In The
Court of Appeals
Of Maryland

September Term, 2019
No. 41

PIZZA DI JOEY, LLC and MADAME BBQ, LLC,

***Petitioners*,**

v.

MAYOR AND CITY COUNCIL OF BALTIMORE,

***Respondent*.**

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

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

BRIEF FOR THE PETITIONERS

Robert P. Frommer, ***pro hac vice***
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
rfrommer@ij.org

Ari Bargil, ***pro hac vice***
INSTITUTE FOR JUSTICE
One Biscayne Tower
2 South Biscayne Boulevard, Suite 3180
Miami, Florida 33131
(305) 721-1600
abargil@ij.org

Glenn E. Bushel
TYDINGS & ROSENBERG LLP
1 East Pratt Street, 9th Floor
Baltimore, Maryland 21202
(410) 752-9718
gbushel@tydingslaw.com

Counsel for Petitioners

THE LEX GROUP[DC] ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Maryland is an independent sovereign with its own Constitution. In 1776, Maryland's Framers put into that Constitution a Declaration of Rights meant to secure Marylanders' rights in perpetuity. As guardian of those rights, this Court has said its "sacred duty" is to preserve the Constitution as the Framers intended. *Johnson v. Duke*, 180 Md. 434, 442 (1942). This Court has done its sacred duty by repeatedly refusing to lash Maryland's jurisprudence to that of other courts interpreting other constitutions. Twice in recent years this Court has rejected attempts to limit the Declaration's protections to those offered under the federal constitution. *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 558 (2013); *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 619–24 (2002).

This case calls on this Court to perform its sacred duty once again. The Framers intended Article 24 to guard the people's life, liberty, and property—including their right to practice a common trade. This Court long honored that intent by invalidating laws under Article 24 that were arbitrary or had an illegitimate purpose such as protectionism or providing special favors to a select few. But an outlier opinion, decided in 1977, cast doubt on this Court's fidelity to the Framers' intent. The result has been several conflicting lines of precedent and a diminution of Marylanders' rights. This Court should return Article 24 to its roots and, in so doing, strike down Baltimore's 300-foot ban. The City frankly

admits that its purpose for hobbling vendors is to financially benefit established businesses, a purpose long anathema to Article 24. And the ban's ambiguous terms, conflicting interpretations, and subjective enforcement violate Article 24 by being unconstitutionally vague.

STATEMENT OF THE CASE

In May 2016, Petitioners Pizza di Joey, LLC and Madame BBQ, LLC challenged Baltimore City Code Article 15, Section 17-33 ("the 300-foot ban"), which states that "[a] mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor." Alleging that the 300-foot ban violated their rights to equal protection and due process both on its face and as applied, Petitioners asked for a declaratory judgment that the ban violates their rights under Article 24 of the Maryland Declaration of Rights, a permanent injunction, and other miscellaneous relief.

Baltimore moved to dismiss, which the Circuit Court denied. After Petitioners amended their complaint and the parties conducted discovery, both parties cross-moved for summary judgment. The Circuit Court denied those motions and the matter went to trial. Several months later, the Circuit Court found that Baltimore's 300-foot ban substantially restricted Petitioners' businesses. It held that the ban's purpose—to protect brick-and-mortar businesses from mobile

competition—did not necessarily violate Article 24. But based on the evidence heard at trial, it concluded the ban violated Article 24's due process guarantee because it was vague. It enjoined the ban and denied Baltimore's motion to reconsider.

Both parties timely appealed to the Court of Special Appeals (CSA), which affirmed and reversed in part. The CSA found the ban effected only a minor infringement of Petitioners' rights—despite the trial court's contrary findings—and that it would judge the ban under what it called "traditional deferential review." The CSA held that numerous cases in which this Court struck down anticompetitive laws were outdated or inapplicable, that the ban's purpose—"to address competition that mobile vendors create for brick-and-mortar retail business establishments"—was legitimate, and that Petitioners' due process and equal protection challenges therefore failed. App. 41–57.

The CSA then reversed the trial court's decision that the 300-foot ban was vague. It held—even though Petitioners' due process claim turned on the ban's ambiguous terms and enforcement, and the city argued the ban was not vague—that the trial court should have avoided the issue. App. 59–60. It then held that Pizza di Joey, Madame BBQ, and other individuals and businesses can only bring pre-enforcement facial vagueness challenges when the ostensibly vague law impinges on a "fundamental" constitutional right. App. 60. Because it did not

believe Petitioners' rights under Article 24 were fundamental, it held that to challenge the law, they must break it. App. 60–61.

Pizza di Joey and Madame BBQ then petitioned this Court for a writ of certiorari, which this Court granted.

QUESTION PRESENTED

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

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

STATEMENT OF FACTS

Petitioners Pizza di Joey, LLC and Madame BBQ, LLC are two closely held Maryland limited liability companies that have operated licensed mobile vendor vehicles ("food trucks") in the City of Baltimore.

Pizza di Joey is owned by Joseph Salek-Nejad, a military veteran and Naval Reservist. Mr. Salek-Nejad, who operates the food truck under his mother's maiden name of Vanoni, started Pizza di Joey in 2014. Pizza di Joey serves

authentic New York-style pizzas along with meatball subs, pasta salads, and other Italian-American food products. Part of Pizza di Joey's mission is to use its food truck to aid Baltimore-area charities and create job opportunities for other veterans.

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

Pizza di Joey and Madame BBQ wished to operate their food trucks on both public and private property in Baltimore. But one of Baltimore's rules, Section 17-33 of Article 15 of the Baltimore City Code, restricted where they could legally operate. Known as the "300-foot ban," that section states that "[a] mobile vendor may not park a vendor truck within 300 feet of any retail business establishment that is primarily engaged in selling the same type of food product, other merchandise, or service as that offered by the mobile vendor." The ban applies to both public and private property throughout Baltimore. And it affects vendors differently based on what they and nearby brick-and-mortar businesses sell. As Petitioners testified, this ban prevented them from operating in many neighborhoods and caused both to limit their activities in Baltimore.

When asked why it enacted the 300-foot ban, Baltimore provided a single, clear answer: To suppress competition between mobile retailers and brick-and-mortar entities so as to protect the brick-and-mortars' bottom lines. The City enforced the ban despite establishing no standardized definitions or enforcement procedures.

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

A. The 300-Foot Ban

Some version of Baltimore's 300-foot ban has existed since the mid-1970's. Originally focused only on food trucks, in 2014 Baltimore expanded the ban to include all mobile vendors no matter what food, product, or service they happened to sell. Subsection 1 of this Part discusses the ban's substance, including a brief discussion of its purpose, its penalties, and how enforcement typically proceeded. Subsection 2 addresses how City officials subjectively interpret and enforce the ban.

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

Baltimore has repeatedly stated that the ban's purpose is to discriminate against vendors to benefit brick-and-mortar businesses. In discovery and at trial, Baltimore made clear the ban is "designed to address competition that mobile vendors create for brick-and-mortar retail business establishments." E.719. In

other words, the ban's purpose is to "eliminat[e] the harm that direct competition can cause to both mobile vendors and brick-and-mortar establishments." E.499. Baltimore's professed fear is that, if vendors and brick-and-mortar entities directly compete, some of the latter may suffer economically.

Baltimore drafted and enforced the 300-foot ban to root out that competition. *See* E.499, 563, 685. Many Baltimore agencies, including the Departments of Transportation, General Services, Police Department, and Health, have enforcement authority. *See* E.510–11. So too does the University of Maryland Police, which exercised that jurisdiction by accusing Pizza di Joey of violating the ban.

Typically, enforcement started when a brick-and-mortar establishment complained. *See* E.688, 741, 577–78, 449; *see also* E.511–13. Baltimore would respond to complaints by ordering vendors to move or cease selling certain items. And Baltimore would issue a citation if a vendor refused. *See* E.511–13, 687–89, 710, 470 (email stating "[w]e do enforce this rule").

