should apply *Waldron*'s "real-and-substantial" standard to this constitutional challenge. It is a standard that, as discussed below, the rule cannot meet.

2. The 300-Foot Rule Fails Real-and-Substantial Scrutiny Both Because the City's "General Welfare" Argument Rests on Idle Speculation and Because the Rule Lacks the Close Fit *Waldron* Requires.

The City's response offers little to demonstrate why its rule survives the "real-and-substantial" standard laid out in *Waldron*. In a footnote, it simply states—briefly, and without any support—that "the circuit court's conclusion that the 300-foot rule passed even that level of review was correct." Opp'n 23 n.7. It later states that, even under *Waldron*, this Court should be duty-bound to accept its "unfair competition" rationale because its expert discussed this post-hoc rationale at trial. Opp'n 27.

This failure to meaningfully wrestle with Plaintiffs' arguments under the real-and-substantial standard is both telling and damning. That standard, far from the manipulable inquiry the City suggests, is a robust standard of review. As the Court in *Waldron* held, real-and-substantial review "pursues the *actual purpose* of a statute and *seriously examines* the means chosen to effectuate that purpose." 289 Md. at 713 (emphases added). It requires that the public interest supposedly motivating the legislation be both "*real and substantial.*" *Id*. at 719 (emphasis added). And it requires a close fit between that interest and the means chosen to accomplish those goals. *Id*. at 713–14 (declaring that "[a] loose fit between the legislative ends and the means chosen . . . is intolerable"). In other words, courts conducting real-and-substantial review should not accept the government's speculation about what may *hypothetically* occur. They should instead determine, as the name of the test suggests, what is *real*.

But the City's "general welfare" justification is not real. It is not "either [a] statutory purpose[] which [is] readily discernible or a legitimate purpose that, presumably, motivated an impartial Legislature." *Id.* at 722. Instead, it is a made-up, post-hoc invention of counsel for the City and its expert witness, Anirban Basu. Although Basu is not an expert on either food truck policy, *see* E.312, or the restaurant economy, *see* E.314–15, he admitted that his testimony simply reflected his musings about those industries. As a result, Mr. Basu's "findings"—on which, significantly, the City rests its entire case—are nothing more than a series of guesses, all drawn on the City's behalf, that he came up with after simply "looking for . . . sources of quick information." E.350.

Although courts should not engage in "speculat[ion] as to the existence of possible justifications for the challenged enactment," *Waldron*, 289 Md. at 717, "reach[ing] out and speculat[ing]" is exactly what the trial court did in accepting those speculative guesses. Accordingly, this Court should reject the City's post-hoc "general welfare" argument and instead see the 300-foot rule in its most natural light: A provision, born out of anti-competitive animus, which blatantly discriminates against one class of entrepreneurs for the financial benefit of another. As discussed in Plaintiffs' opening brief, Br. 17–24, and in Part A above, such protectionism is per se invalid.

Even if the City's suppositions were all true, however, the 300-foot rule would still fail under *Waldron* because its over- and under-inclusiveness lack the "close fit" needed under real-and-substantial review. In their opening brief, Plaintiffs explained how the rule (presumably) allows food trucks to operate directly outside of restaurants

that do not sell the same food products as them, even though they would presumably raise identical competition concerns. Br. 33. And they demonstrated that the rule prevents food trucks from even parking within 300 feet of a restaurant with similar fare, even if that truck is engaged in activities that do not implicate the City's concerns about competition. *Id*.

The City, rather than rebut those points, attempts to glide over them. It summarily states that Plaintiffs "err in asserting that the 300-foot rule fails the rational basis test by being both over- and under-inclusive." Opp'n 30. It then quotes a passage from *Waldron* wherein the Court of Appeals explained when a law would be found unconstitutionally over- and under-inclusive. But the City never actually explains *why* Plaintiffs' arguments about over- and under-inclusiveness are wrong.

The City's failure to rebut Plaintiffs' showing that the 300-foot rule lacks the "close fit" required by *Waldron* is dispositive. The rule denied Plaintiffs "a basic and important personal right," and "the inequality resulting from [its] patchwork legislative demarcations" treated similarly situated food trucks differently. *Waldron*, 289 Md. at 727–28. This disparate treatment "cannot be sanctioned under the equal protection guaranties." *Id*. Accordingly, this Court should reverse and hold that the 300-foot rule fails constitutional scrutiny under the real-and-substantial test.

C. THE 300-FOOT RULE IS NOT SUBJECT TO "DEFERENTIAL" RATIONAL BASIS SCRUTINY, BUT EVEN IF IT IS, THE RULE IS STILL UNCONSTITUTIONAL.

The City argues for the most lenient form of constitutional scrutiny, what it calls the "most deferential rational basis review." Opp'n 23. The trial court was correct to

hold that the rule's broad practical effect on Plaintiffs' rights mandated review under the real-and-substantial standard. But the 300-foot rule is unconstitutional even under the "deferential rational basis review" suggested by the City, since its general welfare argument is not "reasonably conceivable" in light of real-world evidence.

While rational basis review is not the most rigorous check on government authority, it still means something. Indeed, Maryland courts have invalidated numerous restrictions under rational basis scrutiny. *See, e.g.*, *Verzi*, 333 Md. at 426–27 (finding "no rational basis for the classification of in-county and out-of-county towers"). Under Maryland jurisprudence, therefore, "a legislative classification [must] rest upon 'some ground of difference having a fair and substantial relation to the object of the legislation.'" *Id*. at 419 (quoting *Kuhn*, 270 Md. at 507). This is because rational basis is often applied with teeth, particularly under the Maryland Constitution. *See Frankel v. Bd. of Regents of the Univ. of Md. Sys*., 361 Md. 298, 315 (2000) ("'Court has not hesitated'" to strike down laws even under "minimal" version of rational basis test) (citations omitted); *Verzi*, 333 Md. at 418–19 (noting statutes struck down by U.S. Supreme Court under rational basis test; noting that Maryland Court of Appeals has "not hesitated to carefully examine a statute and declare it invalid if we cannot discern a rational basis for its enactment").

This rational basis test does not brook abject speculation; in applying the test, Maryland courts reject speculative deference to hypothetical and improbable justifications. *Frankel*, 361 Md. at 317 (testing classification against "stated object of Board's policy" as contained in Board's written policy document, rather than against

fictitious or speculative policies); *Johnson*, 143 Md. at 608 (holding that a court "certainly cannot assume" different risks posed by different categories and evaluating a distinction based on "more reasonable and probable view"). In fact, Maryland courts have done the opposite, hypothesizing situations where a classification would *not* serve the proffered justification. *Frankel*, 361 Md. at 317–18 (using hypotheticals to debunk relation between classification and stated goals); *Verzi*, 333 Md. at 425–26 ("not difficult to envision numerous other situations" where classification not aligned with justifications).

The City's "general welfare" hypothesis is precisely the type of fantastic, post-hoc speculation that the Court of Appeals rejected in *Frankel*, *Johnson*, and *Verzi*. It does not rest on empirical analysis, technical reports, or actual facts. Instead, it comes wholly from the mind of the City's attorneys and its expert. Moreover, the City's invention asks this Court to swallow a series of increasingly implausible assumptions in order to view the 300-foot rule's discrimination as publicly minded. To believe the City, without the 300-foot rule, food trucks would compete with restaurants. Although restaurants possess many advantages over food trucks—advantages like seats, tables, heating and cooling, protection from the elements, an expanded menu, and alcohol sales, *see* E.320–22—the City further posits that such competition would be so severe and one-sided that restaurants would suffer economically, shedding jobs or going out of business as a result. The City then further suggests that, in the wake of that competition, no new businesses

would move into those commercial spaces, not even successful mobile vendors.[3] And this destruction of restaurants would supposedly occur over and over again throughout Baltimore, such that empty storefronts and a decreased tax base would result.[4] This is the sort of hypothetical and improbable justification that Maryland courts frequently reject.

Indeed, the City made no effort to determine if its string of suppositions had any basis in reality.[5] *See* E.319 (81:17-20 ("Q: Did you do any analysis as to whether restaurants are staying or increasing in the city as a result of the 300-foor rule? A: I did no empirical analysis on that.")). Of course, the City could have tested its speculation, since Mr. Basu is an applied economist whose entire job consists of empirically evaluating the actual effects of policies like the 300-foot rule. But neither he nor the City made any attempt to determine how many food trucks operated in Baltimore, E.316, 328, how many restaurants had opened and closed over time, E.329, or whether the rule boosted the number of restaurants in the city, E.325, even though pertinent data existed

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[3] *But see* Food Truck Facts, DMV Food Truck Association, http://www.dmvfta.org/food-truck-facts (noting that "[i]n our area more than 20 [] food trucks have grown into brick-and-mortars—and nearly two dozen brick-and-mortar businesses have opened food trucks to expand into new markets").