Violating the 300-foot ban is a crime. Baltimore City Code Article 15, Section 17-42, entitled "Criminal Penalties," states that "[a] person who violates any provision of this subtitle or of a rule or regulation adopted under this subtitle is guilty of a misdemeanor and, on conviction, is subject to a penalty of $500 for each offense." Baltimore can revoke a vendor's license for violating the ban. *Id*. § 17-

44(a). And if a mobile vendor commits three violations within a year, including violations of the ban, Baltimore *must* revoke that vendor's license. *Id*. § 17-44(b). Once revoked, the vendor cannot re-apply for at least one year. *Id*. § 17-44(c).

Baltimore recognized that the 300-foot ban may cause entire neighborhoods to be off limits to mobile vendors. *See* E.722 (stating the ban makes operating in business districts and Downtown difficult). As discussed below, Petitioners analyzed how the ban affected their ability to operate in certain neighborhoods. The maps they produced showed how the ban effectively kept them from operating in viable commercial corridors.

2. The Interpretation and Enforcement of the 300-Foot Ban

Although the 300-foot ban's purpose is clear, its meaning is not. The trial court recognized that in holding the ban's phrases, including "primarily engaged in" and "same type of food product," to be incapable of ready discernment by the court or City officials. E.811–14.

Abundant evidence shows the 300-foot ban's lack of clarity. After all, no City employee, department, or agency established a common standard for how to interpret the ban or measure its distance. *See* E.736–37, 740, 743. No document or guidance, including Baltimore's own regulations, defines the ban's terms. E.718, 740, 743. Unsurprisingly, Baltimore testified that its officials may reach different conclusions about the ban's reach and effect. E.717.

This indeterminacy led Petitioners to ask the 300-foot ban's lead legislative drafter and the City's chief enforcement official—both designated as Baltimore's Rule 2-412(d) representatives—to explain its meaning. Both testified that Baltimore had a "commonsense" understanding of the ban's terms. E.749–50; *see also* E.745, 598 (stating that the City uses a "commonsense" definition). But those same representatives admitted that the actual meaning of that "commonsense" definition could vary from person to person. E.750; *see also* E.745. Baltimore ultimately admitted that it is "fair to say that there's *no objective standard* as to what a business is primarily engaged in selling or not engaged in selling" and that it is "*always a subjective analysis*." E.745 (emphases added); *see also* E.600.

When Petitioners asked if certain food items qualified as the "same type of food product," Baltimore could not answer. *See, e.g.*, E.603 ("Q: As the City representative, does the City have a position as to whether pizza is the same type of food product as flat bread? A: I don't know that the City has ever established a formal position on whether or not those two things are similar or equal. Q: Okay. Is a deli sandwich the same type of food product as a burger? A: The same answer to the previous question. Q: Okay. What about, is a barbeque sandwich the same type of food product as a burger? A: That's the same answer to the previous question."). That means that officials decide whether a vendor is selling the "same type of food product" as a restaurant on a "case-by-case basis." E.605–06 ("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.").

Baltimore's interpretation and enforcement of the 300-foot ban is subjective. Baltimore agencies do not coordinate on how to enforce the ban. *See* E.691. And because Baltimore admitted having no objective way to determine if a business is primarily engaged in selling any given food, product, or service, E.745, different officials could interpret terms like "primarily engaged in" as they saw fit. *See* E.742. Baltimore officials predicted this indeterminacy long before the ban's passage: In written comments, the Baltimore Department of Transportation's General Counsel expressed concern that enforcing the ban would be "very subjective." *See* E.750–51, 486–88 (commenting that "the Council will expect us to enforce this, and I don't see how we really can").

Further evidence showed that the 300-foot ban's subjectivity led officials to come up with at least *four* different ways to decide if a vendor had violated it. The first focuses on the specific items sold by a vendor and nearby brick-and-mortar businesses. E.687, 742. The second turns on whether a mobile vendor was operating near a restaurant with a similar cuisine or culinary theme. E.742 ("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."). A third appeared at trial, when Baltimore's counsel suggested the ban turns on how a vendor describes

its menu in marketing materials. E.198–202 (discussing how MindGrub Café's slogan, "Brain Food for Knowledge Workers," may mean it could not operate within 300 feet of restaurants also selling "brain food"). A fourth approach, Baltimore testified, would prohibit vendors from selling foods containing starches within 300 feet of a restaurant also selling foods containing starches. E.741 ("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 . . . .").

In its opinion, the Court of Special Appeals suggested a fifth possible enforcement approach under which City officials would use the "Cube Rule." This "rule" was an Internet creation popularized by a 25-year-old student that looks at "the location of the structural starch," *i.e.*, how many of a food item's sides are covered by bread, rice, or a tortilla. App. 60–61 & n.17. As that student said in one news article, "[i]f you were to serve [a calzone] as a slice, it would be a taco, because it has three sides, technically . . . [t]hat's what brought this whole thing together as mostly a joke."[1]

[1] Maura Judkis, *A hot dog is a taco. A steak is a salad. A Pop-Tart is a calzone. Let the Cube Rule explain*, Wash. Post (Dec. 12, 2018), https://www.washingtonpost.com/news/voraciously/wp/2018/12/12/a-hot-dog-is-a-taco-a-steak-is-a-salad-a-pop-tart-is-a-calzone-let-the-cube-rule-explain/.

B. The 300-Foot Ban's Impacts on Petitioners

1. The Ban's Effect on Pizza di Joey

When Pizza di Joey began, it tried operating on public streets. But it was difficult for Mr. Salek-Nejad to find legal locations due to the 300-foot ban, particularly because of how many pizzerias and other businesses sell pizza throughout Baltimore.

Pizza di Joey has firsthand experience with enforcement of the 300-foot ban. At trial, Mr. Salek-Nejad testified that he was operating at the 800 block of West Baltimore Street when a University of Maryland police officer approached him. E.79–80. That officer had jurisdiction to enforce the ban, *see* E.517–32, and advised Mr. Salek-Nejad he had violated it. Mr. Salek-Nejad avoided being cited only by opening his laptop, reviewing the ban's text, and persuading the officer that he was not selling the same type of food product as a nearby brick-and-mortar establishment. E.80–81.

Yet that incident left Mr. Salek-Nejad shaken. Beyond threatening his livelihood, the ban required him to constantly discern what businesses might sell competing products, and any enforcement (even if he convinced the officer he was not in violation) meant losing precious operating time. For trial, Mr. Salek-Nejad analyzed how the ban affected Pizza di Joey's ability to operate in two Baltimore neighborhoods: Hampden and Federal Hill. E.86–94 (Hampden), 96–104 (Federal

Hill). He reviewed the menus of restaurants in those neighborhoods to determine if they sold pizza or other Italian-American items offered by Pizza di Joey. *See, e.g.*, E.89. That research showed that 12 restaurants in Hampden and 15 in Federal Hill triggered the 300-foot ban for Pizza di Joey. E.533 (Hampden), 535 (Federal Hill). Maps reflecting these restaurants displayed the ban's cumulative effect in Hampden (displayed below) and Federal Hill. As Mr. Salek-Nejad testified, and the map shows, the ban prevented Pizza di Joey from operating near any of the main commercial thoroughfares in Hampden, including 36th Street. E.534.

The same, Mr. Salek-Nejad testified, was true in Federal Hill. E.536. The ban's cumulative effect prevented Pizza di Joey from successfully operating in either neighborhood. E.94 (testifying he "wouldn't be able to [operate in Hampden] successfully"); E.104 (testifying he would "likely lose money" in Federal Hill due to being "kept out of the areas where [his] customers would be").

The ban also blocked Pizza di Joey from operating on private property. For instance, Mr. Salek-Nejad wanted to operate in a private parking lot but could not because the shopping center that parking lot services contains several restaurants selling the same type of food products as Pizza di Joey. E.123–26.

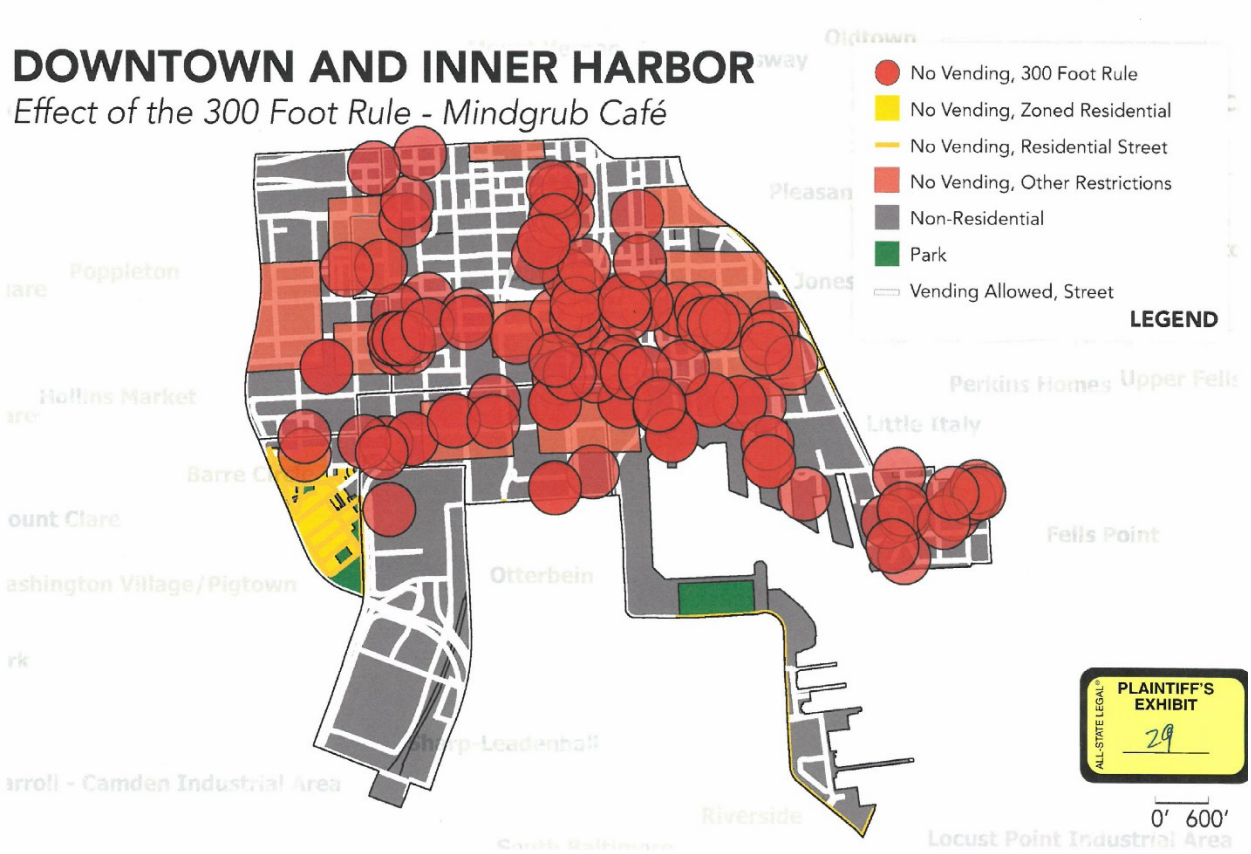
The ban led Mr. Salek-Nejad to severely decrease Pizza di Joey's operations inside Baltimore. E.85–86. Pizza di Joey ended up operating mainly in Anne Arundel County, which accounted for 80%–90% of its activity. E.75.

2. The Ban's Effect on Madame BBQ

Nicole McGowan, Madame BBQ's owner, likewise avoided operating in Baltimore out of concern for the 300-foot ban. That concern grew when Ms. McGowan expanded her food truck's menu to include salads, soups, and sandwiches, which simultaneously expanded how many brick-and-mortar businesses might trigger the ban. E.157.

As a result, Ms. McGowan rarely took her truck out into Baltimore. E.157. For trial, Madame BBQ analyzed how the 300-foot ban affected MindGrub Café's

ability to operate in Hampden, Federal Hill, and the greater Downtown area. E.159–72 (Hampden), 172–80 (Federal Hill), 181–91 (Downtown). Like Mr. Salek-Nejad, Ms. McGowan analyzed restaurants' menus to see if they sold items like those sold by MindGrub Café. *See, e.g.*, E.165. This analysis showed that 31 restaurants triggered the ban in Hampden for MindGrub Café, 50 in Federal Hill, and 113 in the Downtown area. E.537–38 (Hampden), 539–42 (Federal Hill), 543–47 (Downtown). Maps revealing the ban's cumulative effect in Hampden and Federal Hill show that the breadth of MindGrub Café's menu kept it from operating at viable locations. Moreover, this research showed the ban cut off most commercially viable locations for MindGrub Café Downtown.



E.551 (Map of Downtown). Although a few parts of Downtown were open, they were either economically unviable or posed safety concerns. E.189–90.

The ban also blocked Madame BBQ from operating on private property. Ms. McGowan wanted to operate in Waverly Brewing Company's parking lot but could not because MindGrub Café sold pulled-pork sandwiches and Blue Pit BBQ was within 300 feet. E.161–63. Likewise, Ms. McGowan expressed concern about operating in the parking lot of a commissary she owns in Locust Point because of a nearby restaurant named Barracuda's. E.196–97. These concerns led Ms. McGowan to avoid operating in Baltimore.

STANDARD OF REVIEW

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

ARGUMENT

Article 24 of the Declaration of Rights is a key facet of Maryland's unique constitutional history. Originally enacted in 1776, its language comes directly from Magna Carta. That language was intended to secure the rights Marylanders possessed under English common law, including "the right to pursue one's calling

in life."[2] For two centuries, this Court employed meaningful scrutiny when evaluating legislative acts under Article 24, developing a robust line of constitutional precedent along the way. But language from *Governor v. Exxon*, 279 Md. 410 (1977), wrongly suggested the Court should jettison that line of precedent and provide no more scrutiny under Article 24 than what the U.S Supreme Court currently offers for infringements of rights guaranteed by the Fourteenth Amendment. Those two constitutional provisions don't share the same text, structure, or history, though, and it is this Court's "fundamental principle of constitutional construction . . . that effect must be given to the intent of the framers of the organic law and of the people adopting it." *E.g.*, *Kadan v. Bd. of Supervisors*, 273 Md. 406 (1974) (citation omitted).

This Court should honor the Maryland Framers' intent by confirming that Article 24 meaningfully guards Marylanders' rights at common law, including their right to pursue a trade. And in applying Article 24, this Court should declare Baltimore's 300-foot ban constitutionally invalid. Its admitted purpose—"to address competition that mobile vendors create for brick-and-mortar retail business establishments"—is illegitimate anti-competitive animus that violates the common-law prohibition on using public power for private gain. The ban violates Article 24's equal protection guarantee by discriminating between food trucks based on

[2] *Attorney Gen. v. Waldron*, 289 Md. 683, 722 (1981).

their supposed competitive threat to restaurants. And the ban is vague because its ambiguous terms "fail[] to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others." *Ashton v. Brown*, 339 Md. 70, 93 (1995). The ban lacks any legitimate sweep, and this Court should declare it void.

I. Article 24 Requires Robust Judicial Scrutiny Of Government Actions That Abridge The Rights One Had At Common Law.

The Constitution and Declaration of Rights is Maryland's foundational document. "[T]he principles of the constitution are unchangeable," *Johns Hopkins University v. Williams*, 199 Md. 382, 386 (1952), and it is this Court's duty to apply "those principles to changes in the economic, social, and political life of the people, which the framers did not and could not foresee." *Id*. In so doing, "the status of our Constitution as our 'instrument of government,' requires that it be preserved to the fullest extent possible." *Perkins v. Eskridge*, 278 Md. 619, 638 (1976) (citation omitted), overruled on other grounds by *Parrott v. State*, 301 Md. 411 (1984).