[4] The City's brief claims that Plaintiffs are asking this Court to question the factual determinations made by the legislature. Opp'n 29. But Plaintiffs do no such thing: the City's "general welfare" argument arises, post-hoc, from its attorneys and expert witness, not its legislative officials. In any event, this Court has the constitutional duty to decide whether that state of facts is reasonably conceivable. As this brief demonstrates, it is not.

[5] In fact, Mr. Basu, who first injected the notion of a free-rider "problem," all-but-disavowed its plausibility, testifying that there is concrete evidence in Baltimore of multiple businesses selling the same type of food that can and do coexist profitably nearby one another. *See* E.268 (30:18-20 ("[In] Little Italy . . . *we have a profusion of restaurants all serving Italian food in the same place*. And they thrive together. . . .") (emphasis added)).

for each point. Instead, Mr. Basu relied only on "logic" in reaching his conclusions—a practice he admitted is scientifically dubious. E.327 (89:16-18 ("There are instances in which one can appeal to mere logic, but I find that to be dangerous.")).

Therefore, the City's general welfare argument rests on nothing more than implausible surmise. Critically, the City identified no instance where food truck competition led to restaurants closing their doors, nor did it point to any city where such closings led to the parade of horribles that the City claims will befall Baltimore now that the 300-foot rule is gone.[6] Moreover, simple facts undercut the City's unreasonable speculation. Baltimore passed the most modern iteration of its 300-foot rule in 2014. If the City's remedy to its perceived "free rider" problem were correct, then one would expect Baltimore's restaurant industry to outpace restaurant growth in comparable East Coast cities that do not have similar restrictions. But the facts show the exact opposite: from 2014, when the 300-foot rule was enacted, through 2016, the last year of available data, Baltimore's restaurant growth rate was 3.31%, significantly lower than the 4.83% growth in Philadelphia, 5.48% in New York City, or 9.31% in Washington, D.C.[7]

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[6] The City alleges that Plaintiffs would require Baltimore to "first experience that harm the 300-foot rule prevents before it can act," Opp'n 28, but that strawman both misstates Plaintiffs' position and the importance of facts in constitutional adjudication. Here, the City has made a claim—if it cannot restrict where food trucks operate, its restaurants will suffer. If its claim is reasonable, then cities without proximity restrictions like the rule should have suffered the harms the City predicts. The fact that the City cannot point to a single such incident anywhere is strong evidence that the City's chain of suppositions is merely irrational speculation.

[7] U.S. Census Bureau; County Business Patterns, 2014-2016 Geography Area Series: County Business Patterns, Tables CB1400A11, CB1500A11, CB1600A11, http://factfinder.census.gov (generated Oct. 22, 2018).

Thus, the facts undercut the government's supposition. The 300-foot rule doesn't benefit Baltimoreans, nor is it reasonable to think that it might. Instead, it deprives consumers of food options and Plaintiffs and other mobile vendors of their constitutional rights. Far from the "general welfare," the rule only serves to boost "restaurant welfare," as its anti-competitive animus serves only to enrich that preferred constituency. Because the 300-foot rule cannot be seen as reasonably furthering any legitimate government interest, this Court should reverse the trial court's decision on this point and hold that the rule violates Plaintiffs' rights under Article 24.

II. THIS COURT SHOULD REJECT THE CITY'S CROSS-APPEAL AND AFFIRM THE TRIAL COURT'S RULING THAT THE 300-FOOT RULE IS UNCONSTITUTIONALLY VAGUE.

Below, Plaintiffs prevailed when the trial court invalidated the 300-foot rule on the grounds that it was unconstitutionally vague. The trial court based that ruling on "voluminous evidence regarding the ambiguity of the 300-foot rule," E.811 (Opinion 16), including testimony from Babila Lima and Gia Montgomery, the City's Rule 2-412 representatives who were, respectively, the 300-foot rule's principal author and chief enforcement official. They testified that critical terms in the rule lacked fixed definitions, that enforcement officials could and had interpreted and applied those terms differently, and that deciding whether a vendor had violated the rule was a "subjective" inquiry. Based on that testimony and other evidence, the trial court held that the 300-foot rule lacked the fair notice, fixed standards, and adequate guidelines Maryland requires of penal statutes. *See* E.816 (Opinion 21 (holding that the rule "simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials,

brick-and-mortar establishments, or food trucks")). The City sought reconsideration of the trial court's vagueness decision, which the court denied. Rep. App. 22.

On appeal, the City contends that the trial court was wrong and that the 300-foot rule's terms are clear. It argues that the trial court did not have the power to evaluate whether the rule was vague. And the City states that, rather than give the city council the opportunity to rewrite the rule, the trial court should have rewritten the law's terms itself. But these arguments ignore the evidence, the law, and the separation of powers inherent in the Maryland Constitution. In Part A, Plaintiffs demonstrate that the trial court correctly determined that the 300-foot rule was impermissibly vague as a matter of law. In Part B, they show that the trial court had jurisdiction to conduct that inquiry. And in Part C, they demonstrate that the trial court, faced with terms to which it could give no clarifying interpretations, properly refrained from overstepping its constitutional role.

A. THE TRIAL COURT CORRECTLY RULED THAT THE 300-FOOT RULE IS VAGUE.

The Maryland Court of Appeals has repeatedly held that vague statutes violate due process and are unenforceable. *E.g.*, *Bowers v. State*, 283 Md. 115 (1978). A statute is vague: (1) where its terms are so undefined that "men of common intelligence must necessarily guess at its meaning and differ as to its application;" or (2) where "it fails to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws." *Id*. at 120–21.

As the trial court correctly concluded, the 300-foot rule violated both of these strictures. E.810–14 (Opinion 15–19).[8] In reaching that conclusion, the court construed the "voluminous evidence," E.811 (Opinion 16), showing that the rule lacked clear terms or enforcement standards. The City's brief, rather than meet that evidence head on, attacks Plaintiffs' testimony about where they could operate as "imperceptive," "counter-textual," and "absurdist," Opp'n 16, 22, all while studiously avoiding any discussion about the City's own statements. But it is the City's own words, including the words of its counsel, which informed the trial court's decision. And, after reading the City's brief, Plaintiffs *still* have no idea where the City thinks they could operate. Could Madame BBQ operate Mindgrub Café, for instance, in its own parking lot, although it is within 300 feet of Barracudas Tavern? Could Pizza di Joey operate within 300 feet of La Scala Ristorante Italiano? Who knows? None of the City officials knew at trial and the City's lawyers apparently do not know either.

First, as the City admits, Opp'n 38, numerous terms in the 300-foot rule are undefined. Neither the Baltimore City Code, the "Street Vendor Program Rules and Regulations," nor any other publication defines the terms and phrases "primarily engaged in," "retail business establishment," or "same type of food product." Nor are there any

[8] The City notes in its brief that Plaintiffs did not expressly bring a vagueness challenge. Opp'n 12. But that is immaterial, since the trial court had inherent authority to decide whether the 300-foot rule was vague. *See, e.g.*, *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99 (1991) (holding that once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties").

other common documents, such as the Street Vendor Program Rules and Regulations, that explain how to interpret the rule.[9]

That lack of definitions led to inconsistency amongst officials about how to interpret the rule. The City (through its representative Babila Lima) initially testified that officials should give terms such as "primarily engaged in" and "same type of food product" a "commonsense" definition.[10] Its other representative, Ms. Montgomery, similarly invoked this "commonsense" standard, which she described as "nothing more or nothing less than what's written." E.750 (Ex. 32, 182:4–7). But the City admitted that different officials may not share the same "commonsense" definition, E.750 (Ex. 32, 182:8–20), and when Plaintiffs asked the City if common food items qualified as the "same type of food product," it could not provide answers. *See, e.g.*, E.603 (Ex. 30, 205:1–15 ("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

[9] E.719 (Ex. 32, 59:12–14 ("Q Do the rules and regulations provide any guidance in regards to the 300-foot proximity ban? A No.")).

[10] *See, e.g.*, E.598 (Ex. 30, 182:1–7 ("Q --does the City have a definition or understanding of what 'primarily engaged in selling' means? A Not outside the words that can be inferred from reading 'primarily engaged in selling.' Not outside of a commonsense definition.")); E.557 (Ex. 30, 19:20–20:3 ("What is the City's interpretation of 'same type of food product?' A Again, I believe this to have a commonsense definition of the same type of food product.")).