In other words, this Court should interpret Article 24 to best reflect Maryland's unique constitutional text, structure, and history—no matter what the U.S. Supreme Court has said regarding the federal constitution. *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 621–23 (2002) (noting the Declaration of Rights' Articles are "independent" of federal constitutional guarantees). That text,

structure, and history show the Framers intended Article 24 to protect those rights Marylanders had at common law, including the right to practice one's trade. Decisions from both this Court and others show that using government power as a cudgel to further the narrow self-interest of politically connected businesses violates that right.

A. The Text, Structure, and History Surrounding Article 24 Shows the Framers Intended It to Protect Common-Law Rights, Including the Right to Pursue a Trade.

Analyzing the text of Article 24, the historical context surrounding its adoption, and the Maryland Constitution's broader structure is the best method for understanding how the Framers understood the "law of the land" clause and the protections it offered. *State Bd. of Elections v. Snyder ex rel. Snyder*, 435 Md. 30, 53 (2013) ("Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument's drafters and the public that adopted it."); *see also Brown v. Brown*, 287 Md. 273, 282–83 (1980) (stating that "the Constitution ought to have a common sense interpretation, by which we mean the sense in which it was understood by those who adopted it") (quoting *State v. Mace*, 5 Md. 337, 350 (1854)).

That text, history, and structure demonstrates that the Framers intended for Article 24 to broadly protect Marylanders' rights at common law, specifically the right to practice a trade. Article 24's language came directly from Magna Carta,

and to it Framers added language that broadly defined those rights the Article protected. Scholarship and history show both that English common law jealously protected the right to practice one's trade and that Marylanders sought to retain that protection in the New World. And in enacting now-Article 41, the Declaration of Rights' Anti-Monopoly Clause, the Framers showed their concern about the politically connected using public power to restrict entry into a lawful calling for their own private ends.[3]

Maryland's Framers modeled Article 24 on Magna Carta's "law of the land" clause for a reason.[4] In 1776, the prevalent understanding of the "law of the land" came from scholars like Sir Edward Coke and Sir William Blackstone, whose views greatly influenced the drafting of numerous state constitutions. Both Coke and Blackstone reported that Magna Carta's "law of the land" clause referred to rights protected at common law against arbitrary government interference—

---

[3] Commentators argue a lockstep approach to Article 24 "is unsettling not only because a genuine justification appears lacking, but also because opponents can point to several compelling reasons why the Maryland judiciary would be better served to embark upon an independent interpretation of this state constitutional provision," among them Article 24's unique text and history. Mike Raskys, *State Constitutional Law-Due Process-the Court of Appeals of Maryland Remains in Lockstep with the United States Supreme Court*. Cost v. State, *10 A.3d 184 (Md. 2010)*, 43 Rutgers L.J. 853, 865 (2013).

[4] As this Court has repeatedly confirmed, Article 24 and its "law of the land" clause "is based upon Chapter 39 of Magna Carta." *Espina v. Jackson*, 442 Md. 311, 336 (2015) (citation omitted); *Wright v. Wright's Lessee*, 2 Md. 429, 452 (1852) ("[T]he words 'by the law of the land' . . . are copied from Magna Charta . . . .").

including rights to personal security, personal liberty, and private property. *See* Edward Coke, 2 INSTITUTES OF THE LAWS OF ENGLAND 45-46 (E. & R. Brooke, London 1797); 1 William Blackstone, COMMENTARY ON THE LAWS OF ENGLAND 135–39 (1765).

In fact, the few additions the Framers made to Magna Carta's "law of the land" clause reflected their desire that Article 24 construe those rights broadly and protect them thoroughly. The Framers added "life, liberty, or property" to the Article, a phrase John Locke and Blackstone employed to denote the full breadth of rights governments could not abridge. Moreover, by protecting against both "desseiz[ure] of . . . liberties" *and* "depriv[ations] of . . . liberty," Article 24's text guards against unwarranted encroachments to the people's common law rights, no matter the degree.[5] As one commentator said:

> Maryland's committee likely sought to preserve and expand the interests protected by the law of the land, even at the cost of brevity and elegance of language. . . . **It was neither brief nor elegant, but it is broad.** The length of Maryland's draft declaration of rights--more than twice as long as Virginia's or Pennsylvania's declarations of rights--independently indicates a desire for broad constitutional protections.

[5] One commentator suggests these additions were in response to Virginia's law of the land clause, which Maryland's Framers felt offered too few protections. Their work "'reinstated' the traditional Magna Carta language, though with edits to ensure that the protections were extended to interests in life, liberty, and property." Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 Rutgers L.J. 929, 967 (2002).

Andrew T. Bodoh, *The Road to "Due Process": Evolving Constitutional Language from 1776 to 1789*, 40 T. Jefferson L. Rev. 103, 134 (2018) (emphasis added, citations omitted). This is not a new insight; almost 150 years ago, influential commentator Thomas Cooley confirmed that "the words from Magna Carta incorporated in the constitution of Maryland . . . were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 355 (1868) (citing *Bank of Columbia v. Okely*, 4 Wheat. 235 (1819)).

Chief among those common law rights is the right to pursue a lawful trade, a fundamental aspect of the right to private property. 1 William Blackstone, COMMENTARIES 138 (indicating the right to private property included "the free use, enjoyment, and disposal of all [] acquisitions, without any control or diminution, save only by the laws of the land"); *id*. at 427 ("At common law every man might use what trade he pleased."). The law of the land approved of lawful competition arising between private parties who are each pursuing their trades. As one English court held in a case with remarkably similar facts to this one:

> Damage alone is not a cause of action. Thus, [where] an innkeeper or other victualler comes and dwells next to another [innkeeper] and thereby more of the customers resort to him than the other, it is a

> damage to the other, but no wrong, for he cannot compel men to buy victuals from him rather than from the other.

Prior of Christchurch, Canterbury v. Bendysshe (1503), 93 Selden Society 8.

But those same courts invalidated government acts that prevented one person from practicing her trade in order to benefit existing businesses. In 1377, for instance, an English court struck down a royal monopoly on selling wine in London. William Holdsworth, 4 A HISTORY OF ENGLISH LAW 344 n.6 (1938). In *Darcy v. Allein*, also known as the *Case of Monopolies*, the court held that "[a]ll . . . trades, as well mechanical as others . . . [a]re profitable for the commonwealth," and therefore a monopoly grant "is against the common law." 77 Eng. Rep. 1260, 1263 (K.B. 1602). And in *The Case of the Tailors*, the King's Bench reviewed an ordinance requiring would-be tailors to first gain the consent of the local tailors' guild. Holding that "the common law abhors all monopolies, which prohibit any from working in any lawful trade," the King's Bench invalidated the ordinance due to its protectionist purpose. *The Case of the Tailors*, 77 Eng. Rep. 1218, 1218 (1614). Similar cases abound.[6]

From the beginning, Marylanders sought to preserve their rights to the same degree. Maryland's Charter, for instance, guaranteed colonists "all Privileges, Franchises and Liberties" of persons born in England and required that any

[6] *See, e.g.*, *Harrison v. Godman*, 97 Eng. Rep. 161, 164 (1756) (holding that a city "may make bye-laws to regulate trade, but not to restrain it").

legislative acts be "consonant to Reason, and. . . agreeable to the Laws, Statutes, Customs, and Rights of this Our Kingdom of England." Md. Charter arts. X, VII (1632). Over a century later, the colonists passed an "Act for the Liberties of the People," which guaranteed them the rights that a "naturall [sic] born subject of England hath or ought to have or enjoy in the Realm of England." COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 269 (Donald S. Lutz ed., 1998).

Maryland's Framers knew this history. Their deliberate choice to insert Magna Carta's "law of the land" language into Article 24, and then broaden it with the phrase "life, liberty, or property," shows their intent to protect Marylanders' rights to the same degree Magna Carta protected them in England, including the right to practice one's trade.

Moreover, Article 24 is not the only Declaration of Rights provision that protects this right. *See Reed v. McKeldin*, 207 Md. 553, 560-61 (1955) (using "other parts of the instrument" to "ascertain [an Article's] meaning"). Maryland's Framers declared "[t]hat monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered." Originally Article 39 (now Article 41), Maryland's anti-monopoly clause embodies the common-law's distaste for state-sanctioned monopolies, which benefit the politically well-connected by making it a crime to compete against them by

practicing one's trade. *See* Dan Friedman, THE MARYLAND STATE CONSTITUTION 76 (2011). Its inclusion suggests the Framers intended Article 24 to serve a similar role by blocking legislative acts motivated by anti-competitive animus.

B. This Court Has Consistently Invalidated Legislative Acts That Unreasonably Infringed on the Right to Private Property, Including the Right to Pursue a Trade.

Maryland courts have recognized their duty to invalidate acts which violate the Declaration of Rights. *Anderson v. Baker*, 23 Md. 531, 549 (1865) ("Whatever may be the decisions of other States, on the powers of the Courts to nullify legislative Acts . . . in Maryland the question is not open, and the power of the Court is affirmed in the broadest terms."). This Court fulfilled that duty by declaring that legislative acts that unreasonably deprived a person of their private property violated Article 24.

One early case, *Regents of the Univ. of Md. v. Williams*, 9 G. & J. 365 (1838), involved a private corporation established in 1812 to operate several colleges as a single university in perpetuity. The corporation took in donations, acquired property, and ran the university. But in 1825 the legislature sought, in this Court's words, "to destroy the old corporation, and to create a new one in its place." *Id*. at 407. It passed an act that stripped the old corporation of its power to continue operating the university and transferred its assets.

The old corporation sued, arguing in part that the legislature's action violated now-Article 24. This Court agreed. It held that the corporation's power to operate the university and assets were private property, no less than an individual's trade or assets were her private property, and that the legislature could not take away that property and give it to another. To hold otherwise, said this Court, "would be in this age, and in this state, a startling proposition, to which the assent of none could be yielded." *Id*. at 409. This Court concluded the act violated Article 24, which "rises above and restrains . . . the power of legislation" to "protect[] the life, liberty, and property of the citizen from violation, in the unjust exercise of legislative power." *Id*. at 408.

Regents is only one of many cases where this Court protected the right to private property, including the right to practice one's trade, by intervening when the legislature acted arbitrarily, or when the natural reading of a law revealed an illegitimate purpose. Shortly after the 1867 Constitution's enactment, for instance, this Court invalidated an ordinance that gave Baltimore's Mayor unfettered discretion to order any business to stop using a steam engine. *Mayor & City Council of Baltimore v. Radecke*, 49 Md. 217, 227 (1878). Such an order would be crippling: In the days before electric power, "the use of steam engines [wa]s absolutely necessary for the successful prosecution of nearly all the various manufacturing, commercial, industrial and business enterprises which are essential to the prosperity

of large cities." *Id*. at 229. Thus, the ordinance gave the Mayor unchecked power to deprive any business of its livelihood. As this Court held, "an Ordinance which clothes a single individual with such power, hardly falls within the *domain of law* and we are constrained to pronounce it inoperative and void." *Id*. at 231.

Nor is *Radecke* an outlier. In *Shaffer v. Union Mining Co. of Allegany County*, 55 Md. 74, 81 (1880), this Court—recognizing the common-law right to "the free use, enjoyment and disposal of [property] . . . without any control or diminution, save only by the law of the land"—interpreted a statute not to prevent workers from assigning their wages to creditors to avoid a potential constitutional conflict. Several years later, this Court held in *Long v. State*, 74 Md. 565 (1891), that an anti-gambling statute could not be constitutionally applied to a business that gave away presents to induce purchases.[7] In *State v. Rice*, 115 Md. 317 (1911), this Court held that a statute requiring would-be undertakers to work two years in the separate field of embalming had no relation to public health or safety. And in *Mayor & City Council of Havre de Grace v. Johnson*, 143 Md. 601 (1923), this Court held that Havre de Grace's ordinance permitting only its residents to drive a taxicab was invalid since the ordinance's "more reasonable and probable" purpose was to "confer the monopoly of a profitable business upon residents of the town."

[7] *See also State v. Caspare*, 115 Md. 7 (1911) (holding that statute requiring that all stamps have redeemable value of one cent was unconstitutional as applied to businesses that issued stamps to simply evidence customers' previous purchases).

Of course, when a law had an actual public purpose and means reasonably calculated to achieve that purpose, this Court upheld it. For instance, in *Singer v. State*, 72 Md. 464 (1890), this Court upheld a law requiring that plumbers get certified before operating. In *Deems v. Mayor & City Council of Baltimore*, 80 Md. 164 (1894), this Court held that Baltimore could dispose of impure milk since the law requiring the same had as "its immediate object the promotion of the public good." And in *State v. Hyman*, 98 Md. 596 (1904), this Court upheld a clothing manufacturer's prosecution for using an apartment as a factory, since the law prohibiting that use had "a real and substantial relation to the police power."

These cases, along with many others later decided, show that throughout its entire history this Court meaningfully reviewed restrictions on the right to practice one's trade. The test articulated in *Maryland Board of Pharmacy v. Sav-A-Lot, Inc.*, 270 Md. 103, 119–20 (1973)—that legislation must "not be unreasonable, arbitrary, or capricious, and the means selected must have a real and substantial relation to the object sought to be attained"—is substantively identical to the one this Court always used. Two years before *Sav-A-Lot*, this Court used that test to invalidate a restriction that prevented crabbers and others from practicing their trade outside their home county. *See Bruce v. Director*, 261 Md. 585 (1971). And the same year this Court decided *Sav-A-Lot*, it decided that the government's prohibition on cosmetologists cutting men's hair did not "bear a real and

substantial relation to the object sought to be attained." *Md. State Bd. of Barber Exam'rs v. Kuhn*, 270 Md. 496, 512 (1973).[8]

Maryland's approach is far from unique: The test in *Sav-A-Lot* is the test that Pennsylvania uses to this day. *Shoul v. Commonwealth*, 643 Pa. 302, 317 (2017) (stating that Pennsylvania's test asks "whether the challenged law has 'a real and substantial relation' to the public interests it seeks to advance, and is neither patently oppressive nor unnecessary to these ends"); *see also Sav-A-Lot*, 270 Md. at 120 (stating that "Maryland and Pennsylvania adhere to the more traditional test"). As the next Section shows, other states whose constitutions contain "law of the land" clauses like Maryland's also meaningfully review legislative acts that infringe on the right to practice one's trade.

C. Other State Courts Confirm the Correctness of Maryland's Longstanding Approach Regarding Article 24 Rights.

Early decisions from other states with "law of the land" clauses show that those state courts also invalidated legislative acts that unreasonably interfered with the right to practice one's trade. *City of Memphis v. Winfield*, 27 Tenn. 707 (1848), is a prime example. There, Memphis enacted a curfew that kept free African-Americans from being outside during nighttime hours. *Id*. at 708. In striking

[8] *See also Schneider v. Duer*, 170 Md. 326 (1936) (act requiring applicant for barber's license to graduate eighth grade and complete two-year course imposed arbitrary restriction upon right to follow chosen vocation); *Dasch v. Jackson*, 170 Md. 251 (1936).

down the curfew, the Tennessee Supreme Court focused on how it impeded African-Americans' right to practice their trade. The court declared in forceful language that "in cities, very often, the most profitable employment is to be found in the night" and that the "curfew law . . . is high-handed and oppressive, and . . . an attempt to impair the liberty of a free person unnecessarily, to restrain him from the exercise of his lawful pursuits, and to make an innocent act a crime. . . ." *Id.* at 709–10.