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 sold the "same type of food product" as a brick-and-mortar retailer was a decision officials made on a "case-by-case basis."[11] For instance, Ms. Montgomery, the City's chief enforcement official, suggested that the rule made Subway restaurants particularly problematic for vendors to operate nearby. E.743 (Ex. 32, 157:1–5 (stating that "if I were a food truck owner, I wouldn't park anywhere near a Subway because they carry deli-style such as sandwiches, salads, pizza, soups. So that will be good competition, but bad pertaining to the rule")). Both Rule 2-412 representatives described this case-by-case process as "subjective,"[12] a description echoed by the General Counsel for the Baltimore Department of Transportation, who described the 300-foot rule as "very subjective."[13]

Because of that subjectivity, enforcement officials came up with varied approaches for deciding if a vendor violated the rule. One approach focused on whether the specific items a vendor sold were the "same type of food product" as items sold by

[11] E.605-06 (Ex. 30, 213:21–214:3 ("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.")).

[12] E.745 (Ex. 32, 163:7–13 (Defendant admitting "that there's no objective standard as to what a business is primarily engaged in selling" and that "[i]t is always a subjective analysis balancing these different factors")); E.600 (Ex. 30, 191:5–10 ("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.")).

[13] E.486 (Ex. 11, p.15).

nearby brick-and-mortar businesses.[14] A second approach revolved around whether a vendor had a similar cuisine or culinary theme as a restaurant within 300 feet.[15] A third approach appeared at trial, when the City's attorney suggested that the rule could be triggered by how a vendor describes its menu in marketing materials. E.198–201 (58:14–61:14 (discussing how MindGrub Café's slogan, "Brain Food for Knowledge Workers," may mean it is prevented from operating within 300 feet of restaurants that also sell "brain food")). And, as previously discussed, the City testified that a *fourth* possible approach would prohibit vendors from selling foods containing starches within 300 feet of a restaurant that also sells foods containing starches. E.741 (Ex. 32, 149:12–19).

As a result of all of these varying interpretive approaches, coupled with the lack of any common standards, different officials could reach and, in fact, had reached different conclusions about whether a vendor violated the rule.[16] These indefinite terms also kept the City from providing vendors with any authoritative understanding of how the 300-

[14] E.687(Ex. 31, 24:18–25:21); E.742 (Ex. 32, 152:1–6).

[15] E.742 (Ex. 32, 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.")); *id*. (Ex. 32, 151:15–21).

[16] E.692 (Ex. 31, 43:5–10 ("Q Is it possible that your approach is different from an approach of someone in a different department in terms of evaluating whether a mobile vendor is in violation of the 300-foot proximity ban? A Yes.")); E.717 (Ex. 32, 50:16–21 ("Q Is it possible that somebody else with enforcement authority in the city might read that language differently than you do? A Possibly, police. I have been told that police often question when food trucks are parked on city streets.")).

foot rule applies or what it prohibits.[17] In this light, the City's complaint that Plaintiffs should have asked for guidance about the rule's contours, *see* Opp'n 10, rings hollow. The evidence shows that any official's advice would merely be his or her own subjective interpretation.

It was this evidence that led the trial court to hold that the 300-foot rule's terms were unconstitutionally vague. The City's testimony demonstrated that the rule's terms lacked any fixed meaning, that no advice any official gave regarding them was authoritative, and that other enforcement officers could apply their own differing glosses to those terms to cite a vendor no matter what he or she had been previously told. E.717 (City testifying that it was "sure" its enforcement officials had given differing guidance to vendors). Because violating the rule was a crime, E.799 (Opinion 4), Plaintiffs and other vendors were constantly under threat of fines or even the revocation of their vending licenses.

This situation is akin to the one in *Ashton v. Brown*, where the city of Frederick enacted a juvenile curfew ordinance whereby youth would be detained if caught on a business' property past curfew. 339 Md. 70 (1995). Certain businesses, however, were exempt from the ordinance so long as they were supervised by a "bona fide

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[17] E.717 (Ex. 32, 53:5–20 ("Q Going back to your interpretation of the language of section 17-33, it's possible that someone with enforcement authority in the Department of Health might interpret that language differently; is that correct? A Yes. Q In fact it's possible that anybody with enforcement authority in any department might interpret that language differently than you do; is that correct? A Possibly, yes. Q And it's also possible that if they give guidance to mobile vendors that that guidance might be different than the guidance you provide; is that correct? A **I'm sure it's happened, yes.**") (emphasis added)).

organization." *Id*. at 81. One evening, police raided the Rainbow Hunan Restaurant, which they said was not supervised by a "bona fide organization," and arrested anyone who looked underage. Two arrestees sued, arguing in part that the ordinance, which impeded their right to travel, was unconstitutionally vague because it was impossible to determine if a business was supervised by a "bona fide organization." *Id*. at 84.

The Court of Appeals agreed and declared the curfew ordinance unconstitutionally vague. Focusing on the term "bona fide organization," the Court recognized that the ordinance left the phrase undefined, just like the 300-foot rule leaves "primarily engaged in selling" and "same type of food product" undefined. No judicial determinations defined what a "bona fide organization" was and, although dictionaries contained definitions for "bona fide" and "organization," they shed no light either. *Id*. at 91–92; *cf*. E.811 (Opinion 16 (stating that "primarily engaged in" was vague despite its words being in a dictionary)).

More damning in the Court's eyes was that Frederick officials had no consistent interpretation of what qualified as a "bona fide organization." *Ashton*, 339 Md. at 92. The Mayor thought a "bona fide organization" was one "that [was] certified under some previously announced regulation." *Id*. The Police Chief thought a "bona fide organization" was "one that operated without a profit-making motive." *Id*. And the City Attorney thought a "bona fide organization" was "a legitimate association of some type which would supervise the kinds of activities . . . specifically delineated in the Ordinance." *Id*. at 93. These differing interpretations made plain to the Court that the ordinance was unconstitutionally vague on its face. *Id*. Because the Court could not

sever "bona fide" or "organization" from the ordinance, it enjoined the entire ordinance. *Id*. at 96.

This case is little different from *Ashton*. The 300-foot rule, like the curfew in *Ashton*, is a penal statute. It contains broad, vague terms that are incapable of precise definition. And the City's officials have offered up multiple contradictory interpretations for how a vendor could potentially violate the rule. The trial court therefore did nothing more than faithfully follow precedent in declaring the rule unconstitutionally vague.

B. THE TRIAL COURT HAD JURISDICTION TO HOLD THAT THE 300-FOOT RULE WAS VAGUE.

"Vague penal statutes violate due process because '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'" *Ashton*, 339 Md. at 88 (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). But the 300-foot rule forced both vendors and officials, as the City's own testimony demonstrated, to guess at its meaning. Guessing wrong meant being fined or even losing the right to practice one's trade. By all accounts, the rule was vague.

Perhaps due to the weakness of its arguments on the merits, the City's brief focuses on whether the trial court was empowered to decide whether the 300-foot rule was vague. It suggests that, because neither Plaintiff had been cited for violating the rule, the court could not review the rule's vagueness as applied to their conduct. Opp'n 34–36. The City furthermore says that facial review was unavailable because the 300-foot rule did not touch upon First Amendment freedoms. Opp'n 35 (quoting *Galloway v. State*, 365 Md. 599, 616 n.11 (2001) (stating that "[w]e have not applied [the void-for-

vagueness] standard to a facial challenge other than one implicating First Amendment rights")).

The City errs on both counts. First, courts are fully empowered to consider pre-enforcement, as-applied challenges to laws like the 300-foot rule whenever vendors face a credible threat of prosecution, even if they have not personally received a citation.[18] As the United States Supreme Court has stated, "[w]hen the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)); *see also Davis v. State*, 183 Md. 385, 389–90 (1944). This general principle applies to vagueness challenges. *See, e.g.*, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1020 (9th Cir. 2013) (holding that pre-enforcement as-applied vagueness challenge was successful where plaintiff wished to engage in activities that would violate criminal statute whose terms "ha[d] no core").

All the conditions discussed in *Babbitt* and *Davis* are met here. As the trial court found, Plaintiffs Pizza di Joey and Madame BBQ have a constitutional right to conduct their trade. They wished to exercise that right by operating at specific locations around Baltimore, but avoided doing so because it was a crime to violate the 300-foot rule. City

[18] This Part focuses on the trial court's power to evaluate whether the 300-foot rule was vague. Title III of Plaintiffs' brief, *see infra*, provides an expanded discussion about why the trial court had jurisdiction to hear Plaintiffs' pre-enforcement challenge to the 300-foot rule.

officials repeatedly emphasized that they enforced that rule. If a vendor operated within 300 feet of a restaurant selling a similar item, he either had to accede to enforcement officials' demands to move or face fines and the possible revocation of his vending license. One day, Joey Vanoni faced such enforcement firsthand. E.81. He largely stopped operating in Baltimore as a result. E.75. Nothing more is needed.