Other decisions echo *Winfield*. In Massachusetts, the Supreme Judicial Court struck down an ordinance that prevented a church employee from interring bodies without first being licensed, holding that "the law will not allow the right of property to be invaded, under the guise of a police regulation for the preservation of health, when it is manifest that such is not the object and purpose of the regulation." *Austin v. Murray*, 33 Mass. 121, 126 (1834). In New York, the Court of Appeals reversed James Wynehamer's conviction for selling alcoholic drinks on the grounds that the statute prohibiting the same violated the "law of the land" by depriving him of his property. *Wynehamer v. New York*, 13 N.Y. 378 (1856).[9] And in *Trustees of the University of North Carolina v. Foy*, 5 N.C. 58, 87–89 (1805),

[9] In 1885, the Court of Appeals held that "[a]ll laws, therefore, which impair or trammel [the right to earn a livelihood in any lawful calling], which limit one in his choice of a trade or profession, or confine him to work or live in a specified locality . . . are infringements upon his fundamental rights of liberty, which are under constitutional protection." *In re Jacobs*, 98 N.Y. 98, 106-07 (1885).

the North Carolina Supreme Court invoked its law of the land clause in invalidating a legislative attempt to divest a corporation of land previously granted.

Nor are these decisions relics of a bygone age: To this day, state courts across the country meaningfully scrutinize legislative acts that infringe on the right to practice one's trade. In *Patel v. Texas Department of Licensing & Regulation*, 469 S.W.3d 69 (Tex. 2015), the Texas Supreme Court interpreted its law of the land clause to require more searching review than the "rational relationship" test applied by federal courts, which it criticized as being "for all practical purposes no standard" at all. *Id*. at 90. Instead, it held that courts must look at a "statute's actual, real-world effect" and determine if it is both related to a legitimate government interest and not "so burdensome as to be oppressive in light of, the governmental interest." *Id*. at 87; *see also id*. at 120 (Willett, J., concurring) (stating that, under such review, "an independent judiciary must *judge* government actions, not merely rationalize them"). *See also Jegley v. Picado*, 349 Ark. 600, 635 (2002) (noting that an exercise of the police power must be (1) "reasonably necessary for the accomplishment of [a legitimate] purpose," and (2) "not unduly oppressive upon individuals") (citation omitted); *Troiano v. Zoning Comm'n*, 155 Conn. 265, 267 (1967) (applying similar test); *Powell v. State*, 270 Ga. 327, 334 (1998) (same); *Honomichi v. Valley View Swine, LLC*, 914 N.W.2d 223, 235 (Iowa 2018) (same); *Guimont v. Clarke*, 121 Wash. 2d 586, 608–09 (1993) (same).

In other words, Maryland's traditional approach to reviewing legislative acts under Article 24 was both faithful to the Framers' intent and consistent with how other states with similar constitutional language evaluate impingements of common-law rights. But language from *Governor v. Exxon*, 279 Md. 410 (1977), wrongfully cast doubt on that approach and led to confusion about this Court's continuing fidelity to Article 24's unique text, structure, and history.

D. This Court's Quotation of U.S. Supreme Court Opinions in *Governor v. Exxon* Did Not, and Could Not, Reduce the Substantive Protections Article 24 Affords Marylanders.

The Court of Special Appeals believed this Court threw away Maryland's entire Article 24 history in *Governor v. Exxon*. But that belief rests on several unjustified assumptions.

First, the Court in *Exxon* suggested that Article 24 and the Fourteenth Amendment are one and the same. *See* 279 Md. at 423 n.3, 438 n.8. They are not. The people of Maryland enacted the Declaration of Rights in 1776, over ninety years before the Fourteenth Amendment was ratified. Moreover, Article 24's "law of the land" clause was meant to protect Marylanders' rights as they existed in England, whereas the Fourteenth Amendment's language was meant to safeguard the rights of newly freed slaves from state governments. The two are like fish in a

stream—they may happen to swim alongside one another, but each one has its own origin and charts its own path.[10]

Second, the language the Court of Special Appeals cited from *Exxon* is largely quotes from cases the United States Supreme Court decided under the Fourteenth Amendment. They have no bearing on Maryland's unique constitutional text, structure, or history, nor did *Exxon* explain why quotes about the federal constitution have any relevance to Maryland's own organic document. Indeed, as scholar Michael Tolley points out:

> "The 'original due constitutional proposition,' which Judge Eldridge mentioned, is more closely associated with the Supreme Court's treatment of due process than it is with the history of due process in Maryland's constitutional history . . . . In its zeal to reject substantive due process and adopt the same, deferential standard of review the federal courts use to evaluate economic legislation today, ***the Maryland court ignored and, to some extent, rewrote its own constitutional history."***[11]

As discussed above, *see supra* Section I.A., Maryland's "original due constitutional proposition" was that Article 24 substantively restrains the legislative power and requires courts to safeguard those rights Marylanders enjoyed at common law—including the right to practice one's trade—from arbitrary and illegitimate legislative acts. *Regents of the Univ. of Md. v. Williams*,

---

[10] *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621–23 (2002) (noting the Declaration of Rights' Articles are "independent" of federal constitutional guarantees).

[11] Michael Carlton Tolley, STATE CONSTITUTIONALISM IN MARYLAND 157 (1992) (emphasis added).

9 G. & J. 365, 408 (1838) (stating that "a fundamental principle of right and justice . . . protects the life, liberty and property of the citizen from violation in the unjust exercise of legislative power"); *see also Dasch v. Jackson*, 170 Md. 251 (1936) (holding that the legislature may not "deprive the individual of rights, privileges, immunities, or property . . . except for the protection of some real and substantial public interest").

In any event, history reveals that *Exxon* is a constitutional outlier. Following *Exxon*, this Court continued to protect the right to practice one's trade. Look at *Attorney General v. Waldron*, 289 Md. 683 (1981), where a rule kept retired judges who practiced law for money from receiving pensions. This Court declared it would be especially vigilant "when an enactment invades protected rights to life, liberty, property or other interests secured by the fundamental doctrines of our jurisprudence." *Id*. at 704. Since the rule prevented Waldron from practicing his trade, this Court declared that its review under Article 24 would not "tolerate random speculation." *Id*. at 713. Instead, it focused on the rule's actual purpose and "seriously examine[d] the means chosen to effectuate that purpose." *Id*. This Court struck down the rule after rejecting one justification—saving the state money—as "tautological" and finding the rule to be an under- and overinclusive means of assuring confidence in the judiciary. *Id*. at 724.

Likewise, in *Kirsch v. Prince George's County*, 331 Md. 89 (1993), this Court meaningfully scrutinized a mini-dorm ordinance that regulated student-occupied rentals. The Court applied rational-basis review, which it viewed as consistent with the approach taken in *Kuhn*, *Dasch*, and *Johnson*. *Id*. at 104–05. The County claimed its ordinance would alleviate "illegal parking and saturation of available parking by residents of mini-dormitories, litter, and noise." *Id*. at 105. But this Court did not take that statement at face value. Instead, it examined the evidence and found that imposing "more strenuous zoning requirements" on student-occupied rentals was arbitrary and lacked a rational basis because *all* properties rented to several unrelated individuals, no matter what those individuals did, raised identical concerns. *Id*. at 106.

Or look at *Verzi v. Baltimore County*, 333 Md. 411 (1994), where a towing rule meant police would not assign a Harford County operator a service area. It was a narrow restriction: Mr. Verzi wouldn't be called to service accidents, but he could otherwise operate throughout Baltimore County. *Id.* at 413, 426. Still, this Court meaningfully scrutinized whether the rule minimized congestion and prevented fraud. After rejecting those pretextual justifications, this Court came upon the rule's true purpose—to "confer[] the monopoly of a profitable business upon" in-county operators. This Court struck the rule down, holding that goal to be "wholly unrelated to any legitimate government objective." *Id*. at 427.

As this Court stated long ago, "[t]he constitution of this State, composed of the declaration of rights and form of government, is the immediate work of the people, in their sovereign capacity, and contains *standing evidences of their permanent will*." *Crane v. Meginnis*, 1 G. & J. 463, 471 (1829) (emphasis added). Twice in recent years this Court has rejected arguments to ignore that permanent will in favor of federal precedent. *See, e.g.*, *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 558 (2013) (refusing to "limit the protections provided by Article 17 to only those provided by the federal Constitution"); *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 619–24 (2002) (rejecting arguments, based on federal precedent, that deprivations of vested rights are constitutional if there is a "rational basis").

This Court should do the same here. "It is the sacred duty of the Courts to preserve inviolate the integrity of the Constitution." *Johnson v. Duke*, 180 Md. 434, 442 (1942). The people as sovereigns wrote language from Magna Carta directly into the Declaration of Rights, language everyone understood safeguarded the rights Marylanders held at common law, including the right to practice a trade. This is Article 24, the law of the land, and its protections are immutable. As the next section shows, Baltimore's 300-foot ban fails Article 24's substantive-due-process and equal-protection guarantees since its purpose—to financially benefit restaurants by hobbling their mobile competitors—is illegitimate.

II. The 300-Foot Ban Violates Article 24 Because Infringing One's Trade To Enrich Existing Businesses Is An Illegitimate Legislative Purpose.

This Court, like virtually all Anglo-American courts, has long held that the police power should not be used to suppress competition. In *Goldman v. Harford Road Building Ass'n*, 150 Md. 677 (1926), this Court said that "the law is in accord in favoring free competition" and that "[d]isparity in knowledge, experience, skill, credit, wealth, or foresight of the competitors does not . . . make the competition unequal in a legal sense." Three centuries earlier, the King's Bench in the *Case of the Tailors of Ipswich*, 77 Eng. Rep. 1218 (K.B. 1615), criticized the marriage of private avarice and public power, which led to a system of "oppression of yo[u]ng Tradesmen, by the old and rich of the same Trade, not suffering them freely to live in their Trade."[12]

Using public power to stifle competition impoverishes both the person kept from her trade and the broader community. *Chesman ex ux v. Nainby*, 93 Eng. Rep. 819, 821 (1727) (criticizing restraints of trade "because the publick loses the benefit of the party's labour, and the party himself is rendered an useless member of the community"); *Goldman*, 150 Md. 677 (noting that competition "is essential to the general welfare of society"). It is why this Court refuses to allow someone

[12] By contrast, Samuel Chase upheld the Maryland Constitution, which he helped draft, as "afford[ing] security to property and ample protection . . . from any oppression of the poor by the rich and powerful." THE COMPLETE ANTI-FEDERALIST 81 (Herbert J. Strong ed., University of Chicago Press 1981).

to challenge a zoning decision based on competitive impact. *Aspen Hill Venture v. Montgomery Cty. Council*, 265 Md. 303, 314 n.3 (1972) (noting that "when economic impact standing alone becomes a sufficient basis for such dis[c]riminatory legislation it will mark the extinction of the last vestige of the economic system under which this government operates"). And it is why this Court has consistently invalidated legislative attempts "to confer the monopoly of a profitable business upon" well-connected constituents. *Johnson*, 143 Md. at 608.

Despite all this, Baltimore has not hidden the 300-foot ban's purpose. It admits designing the ban to "address competition that mobile vendors create for brick-and-mortar retail business establishments." E.719. Its hope was that the ban would "eliminat[e] the harm that direct competition can cause to both mobile vendors and brick and mortar establishments." E.498–99. In other words, Baltimore made it a crime for vendors to operate near brick-and-mortar eateries so those eateries would financially benefit.

But legislative acts that hobble one person's trade to enrich her would-be competitors violate Article 24. Their purpose is protectionism, anti-competitive animus, and they fail because the police power may only be used when "the interest of the public generally as distinguished from those of a particular class . . . require the regulatory interference." *Bureau of Mines of Md. v. George's Creek Coal & Land Co.*, 272 Md. 143, 175 (1974). It is why this Court has not "hesitated

to strike down discriminatory economic regulation[s]" that "impose[] economic burdens, in a manner tending to favor [some Maryland] residents . . . over [other Maryland] residents." *Frankel v. Bd. of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 315 (2000).

This Court has long vindicated Article 24's prohibition on legislation motivated by anti-competitive animus. In *Verzi*, for instance, the County proffered generic interests for its towing rule, such as "decreas[ing] traffic congestion and delays in the roadways." 333 Md. at 425. This Court saw through the charade, holding that such generic 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, ran "afoul of the guarantee of equal protection of the laws." *Id*. at 427–28. Likewise, in *Maryland State Board of Barber Examiners v. Kuhn*, this Court 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*, this Court invalidated Havre de Grace's rule allowing only town residents to drive taxicabs, holding that an ordinance meant to enrich

town residents by hamstringing their would-be competitors was illegitimate. 143 Md. at 608.

The 300-foot ban is more blatantly anti-competitive than the restriction in *Verzi*. First, *Verzi*'s towing rule did not expressly discriminate between towers, *see* 333 Md. at 415, but the ban prohibits vendors from operating near businesses selling "the same type of food product"—*i.e.*, businesses they would compete with. Second, Baltimore County *never* admitted the purpose of its towing rule was to protect in-county towers from competition, see *Verzi*, 333 Md. at 425–26, but the City *admits* designing the ban to do just that. E.498–99, 719. Lastly, record evidence shows that Baltimore regularly enforced the ban at restaurants' request.

The 300-foot ban's crippling effect also underscores its unconstitutionality. The restriction in *Verzi* only prevented Mr. Verzi from being hailed by county police in one narrow circumstance. 333 Md. at 415. But the trial court credited evidence showing that the ban made it impossible for Petitioners to operate in viable commercial areas. In fact, the City *itself* said the ban makes its downtown and business district off-limits to vendors. E.722. This Court invalidated the restriction in *Verzi* after determining its purpose was economic protectionism. This Court should conclude that Baltimore's similar purpose in enacting the ban violates the substantive due process guarantee of Article 24.

Baltimore's 300-foot ban also violates the implicit equal-protection guarantee of Article 24. *Waldron*, 289 Md. at 704 (holding that the "concept of equal treatment is embodied in . . . Article 24"). The 300-foot ban discriminates between similarly situated vendors based on what they sell. For instance, the ban prohibits Pizza di Joey from operating within 300 feet of a pizzeria, but other food trucks may. A truck with a broad menu faces far more 600-foot wide "no vending" zones than a truck with few offerings.

Why? The Court of Special Appeals said it best: Such disparate treatment "makes sense, given the rule's aim to protect brick-and-mortars from direct competition." App. 57. But no case from this Court suggests that Baltimore may deprive one person the use of her own property so that another, better-connected business may more profitably use their own. *See Dasch*, 170 Md. 251 (1936) (holding that the right to conduct one's trade "is property" under Article 24); *Hoye v. Swan*, 5 Md. 237, 244 (1853) (holding the government "has no right to take one man's [property] and confer it upon another").

The 300-foot ban is a very unusual ordinance. While most laws aim at protecting the public's health, safety, or welfare, this one aims at protecting the profits of a class of well-connected businesses. Using public power for private gain is against the law of the land, and no case from this Court upholds such

efforts. For these reasons, this Court should declare that the ban violates the substantive-due-process and equal-protection guarantees of Article 24.

III. This Court Should Hold That The Trial Court Was Correct In Holding That The 300-Foot Ban Is Unconstitutionally Vague.

At trial, Petitioners complained that the 300-foot ban violated due process. In support, they presented abundant evidence of the ban's ambiguity. Of that evidence, perhaps most revealing was testimony from Babila Lima and Gia Montgomery, the City's Rule 2-412(d) representatives and the ban's principal author and chief enforcement official, respectively. Their testimony showed that the ban's key terms have no fixed meanings, that officials interpreted and applied those terms differently, and that deciding whether a vendor violated the ban was a "subjective" inquiry. Petitioners contended these ambiguities meant the ban violated due process because it lacked a rational basis.