Accordingly, the trial court conducted a vagueness inquiry that looked at "the statute's application to the particular facts at hand." *Bowers v. State*, 283 Md. 115, 122 (1978). It analyzed whether the rule's phrases "primarily engaged in" and "same type of food product" provided Pizza di Joey, Madame BBQ, and officials with sufficient notice and enforcement guidance. It credited testimony from Joey Vanoni, Plaintiff Pizza di Joey's owner, who avoided Subway restaurants because he was "uncertain if Subway qualifies as 'primarily engaged in selling' pizza and meatball subs since those items are on Subway's menu." E.812 (Opinion 17). It similarly credited testimony from Nicole McGowan, owner of Madame BBQ and its Mindgrub Café food truck, that she was unsure whether she could operate near "chick-fil-a since they offer gluten free items and grilled chicken as well." E.813 (Opinion 18). It found probative the fact that "[d]uring cross-examination, defense counsel used Mrs. McGowan's slogan 'Brain Food for Knowledge Workers' as defining her food as a type of food product." *Id*. And it concluded that the City's own testimony revealed that neither "primarily engaged in selling" nor "same type of food product" was capable of any determinate meaning. E.816 (Opinion 21). In other words, the trial court looked at the specific facts at hand and found the rule to be constitutionally wanting. This was proper.

Moreover, the trial court was fully empowered to analyze the rule's vagueness on its face. A facial vagueness challenge empowers a litigant "to challenge the validity of a statute as applied to marginal cases." *Bowers*, 283 Md. at 123.[19] The City quotes a footnote in *Galloway* to suggest that facial review may only occur when a law impinges on First Amendment freedoms. Opp'n 36. But in that same opinion, the Court held that a facial challenge is available when a law "encroaches upon fundamental constitutional rights." *Galloway*, 365 Md. at 616. Indeed, just two years ago the Court of Appeals noted that "[o]ther types of facial challenges, however, have arisen out of fundamental constitutional rights other than those that the First Amendment protects." *Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 182–83 (2016) (holding that "Seenath has standing to raise a facial challenge that arises out of the right to due process"). In so holding, the Court in *Seenath* pointed to numerous recent cases that entertained facial challenges, including *King v. State*, 425 Md. 550 (2012), *Tyler v. City of College Park*, 415 Md. 475 (2010), and others.

Just like Seenath, Plaintiffs Pizza di Joey and Madame BBQ have raised a due-process challenge. They have consistently contended that the 300-foot rule violates their rights to due process and equal protection under Article 24. These are important constitutional rights: As the Court of Appeals held in *Waldron*, the right to practice one's

[19] Accordingly, even if the rule were clear as applied to Plaintiffs—which the trial court correctly held it was not—a facial challenge would empower the Court to evaluate whether the 300-foot rule was vague in other respects.

trade is a liberty interest that is "vital to the history and traditions of the people of this State." 289 Md. at 715.

In the end, the trial court had the power to determine whether the 300-foot rule was unconstitutionally vague, both as applied and on its face. It exercised that power by evaluating evidence regarding how the rule was interpreted and enforced. Construing that evidence, it found the rule constitutionally wanting because its key phrases have no core meaning. Its decision to declare the rule vague was correct, as was its decision not to rewrite the rule to save it from its constitutional infirmity.

C. THE TRIAL COURT CORRECTLY REFUSED TO UNILATERALLY REWRITE THE 300-FOOT RULE.

After the trial court concluded that the 300-foot rule was impermissibly vague, the City asked it to alter or amend its judgment, arguing that inserting a "reasonable person" standard would cure any vagueness concerns. Rep. App. 6 (Mot. to Alter or Amend 2). The trial court declined that invitation, noting that because the phrases "primarily engaged in selling" and "same type of food product" have no concrete meaning, the City was essentially asking the trial court to rewrite the rule. The court demurred, concluding that for it to unilaterally define those terms would violate the Maryland Constitution's separation of powers guarantee. Rep. App. 20 (Mem. Op. on Mot. to Alter or Amend 3) ("The terms used in Article 15, Section 17-33 are not standard legislative language and there are no 'judicial determinations' with respect to those terms. Under the circumstances, this Court should not be infringing on the duties of the legislative

branch."). Ignoring those concerns, the City now asks this Court to act where the trial court properly refrained. This Court should refuse that request for two reasons.

First, because the phrases "primarily engaged in selling" and "same type of food product" have no readily understandable meaning, injecting a "reasonable person" standard as the City suggests, Opp'n 41, would not fix anything. Notably, the City's brief provides no definitive interpretation for either term. Nor do its officials: although the City repeatedly chides Joey Vanoni and Nicole McGowan for their "imperceptive" reading of the rule, the trial court held that "[t]hrough testimony in the record it was clear that even the City Officials involved in drafting this Code did not have a clear understanding of these terms, nor did they have a way to define them." Rep. App. 19–20 (Mem. Op. on Mot. to Alter or Amend 2–3). Because neither lawyers nor laypeople understand what "primarily engaged in selling" and "same type of food product" mean, neither could a "reasonable person."

This insight explains why the City's invocation of *Galloway v. State*, 365 Md. 599 (2001), misses the mark. In *Galloway*, the Court of Appeals held that the statute's terms—"harass," "annoy," and "alarm"—*were* understandable, and that a "reasonable person" standard just helped ensure that applications of the statute were "limited to its intended purposes." *Id*. at 636. In other words, in *Galloway* the "reasonable person" standard narrowed an understood, but potentially overbroad, meaning. But here, "primarily engaged in" and "same type of food product" are understood by *no one*. That is why the trial court concluded "that a *reasonable person* would not have fair notice of

what the ordinance intended as required by *McFarlin* and *Bowers*." Rep. App. 20 (Mem. Op. on Mot. to Alter or Amend 3) (emphasis added).[20]

Because no "re-interpretation" of the rule's terms could resolve their inherent vagueness, what the City is asking this Court to do is not to interpret, but to draft, to impose new substance and meaning. This would violate Article 8 of the Maryland Declaration of Rights, which specifically mandates "[t]hat the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." As this Court previously stated,

> The Legislature is the law-making branch of government. . . . We may not substitute our judgment for that of the Legislature and rewrite legislation even if we disagree with it. Nor are we free to amend a statute under the guise of statutory construction. If we believe there is a problem with particular legislation, we are limited to calling the Legislature's attention to it.

Linkus v. Md. State Bd. of Heating Ventilation, Air-Conditioning and Refrigeration Contractors, 114 Md. App. 262, 278 (1997) (citations omitted). As the Court of Appeals has long stated, "we will not, under the guise of construction, remedy a defect in a statute or insert an exception not made by the Legislature." *Davis v. State*, 294 Md. 370, 378 (1982). Accordingly, this Court should refuse the City's invitation.

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[20] By contrast, as the trial court noted, E.814–15(Opinion 19–20), measuring the 300-foot distance between a restaurant and food truck could be easily clarified through the use of a "reasonable person" standard, so that officials measured from the closest point of the building in which a restaurant was located to the closest point of the food truck. *See also* Rep. App. 20–21 (Mem. Op. on Mot. to Alter or Amend 3–4).

III. THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION THAT PLAINTIFFS' CONSTITUTIONAL CHALLENGE IS RIPE.

The City also appealed the trial court's determination that this case presents a ripe controversy. In its appeal, the City admits that it enforced the 300-foot rule until the trial court invalidated it. Yet, before this Court, the City simultaneously argues that the rule is gravely important *and* that it did not really enforce the rule at all. To make this point, the City glosses over its own officials' extensive testimony and implicitly suggests that Plaintiffs falsely testified regarding how enforcement of the 300-foot rule limited where they could operate. But the unrebutted evidence—evidence the trial court credited—shows that the 300-foot rule was enforced, with the effect of having prevented Plaintiffs from operating in large portions of Baltimore.

First, with regard to enforcement, Plaintiffs Pizza di Joey and Madame BBQ faced a credible threat of prosecution under the 300-foot rule if they operated too near a brick-and-mortar eatery, Opp'n 15, and both changed their business plans to avoid violating it. Ultimately, the unrebutted evidence established that:

- The City actively enforced the 300-foot rule. *See, e.g.*, E.470 ("We do enforce this rule");
- In enforcing the rule, the City acted upon "complaints from brick-and-mortar businesses about mobile vendors operating too close to them." E.688 (Ex. 31, 27:19-28:2);
- Any food truck suspected of violating the 300-foot rule would be "asked . . . to leave." E.689 (Ex. 31, 30:10-11). If the truck did not accede to the City's commands, it would be "issue[d] a citation." *Id*.
- At least one food truck, "B'More Greek" was forced to move or stop selling certain prohibited items after a City official accused it of violating the 300-foot rule. E.687-88 (Ex. 31, 23:2–26:16);

- University of Maryland police accused Pizza di Joey of violating the rule due to his proximity to a nearby restaurant. E.79-80 (64:12-65:24);

- In order not to violate the rule, Plaintiffs both refrained from operating their Pizza di Joey and Mindgrub Café food trucks at specific locations on public and private property throughout Baltimore. As a result, Pizza di Joey severely decreased operations inside Baltimore City, instead operating primarily in Anne Arundel County. E.75 (60:5-6). Mindgrub Café likewise limited operations inside Baltimore City due to fear it might park in a forbidden location, even going so far as to avoid operating in its own private parking lot. E.196-97 (56:13-57:18).

- The 300-foot rule made entire neighborhoods off limits to food trucks. E.804 (Opinion 9 (agreeing with Plaintiffs that "due to the layout of the City and the concentration of various types of brick-and-mortar restaurants in high traffic areas, . . . this ordinance in essence makes it virtually impossible . . . to operate")).

  The trial court unequivocally agreed, finding that:

  > [T]his ordinance has in effect barred [Pizza di Joey and Mindgrub Café] 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. . . .
  >
  > 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.816–17 (Opinion 21–22).

Yet despite all of this, the City continues to claim that Plaintiffs may not challenge the rule unless they have been cited under it and can identify precisely how much money the rule has cost them. As Plaintiffs demonstrated both above, *see supra* Part II.C, and here, this argument misreads Maryland case law and lacks merit.

Maryland's ripeness requirement exists to ensure that adjudications dispose of actual controversies. *See State Center, LLC v. Lexington Charles Ltd. P'ship*, 438 Md. 451, 591–92 (2014). Such a controversy exists here: As the evidence shows, the constitutional claims in this case rest on concrete facts regarding the 300-foot rule's

enforcement and effect. *See Boyds Civic Ass'n v. Montgomery Cty. Council*, 309 Md. 683, 690–91 (1987) (stating that a justiciable controversy exists when there are interested parties asserting adverse claims on concrete facts and that declaratory judgment is appropriate once the facts have been sufficiently developed). Moreover, the trial court's ruling that the 300-foot rule was invalid worked a practical benefit to Pizza di Joey and Madame BBQ, who now may operate at specific locations and neighborhoods they previously could not. Thus, there is nothing "future, contingent [or] uncertain" about this controversy, *see* Opp'n 15, and far from providing merely an "advisory opinion," this challenge will conclusively resolve the parties' controversy by establishing whether mobile vendors may operate within 300 feet of their brick-and-mortar competitors. *See Boyds Civic Ass'n*, 309 Md. at 690.

The City's complaint that neither Pizza di Joey nor Madame BBQ were cited for violating the rule, Opp'n 16, is irrelevant. The very purpose of the declaratory judgment act is to enable Plaintiffs to seek a judicial interpretation of their rights *without* having to violate the law, risk criminal penalties, and raise their constitutional claims as a defense against prosecution. *Davis*, 183 Md. at 389 ("[I]f 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."); *see also Babbitt*, 442 U.S. at 298. Where the government is duty bound to enforce a statute and is enforcing it or is about to enforce it—as the facts laid out above demonstrate—a plaintiff whose constitutional rights would be infringed by such enforcement may bring a declaratory judgment action. *Davis*, 183 Md. at 388–89, 392.

The Court of Appeals' decision in *Bowie Inn, Inc. v. City of Bowie*, 274 Md. 230 (1975), is illustrative. There, the city of Bowie enacted a mandatory bottle-deposit law, and stated that any violation of it would be a misdemeanor. Retail merchants, bottlers and distributors brought a pre-enforcement suit against Bowie, contending in part that the law was unconstitutionally vague. *Id*. at 232–33. The courts adjudicated that case on the merits, as the businesses would be forced to either change their behavior or risk violating the law. The same is true in *Davis*, where the doctor chose to avoid violating the law and therefore stopped "advertising rather than run the risk of having his license revoked." *See* 183 Md. at 392–93. As a consequence, "he was unable to allege that he had been threatened" with enforcement. *See id.* But that did not matter; in proceeding to the merits, the Court of Appeals noted that Davis wished to engage in a course of action forbidden by law and would do so if the law was declared invalid. In other words, Davis' challenge was ripe because the statute caused him to change his behavior to avoid being a criminal. That is what happened here. *See also Salisbury Beauty Schs.*, 268 Md. at 41–44 (holding that beauty schools had ripe challenge to restriction on their business although they had not received a citation or been subject to any direct enforcement threat); *Bruce v. Director, Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 595 (1971) (holding that oystermen and crabbers could proceed with their (ultimately successful) challenge to law barring them from operating in certain locations despite not receiving citations or direct enforcement threats).

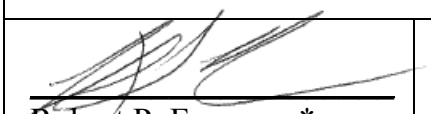
Nor does Maryland case law require plaintiffs to quantify precisely how much financial harm they suffered in order for their challenge to proceed. The Court of

Appeals in *Salisbury* did not discuss how much the challenging schools had suffered financially. The same is true in *Kuhn*, where a law prevented cosmetologists from cutting men's hair. Like the 300-foot rule, in *Kuhn* a violation "could result in the loss of their licenses and in criminal prosecution." 270 Md. at 501. The cosmetologists brought a pre-enforcement challenge, arguing that the prohibition violated their right to pursue a lawful occupation. Despite the cosmetologists not presenting any evidence regarding how much the prohibition was costing them, the Court of Appeals declared the prohibition invalid.[21] *Id*. at 512.

CONCLUSION

For the foregoing reasons, Plaintiffs ask this Court to reverse the trial court's decision that the 300-foot rule does not violate Article 24 of the Maryland Declaration of Rights, and to otherwise affirm the trial court's decision.

[21] Moreover, the City's claim that Pizza di Joey and Madame BBQ should have to show the extent of their financial harm, Opp'n 16, makes no sense. First, such information is irrelevant, since nothing about the 300-foot rule's constitutionality turns on whether they have suffered $5 in damages or $50,000. Second, such information is impossible to obtain. Quantifying Pizza di Joey and Madame BBQ's injuries would require comparing their revenues to a hypothetical world where the rule never existed. This is literally impossible.

INSTITUTE FOR JUSTICE		TYDINGS & ROSENBERG LLP
 Robert P. Frommer* 901 N. Glebe Rd., Ste. 900 Arlington, VA 22203 Tel: (703) 682-9320 Fax: (703) 682-9321 Email: rfrommer@ij.org	Ari Bargil* One Biscayne Tower 2 S. Biscayne Blvd., Ste. 3180 Miami, FL 33131 Tel: (305) 721-1600 Fax: (305) 721-1601 Email: abargil@ij.org **Admitted pro hac vice*	Glenn E. Bushel 1 E. Pratt St. 9th Floor Baltimore, MD 21202 Tel: (410) 752-9718 Fax: (410) 727-5460 Email: gbushel@tydingslaw.com
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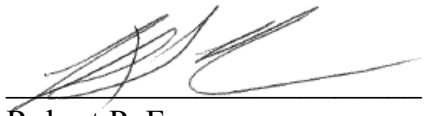
CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 11,166 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 1st day of November, 2018, two copies of the Reply Brief and Appendix of Appellants/Cross-Appellees Pizza Di Joey, LLC and Madame BBQ, LLC were served, via UPS Ground Transportation, to:

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APPENDIX

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RULE 8-501(f) STATEMENT SUPPORTING INCLUSION OF CERTAIN PARTS OF THE RECORD AS APPENDIX

Pursuant to Rule 8-501(f), Appellants/Cross-Appellees Pizza di Joey, LLC and Madame BBQ, LLC include four documents, totaling 22 pages, as an Appendix to this reply brief. Those documents, which include the parties' briefing on the City's Motion to Alter or Amend the Court's Judgment Granting Plaintiffs' for Injunctive Relief and the trial court's decision thereupon, were not included in the Record Extract and contain pertinent legal discussions regarding matters relevant to this appeal.

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.	*	

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

MAYOR AND CITY COUNCIL OF BALTIMORE'S MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT GRANTING PLAINTIFFS' REQUEST FOR INJUNCTIVE RELIEF

Defendant, Mayor and City Council of Baltimore ("City" or "Defendant"), through undersigned counsel, and pursuant to Rule 2-534, hereby requests this Honorable Court to alter or amend its Judgment granting Plaintiffs' request for injunctive relief and enjoining the City from enforcing Baltimore City Code, Article 15, Section 17-33, for the following reasons, and as more fully set forth in the accompanying Memorandum:

1. On December 20, 2017, this Honorable Court issued a Memorandum Opinion in which it declared that Baltimore City Code, Article 15, Section 17-33 ("the 300-foot rule" or "rule") is constitutional and does not infringe on Plaintiffs' Due Process and Equal Protections rights guaranteed by Article 24 of the Maryland Declaration of Rights. *Memo. Op.* at 14.

2. Nonetheless, this Honorable Court found that certain terms within the 300-foot rule, namely, "primarily engaged in" and "same type of food product," are so indefinite as to render the 300-foot rule unconstitutionally void-for-vagueness. *Memo. Op.* at 16-19.

3. Accordingly, this Honorable Court issued an Order denying Plaintiffs' request for a judgment declaring the 300-foot rule unconstitutional, but granting Plaintiffs' request for an injunction enjoining the City from enforcing the 300-foot rule; the injunction was stayed for

sixty days, presumably to allow the City time to "clarify" the statute by legislative action. *See Memo. Op.* at 22. The Court did not provide any guidance as to this clarification process.

4. In conducting a void-for-vagueness analysis, the Court must presume that the 300-foot rule is valid, and avoid finding it "unconstitutional if, 'by *any* construction, it can be sustained.'" *Galloway v. State*, 365 Md. 599, 610-11 (2001) (quoting *Beauchamp v. Somerset County,* 256 Md. 541, 547 (1970)) (emphasis added).

5. This Honorable Court can set forth its own construction of the 300-foot rule's ostensibly vague terms so as to save the rule from unconstitutionality. *See McFarlin v. State*, 409 Md. 391, 411 (2009) ("A statute is not vague . . . if the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations . . . dictionaries . . . or even the words themselves if they possess a common and generally accepted meaning." (quoting *Galloway*, 365 Md. at 615-16)); *Schochet v. State,* 320 Md. 714, 729 (1990) (examining the principal that statutes "should be interpreted to avoid a serious constitutional issue" and "have regularly been the subject of narrowing constructions so as to avoid the constitutional issues.").

6. The Court exercised this prerogative by explicitly dictating how 300 feet should be measured, thereby overcoming the specter of "lack of clarity" and "arbitrary enforcement" on that front. *Memo. Op.* at 20. The Court similarly should provide a construction of the terms "primarily engaged in" and "same type of food product" to save the statute from apparent unconstitutional vagueness, including by reading into the statute an objective "reasonable person" standard. *See Galloway*, 365 Md. at 634 ("Reading a reasonable person standard into [a statute] helps to narrow further the construction of the statute, keeping in mind that a statute 'does not become unconstitutionally vague merely because it may not be perfectly clear at the margins.'" (quoting *Williams v. State*, 329 Md. 1, 11 (1992)).

7. Applying an objective reasonable person standard to the 300-foot rule would highlight that the terms "primarily engaged in" and "same type of food product" are readily intelligible by their common meanings and dictionary and statutory definitions; accordingly, a person of ordinary intelligence and experience has "fair notice" of the behavior that is prohibited by the 300-foot rule, and arbitrary enforcement would be held in check. *See, e.g., McFarlin*, 409 Md. at 411.

WHEREFORE, for the reasons stated above and in the accompanying Memorandum of Law, and in accordance with Rule 2-534, Defendant Mayor and City Council of Baltimore respectfully requests this Honorable Court to alter or amend its Judgment granting Plaintiffs' request for injunctive relief and enjoining the City from enforcing Baltimore City Code, Article 15, Section 17-33.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January, 2018, a copy of *Mayor and City Council of Baltimore's Motion to Alter or Amend*, and accompanying *Memorandum of Law*, was mailed first class, postage prepaid to:

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

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

MEMORANDUM OF LAW IN SUPPORT OF MAYOR AND CITY COUNCIL OF BALTIMORE'S MOTION TO ALTER OR AMEND JUDGMENT

Defendant, Mayor and City Council of Baltimore ("City" or "Defendant"), through undersigned counsel, and pursuant to Rule 2-534, respectfully submits this Memorandum of Law in support of its Motion to Alter or Amend Judgment, and states:

THE COURT'S JUDGMENT

Baltimore City Code, Article 15, Section 17-33 ("the 300-foot rule" or "rule") provides: "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." In its December 20, 2017 Memorandum Opinion, this Court declared that the 300-foot rule is constitutional and does not infringe on the Plaintiffs' Due Process and Equal Protection rights. *Memo. Op.* at 14.

However, the Court also found that three aspects of the 300-foot rule were void-for-vagueness. First, the Court found that the phrase "primarily engaged in" is "unable to be accurately interpreted" because it is not defined in the ordinance. *Id.* at 17. The Court acknowledged that these words "can be found in a dictionary," and that, according to the City's designee, the phrase

can be "defined by common sense." *Id.* Nonetheless, it ruled that the phrase lacked clarity and was susceptible to "arbitrary and discretionary enforcement." *Id.*

Second, the Court found that the phrase "same type of food product" "has never been clearly defined." *Id.* at 18. The Court again acknowledged that the words can be found in a dictionary, but, as with "primarily engaged in," credited Plaintiffs' testimony as to their confusion about the meaning of the term. It therefore ruled that the phrase "same type of food product" "constitutes a failure to provide fair notice and creates the danger of arbitrary and discretionary enforcement." *Id.* at 19.

Third, the Court found that there was no definition or guidance "as to how the 300 foot distance is measured," and it was concerned about "the danger of arbitrary and discretionary enforcement." *Id.* The Court overcame this potential vagueness, deciding to "resolve the 'how to measure' issue" by explicitly directing how the distance must be measured. *Id.* at 20.

Because, in the Court's estimation, two of the terms of the 300-foot rule remained vague, it issued an Order denying Plaintiffs' request for a judgment declaring the 300-foot rule unconstitutional, but granting Plaintiffs' request for an injunction enjoining the City from enforcing the rule. The Court stayed the injunction for sixty days, presumably to allow the City time to "clarify" the terms through legislative action. *See Memo. Op.* at 22.

ARGUMENT

Determining whether a statute is unconstitutionally vague requires examining whether the statute: 1) provides fair notice to those subject to it; and 2) is sufficiently definite to allow for non-arbitrary enforcement, application, and administration. *See McFarlin v. State*, 409 Md. 391, 410-11 (2009). A statute provides "fair notice" if "persons of ordinary intelligence and experience

[are] afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly." *Id.* (quoting *Galloway v. State*, 365 Md. 599, 615 (2001)).

> The standard for determining whether a statute provides fair notice is whether persons of common intelligence must necessarily guess at the statute's meaning. A statute is not 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 even the words themselves if they possess a common and generally accepted meaning.

Id. at 411. In addition to "being intelligible to the reasonable person," a statute must "eschew arbitrary enforcement." *Id.*

The Court must presume that the statute is valid, and must avoid finding it "unconstitutional if, 'by *any* construction, it can be sustained.'" *Galloway*, 365 Md. at 610-11 (quoting *Beauchamp v. Somerset County,* 256 Md. 541, 547 (1970)) (emphasis added). "[A]bsolute mathematical precision . . . is neither reasonably attainable nor constitutionally mandated." *Bowers v. State*, 283 Md. 115, 129 (1978).

> The root of the vagueness doctrine is a rough idea of fairness. It is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.

Id. (quoting *Colten v. Kentucky*, 407 U.S. 104, 110 (1972)). *See also id.* at 125 ("'Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid[.]'") (quoting *Rose v. Locke*, 423 U.S. 48, 50 (1975)). Moreover, a statute is not 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.

I. This Court should clarify the 300-foot rule's ostensibly vague terms.

This Court exercised its prerogative to salvage potential statutory ambiguity in the 300-foot rule by explicitly dictating how 300 feet should be measured, thereby overcoming the rule's "lack of clarity" and the specter of "arbitrary enforcement" on that front. *Memo. Op.* at 20. The Court should continue in this vein and similarly provide narrowing constructions of the terms "primarily engaged in" and "same type of food product" to save the rule from apparent unconstitutional vagueness. *See McFarlin*, 409 Md. at 411 (2009) ("A statute is not vague . . . if the meaning of the words in controversy can be fairly ascertained by reference to *judicial determinations*. . . .") (quoting *Galloway*, 365 Md. at 615-16) (emphasis added). Statutes "should be interpreted to avoid a serious constitutional issue." *Schochet v. State*, 320 Md. 714, 729 (1990). Accordingly, they "have regularly been the subject of narrowing constructions so as to avoid the constitutional issues." *Galloway*, 365 Md. at 619 (quoting *Schochet*, 320 Md. at 714). "[E]ven if arguably otherwise deficient," a statute may be "salvageable because [the Court can] employ a limiting construction to the statute to ensure it provides a standard of conduct. . . ." *Id.*

In addition to interpreting the terms narrowly by using dictionary and statutory definitions, as discussed below, this Court has the option of reading "a limiting 'reasonable person' standard into the statute." *See Galloway*, 365 Md. at 625 (narrowing the construction of a harassment statute "by application of a reasonable person standard to save it from possible unconstitutional vagueness"). "Reading a reasonable person standard into [a statute] helps to narrow further the construction of the statute, keeping in mind that a statute 'does not become unconstitutionally vague merely because it may not be perfectly clear at the margins.'" *Id.* at 634 (quoting *Williams v. State*, 329 Md. 1, 11 (1992)). "'The objective "reasonable" test is used in many areas of the law

as an appropriate determinant of liability and thus a guide to conduct.'" *Id.* (quoting *Eanes v. State*, 318 Md. 436, 461-62 (1990)).

Applied to the 300-foot rule, the "reasonable person" standard would look something like the following: "A mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that [*a reasonable person would believe*] is primarily engaged in selling the same type of food product . . . as that offered by the mobile vendor." *See id.* at 634-35 (giving an example of the "reasonable person" standard as applied to a harassment statute). This objective "reasonable person" standard would guide the conduct of both mobile vendors and enforcement officials, thereby reducing the potential for subjective interpretations and irrational, overly discretionary enforcement. Likewise, the "reasonable person" standard could be applied objectively by a reviewing tribunal or court to determine if an aggrieved mobile vendor was actually in violation of the 300-foot rule.

II. The 300-foot rule is intelligible to an objective reasonable person, and is not subject to irrational enforcement.

Reading an objective "reasonable person" standard into the 300-foot rule would draw upon and highlight the fair notice that is inherent in the rule itself, based upon the plain meaning of the words, as defined by dictionaries, common usage, and the statute. After all, the standard for determining whether a statute provides fair notice is an *objective* one, *i.e.*, whether a person of ordinary intelligence and experience can reasonably understand its meaning. *See McFarlin*, 409 Md. at 410-11. Plaintiffs' subjective – and self-serving – understanding of the rule should have no bearing on this legal determination.

This Court does not dispute that the words in the phrases "primarily engaged in" and "same type of food product" are common and have generally accepted meanings, and that they can be

found in the dictionary. *Memo. Op.* at 16, 18. For example, "primarily" is defined by the Merriam-Webster Dictionary as "for the most part; chiefly." *Primarily*, *merriam-webster.com*, 2018, https://www.merriam-webster.com/dictionary/primarily (last visited January 4, 2018). With regard to "food product," that term is defined in the ordinance itself as "any *item* used as food, drink, confectionary, or condiment for human consumption, whether simple or compound." Baltimore City Code, § 17-1(c)(1) (emphasis added).

Despite the definitional specificity described above, the Court's opinion relies upon Plaintiffs' self-professed confusion in finding these terms vague. The Court notes that Joey Vanoni, the proprietor of a food truck that "sells ***mainly pizza*** and occasionally . . . meatball subs," testified that he is "hesitant to park near a Subway since Subway sells pizzas and meatball subs as well." *Memo. Op.* at 17 (emphasis added). Mr. Vanoni "is uncertain if Subway qualifies as 'primarily engaged in selling' pizza and meatball subs since those items are on Subway's menu." *Id.* This strains credulity. It is objectively unreasonable to believe that a person of ordinary intelligence and experience, let alone a restaurateur, could believe that Subway, a fast food restaurant that primarily, *i.e.*, chiefly, *i.e.*, for the most part, sells submarine/sub sandwiches is primarily engaged in selling pizza.

Similarly, the Court points out that Mr. Vanoni "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." *Id.* at 18. However, if Mr. Vanoni refers to the definition set forth in City Code, Section 17-1(c), he would know that "food product" means an *item* of food, not a category or a style. This definition of "food product" also obviates the concern that Nikki McGowan, proprietor of MindGrub Café, must identify whether restaurants are selling "brain food" before she determines whether to vend nearby. *See id.* Instead of referring to a *type* of food, the statutory definition

applies only to *items*, which can be easily gleaned from a restaurant's menu. It is objectively unreasonable, then, for Ms. McGowan to be "unsure if she can park near a chick-fil-a since they offer gluten free items and grilled chicken." *See id.* A person of ordinary intelligence and experience could easily determine that Chick-fil-A is primarily/chiefly/mainly engaged in selling chicken sandwiches; if MindGrub Café also offers chicken sandwiches, then it cannot vend within 300 feet of Chick-fil-A.

Because the terms "primarily engaged in" and "same type of food product" can easily be understood by their common meanings and by their dictionary and statutory definitions, there also is minimal danger of "irrational and selective patterns of enforcement." *Bowers*, 283 Md. at 122. Where "definitions are sufficient to qualify as common and generally accepted meanings[,] they 'comport with everyday understandings of the words they define' and are 'as plain to law enforcement officials as to the general public.'" *Galloway*, 365 Md. at 628-29 (quoting *Williams v. State*, 329 Md. 1, 11 (1992)).

This point is underscored by Mr. Vanoni's testimony about his interactions with a University of Maryland police officer in June of 2015, which constitutes the only evidence of potential enforcement of the 300-foot rule. During that encounter, the officer advised Mr. Vanoni

> that a complaint was lodged [by a brick-and-mortar restaurant] 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-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.*

Memo. Op. at 20 (emphasis added). The Court concludes from this encounter that "Mr. Vanoni, the officer, and the brick-and-mortar restaurant all have their own way of interpreting and applying the 300 foot rule." *Id.* To the contrary, however, this very encounter shows that the text of the statute is clear enough to guide the conduct of both the mobile vendor and the enforcement officer.

In other words, Mr. Vanoni was not in danger of irrational enforcement of the rule because it held a clear and common meaning for him and the officer; its meaning was intelligible to them both.

Because the terms "primarily engaged in" and "same type of food product" are properly viewed through the objective standard of a person of ordinary intelligence and experience, the Plaintiffs' subjective understandings of the rule should be disregarded. And when analyzed through the objective standard of a reasonable person, the common, generally understood meanings of the words, together with their dictionary and statutory definitions, are sufficiently definite to overcome fatal vagueness.[1]

CONCLUSION

For the reasons above, this Court can interpret the 300-foot rule so as to avoid finding it unconstitutionally vague. The terms in the rule that trouble the Court can be defined by their common, generally understood meanings, and by their dictionary and statutory definitions, thereby rendering them intelligible to persons of ordinary intelligence and experience – mobile vendors and enforcement officials alike. Moreover, the Court can exercise its prerogative to further narrow the terms by judicial determination, including by applying an objective "reasonable person" standard to the rule. Accordingly, the City respectfully requests this Honorable Court to alter or amend its judgment finding the 300-foot rule unconstitutionally vague and enjoining the City from enforcing it.

[1] As it stands, the Court has stayed its injunction enjoining the City from enforcing the 300-foot rule for sixty days, presumably to give the City an opportunity to "clarify" the ostensibly vague terms "by amendments." *Memo Op.* at 22. However, the Court did not provide any guidance as to what kind of clarifications would render the rule sufficiently definite to pass constitutional muster. If the Court chooses to not alter its ruling in light of the arguments above, the City respectfully requests the Court to provide judicial guidance on this front.

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

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CIVIL DIVISION

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

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND

This Court held that the City's 300-foot rule "does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks." Opinion 21. That conclusion rested on "voluminous evidence," including the City's own testimony that the rule's phrases can be interpreted multiple ways and are, at bottom, subjective.

Defendant's motion repeats arguments the City made at trial, including claiming that the rule is easily understood and that Plaintiffs' interpretations are unreasonable. But "a post-trial motion to reconsider is not a time machine in which to travel back to a recently concluded trial in order to try the case better with hindsight. . . . Losers do not enjoy carte blanche, through post-trial motions, to replay the game as a matter of right." *Steinhoff v. Sommerfelt*, 144 Md. App. 463, 484 (2002).

In any event, this Court's ruling was correct. In claiming the rule's phrases are clear, the City ignores the evidence this Court considered. And in seeking to insert a "reasonable person" standard, the City fails to appreciate that, because the rule's phrases have *no* common understanding, such a revision would solve nothing. Accordingly, the City's motion should be denied.

A. DEFENDANT IGNORES "VOLUMINOUS EVIDENCE" REGARDING VAGUENESS.

Defendant's motion focuses on Plaintiffs' testimony, arguing that their confusion regarding the rule was both "subjective" and "self-serving." *See* Motion 5–8. But Plaintiffs were not the only ones unable to decipher the rule's meaning. Indeed, this Court heavily relied on the City's own

testimony in holding that the rule "d[id] not provide the clarity or fair notice that is required to avoid arbitrary and discretionary enforcement." *See* Opinion 17.

Babila Lima, the 300-foot rule's author, and Gia Montgomery, its lead enforcement agent, testified as the City's Rule 2-412(d) designees. *See id.* at 16–18. Both stated that what a business is "primarily engaged in selling" is subjective. *See id.* at 17. Both testified that "same type of food product" was also subjective, *see id.* at 18, and the Court noted that Ms. Montgomery identified three different ways to apply that phrase. *Id.* (noting an official could use (1) cuisine, (2) food categories like "starch" or "vegetable," or (3) individual items in deciding if the rule had been violated). Other City officials echoed their testimony. Pls.' Proposed Findings of Fact ¶ 29 (noting that the Department of Transportation's general counsel described the rule as "very subjective").[1] There is no reason to disturb this Court's conclusion that "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,'" Opinion 21 (quoting *Bowers v. State*, 283 Md. 115, 122 (1978)), and violate the Maryland Constitution.

B. THE CITY'S "REASONABLE PERSON" LANGUAGE WOULD NOT CURE THE INFIRMITIES THIS COURT IDENTIFIED.

Because Defendant's motion focuses solely on Plaintiffs' testimony while ignoring its own statements, it suggests that any vagueness concerns can be corrected merely by reading a "reasonable person" standard into the rule. Motion 4–5. This is incorrect.

Central to Defendant's "reasonable person" argument is the idea that "primarily engaged in" and "same type of food product" are readily understood phrases. In its motion, Defendant states that "[t]his Court does not dispute that the words in the phrases 'primarily engaged in' and 'same type of food product' are common and have generally accepted meanings." Motion 5. But not one

[1] Mr. Vanoni testified that he interpreted the rule as prohibiting him from operating near Subway. Although the City says that interpretation "strains credulity"—at odds with this Court's credibility determination—Ms. Montgomery's testimony embraces that same interpretation. Pls.' Proposed Findings of Fact ¶ 28 (testifying that "if I were a food truck owner, I wouldn't park anywhere near a Subway because they carry . . . sandwiches, salads, pizza, and soup.").

person—not any City official and not the Plaintiffs—understand what these phrases mean. Even the City's lawyers have not offered an understandable definition of either phrase. That is why this Court held that the phrases used in the rule were undefined and that referring to the dictionary did not clarify their meaning. Opinion 16–18.

Since neither lawyers nor laypeople can understand these phrases, a "reasonable person" would likewise have no idea what they mean. Accordingly, adding "a reasonable person" to the 300-foot rule would accomplish nothing. That same insight explains why Defendant's invocation of *Galloway v. State*, 365 Md. 599 (2001), misses the mark. In *Galloway*, the Court of Appeals held that the statute's terms—"harass," "annoy," and "alarm"—*were* understandable, and that a "reasonable person" standard just helped ensure the statute was "limited to its intended purposes." *Id.* at 636. In other words, in *Galloway* "reasonable person" narrowed an understood, but potentially overbroad, meaning. But as this Court held, the terms "primarily engaged in" and "same type of food product" are understood by *no one*. *See* Opinion 21. Preceding them with "a reasonable person would believe" would not clarify matters or provide guidance to food trucks or City officials.

CONCLUSION

Plaintiffs respectfully request that this Court deny the City's Motion to Alter or Amend.

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2018, this PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO ALTER OR AMEND THE JUDGMENT was both filed and submitted to the chambers of the Honorable Karen Friedman via overnight mail, and was sent via email to the following counsel of record:

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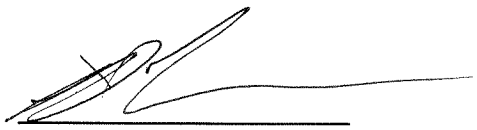

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PIZZA DI JOEY, LLC, *et. al.*	*	**IN THE**
Petitioners,	*	**CIRCUIT COURT**
v.	*	**FOR**
MAYOR AND CITY COUNCIL OF BALTIMORE	*	**BALTIMORE CITY**
	*	**Case No. 24-C-16-002852**
Defendant.		

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

MEMORANDUM

This Court has considered Defendant's Motion to Alter or Amend the Court's Judgment Granting Plaintiffs' Request for Injunctive Relief (Docket No. 52000/52001), and Plaintiffs' Opposition to Defendant's Motion to Alter or Amend (Docket No. 52002).

1. **Background**

This Court issued a Memorandum Opinion and Order on December 20, 2017, that: (1) denied the Plaintiffs' request to declare Article 15, Section 17-33 per se unconstitutional; and (2) denied the Plaintiffs' request for declaratory relief; but (3) granted Plaintiffs' injunctive relief that stayed the enforcement of Article 15, Section 17-33. The Court ruled that the terms "primarily engaged in" and "same type of food product," are so vague that fair notice was not provided and enforcement was likely to be subjective and arbitrary.

On or about January 5, 2018, pursuant to Md. Rule 2-534, the Defendant filed a Motion to Alter or Amend Judgment, in which it argues that this Court should: (1) "clarify the 300-foot's ostensibly vague terms"; and (2) find that "the 300-foot rule is intelligible to an objective reasonable person, and is not subject to irrational enforcement." *See Def. Memo.* at 4-7.

2. **Analysis**

First, the Defendant argues that this Court should "provide narrowing constructions of the terms 'primarily engaged in' and 'same type of food product' to save the rule from apparent

unconstitutional vagueness." *See Def. Memo.* at 4. According to the Defendant, this Court should define "primarily engaged in" and "same type of food product" in order to avoid a constitutional issue. *Id.*

Article 8 of the Maryland Constitution Declaration of Rights provides: "That the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." This provision adheres to the long followed principle that issues judicial in their character are left for the judiciary branch, as are legislative to the legislative branch, and executive to the executive branch. *Attorney General of Maryland v. Waldron*, 289 Md. 683, 689 (1981).

It is the role of the legislature to create and define law. When a court is asked to review a challenged statute, "the cardinal rule of statutory construction is to ascertain and effectuate the intent of the Legislature." *Walzer v. Ozborne*, 395 Md. 563, 571 (2006). Under statutory construction, if a statue is "clear and unambiguous then the courts will not look beyond the statutory language to determine the Legislature's intent." *Id.* at 572. On the other hand, if "the language of the statute is ambiguous, however, then 'courts consider not only the literal or unusual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of [the] enactment [under consideration].'" *Id.* at 572.

Here, this Court has already ruled that the language in Article 17, Section 17-33 is ambiguous. Based on the evidence provided by the parties, this Court was unable to determine the legislative intent or meaning as applied to this ordinance of "primarily engaged in" or "same type of food product." Through testimony in the record it was clear that even the City Officials involved in drafting this Code did not have a clear understanding of these terms, nor did they

have a way to define them. *See Memo. Op. Part IV.C.1-2.* Since those involved in drafting this ordinance were unable to provide any clarity, and the Code itself does not provide any clarity, this Court is unable to avoid a "constitutional issue."

The terms used in Article 15, Section 17-33 are not standard legislative language and there are no "judicial determinations" with respect to those terms. Under the circumstances, this Court should not be infringing on the duties of the legislative branch. The separation of powers "concept may constitutionally encompass a sensible degree of elasticity . . . (Article 8) cannot be stretched to a point where, in effect, there no longer exists a separation of governmental power." *Waldron*, 289 Md. At 689. Therefore, this Court will not define the terms "primarily engaged in" nor "same type of food product."

The Defendant argues that the Court should apply an objective reasonable person standard to the terms. *See Def. Memo. Part II.* They state that the Court's opinion "relies upon Plaintiffs' self-professed confusion in finding these vague terms." *See Def. Memo.* at 6. The Plaintiffs' Response to Defendant's Motion to Alter or Amend correctly points out that this Court not only quoted from the testimony of the Plaintiffs, but also from the statements made by City Officials involved in drafting the Article 15, Section 17-33. *See Pl. Memo.* at 2-3. This Court carefully considered the evidence and testimony submitted by both parties before concluding that a reasonable person would not have fair notice of what the ordinance intended as required by *McFarlin* and *Bowers*. *See Memo. Op. Part IV.C.*

As the Defendant mentioned, this Court was able to resolve how to measure 300-feet. Unlike the "primarily engaged in" and "same type of food product," the lack of detail in how the 300-feet is to be measured was easy to clarify. The use of measurements in ordinances or statutes is not unusual. Applying the "reasonable person" standard, it is obvious that the 300-feet 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." *See Memo. Op.* at 20. Here, it is obvious that this Court's application of the reasonable person standard to clarify the measurement issue did not violate the separation of powers doctrine.

For the reasons stated above, it is not for this Court to define the ambiguous terms "primarily engaged in" and "same type of food product" used in Article 15, Section 17-33. Therefore, this Court **DENIES** the Defendant's Motion to Alter or Amend the Court's Judgment Granting Plaintiffs' Request for Injunctive Relief.

2/7/8
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

MARILYN BLANTON

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

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

ORDER

Upon consideration of Defendant's Motion to Alter or Amend the Court's Judgment Granting Plaintiffs' Request for Injunctive Relief (Docket No. 52000/52001), and Plaintiffs' Opposition to Defendant's Motion to Alter or Amend (Docket No. 52002), for the reasons stated in this Court's Memorandum, it is **this** 7 **day of February 2018**, by the Circuit Court of Baltimore City, Part 29, hereby:

ORDERED that the Defendant's Motion to Alter or Amend the Court's Judgment Granting Plaintiffs' Request for Injunctive Relief (Docket No. 52000/52001) is hereby **DENIED**.

Judge Karen Friedman

Judge Karen C. Friedman

TRUE COPY
TEST

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

COURT FOR BALTIMORE CITY 1983