The trial court, however, took a slightly different tack. Although it agreed the ban violated Article 24, the court felt the ban violated due process because it was vague. *See State v. Magaha*, 182 Md. 122, 125 (1943) (holding that a vague statute "violates the constitutional guarantee of due process of law"). In so holding, it credited the "voluminous evidence regarding the ambiguity of the 300-foot rule," E.811, that Petitioners acquired from Lima, Montgomery, and other City officials and documents. The trial court found it particularly persuasive that officials could not agree on how to interpret and enforce the ban. As a result, the

trial court held that the ban "simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks." E.816.

The Court of Special Appeals, however, held the trial court should not have reached vagueness. Even though Petitioners' due-process claim turned on the ban's ambiguity, the court stated (with no supporting authority) that the trial court should not have resolved that claim using a slightly different legal theory that arises under the same constitutional provision and turns on the exact same facts. App. 59–60. It then held that *no one* in Petitioners' position could bring a pre-enforcement vagueness challenge. In its view, courts should *only* consider a facial vagueness challenge when the law impinges on a "fundamental" right. App. 60. Because the court viewed the right to practice one's trade as not fundamental, it said Petitioners could only challenge the ban as applied to their own conduct. App. 60. And because both avoided breaking the law, the court held that *no* vagueness inquiry could occur. *Id*. In other words, even though the 300-foot ban could have cost Petitioners their livelihood and given them a criminal record, the court said they had to violate the ban to challenge it.

The Court of Special Appeals is wrong. This Court's holding in *Ashton v. Brown*, 339 Md. 70 (1995)—where this Court held that a Frederick ordinance whose terms city officials disagreed upon was vague—shows the 300-foot ban's

constitutional infirmity. Moreover, the CSA's conclusion that individuals and businesses cannot generally bring pre-enforcement vagueness challenges conflicts with decisions from both this Court and other courts throughout the country. And its statement that the trial court had to ignore evidence of the ban's vagueness because Petitioners had used that same evidence in pressing a slightly different legal theory under the same constitutional provision lacks any support. Because the ban fails to provide fair notice or adequately guide enforcement officials, this Court should hold that its vagueness violates Article 24.

A. The 300-Foot Ban Is Vague.

This Court has repeatedly held that vague statutes violate due process. *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.

The trial court correctly concluded that the 300-foot ban violates both strictures. E.809–16. First, the ban's critical terms are left undefined. Neither the Baltimore City Code, the "Street Vendor Program Rules and Regulations," nor any other publication defines the terms "primarily engaged in," "retail business

establishment," or "same type of food product." *Id*. Nor do any documents explain how to interpret the ban.[13]

That lack of definitions led officials to inconsistent interpretations. The City (through its representative Babila Lima) first testified that officials should give terms such as "primarily engaged in" and "same type of food product" a "commonsense" definition. *See, e.g.*, E.598, 557. The City's other representative, Ms. Montgomery, similarly invoked this "commonsense" standard, which she described as "nothing more or nothing less than what's written." E.750. But the City admitted that different officials may not share the same "commonsense" definition, E.750, and when Petitioners asked if common food items qualified as the "same type of food product," the City could not answer. *See, e.g.*, E.603.

This lack of clarity meant that officials decided whether a vendor sold the "same type of food product" as a brick-and-mortar retailer on a "case-by-case basis." E.605-06. For instance, Ms. Montgomery, the City's chief enforcement official, suggested the ban made Subway restaurants particularly problematic for vendors. E.743 (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").

[13] E.719 ("Q Do the rules and regulations provide any guidance in regards to the 300-foot proximity ban? A No.").

Both Rule 2-412(d) representatives described this case-by-case approach as "subjective," E.745, 600, which the Baltimore Department of Transportation's General Counsel echoed in describing the ban as "very subjective." E.486.

That subjectivity led officials to devise several different ways to decide whether a vendor violated the ban. *See* Statement of Facts, *supra*, at 13–14. But all of these approaches, coupled with the lack of any common standards, mean officials could reach—and, in fact, have reached—different conclusions about whether a vendor committed a crime. E.692, 717. These indefinite terms also kept the City from providing vendors with any authoritative understanding of the ban's contours. E.717 ("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). Because violating the ban was a crime, E.799, neither Petitioners, other vendors, nor officials could be sure what conduct would subject vendors to fines or even revocation of their licenses.

This situation is like the one in *Ashton v. Brown*, where Fredrick enacted a juvenile curfew ordinance under which police would arrest youth caught on a business' property past curfew. 339 Md. 70, 80 (1995). Certain businesses, however, were exempt if supervised by a "bona fide organization." *Id*. at 81. One evening, police raided a restaurant and arrested anyone who looked underage.

Two arrestees sued, arguing in part that the ordinance was unconstitutionally vague because it was impossible to determine whether a business was being supervised by a "bona fide organization." *Id*. at 90.

This Court declared the ordinance vague. Focusing on the term "bona fide organization," the Court recognized that Frederick's ordinance left the phrase undefined, *id*. at 90–93, just like the City has left the ban's terms "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 (holding that "primarily engaged in" was vague despite its words being in a dictionary).

More damning in this Court's eyes was the fact that Frederick officials disagreed about 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 vague. *Id*.

This case is like *Ashton*. The 300-foot ban, like the curfew in *Ashton*, is a penal statute. Its broad, vague terms are incapable of precise definition. And the City's officials have offered multiple contradictory interpretations for how a vendor might violate it. The trial court followed precedent in holding the ban was unconstitutionally vague, and this Court should confirm that determination.

B. The Trial Court Had Jurisdiction to Hold That the 300-Foot Ban 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)). Violating the 300-foot ban is a crime that could cost vendors their money and their right to practice their trade. The City's testimony shows both vendors and officials had to guess at the ban's meaning. The evidence shows that the ban is vague.

Perhaps due to this evidence, the Court of Special Appeals largely avoided the merits, other than to suggest the "Cube Rule" as a fifth way to enforce the ban. Instead, it held the trial court should not have scrutinized the evidence to determine if the ban was vague, and that vendors had to violate the ban to challenge it. Both positions are incorrect.

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

Maryland and federal jurisprudence show that courts may rule on dispositive legal issues before them. As the Supreme Court has held, once "an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties." *Kamen v. Kemper Fin. Servs., Inc*., 500 U.S. 90, 99 (1991). Moreover, because the trial court reached vagueness, so too can this Court.

Recall the history of this litigation. Petitioners alleged that the 300-foot ban violates Article 24. *Tidewater/Havre de Grace, Inc. v. Mayor & City Council of Havre de Grace*, 98 Md. App. 218, 229 n.6 (1993) (stating that "Article 24 . . . protect[s] citizens against vague statutes"). They argued that, due to Baltimore's ambiguous interpretation and enforcement, the ban lacked any rational basis. They supported that argument with evidence, including the City's own admissions. In response, Baltimore argued both at trial and in post-trial briefing that the ban was not vague. E.387; *see also* App. 9–13. This was more than enough; as Rule 8-131(a) states, issues are preserved if "raised in ***or*** decided by the trial court." Here, both occurred.

U.S. Supreme Court precedent shows this is unobjectionable. In *Lebron v. National Railroad Passenger Corp*., 513 U.S. 374, 378–79 (1995), for instance, the plaintiff argued to the Supreme Court that Amtrak was a government entity, an argument he had disavowed below. The Court entertained the argument, holding

that "[o]nce a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id*. at 379 (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

The Court of Special Appeals' contrary admonition lacks support. In fact, it did not provide *any* citation in support. And that is because nothing prevents a trial court from resolving a due-process challenge based on the evidence, even if that evidence points to a slightly different legal theory than one pressed by the parties.

2. This Court, and courts nationwide, entertain pre-enforcement facial vagueness challenges.

As this Court held in *Davis v. State*, "if a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional." 183 Md. 385, 389 (1944). Both courts below found that the ban directly affects Petitioners, who wished to operate at specific locations but avoided doing so to avoid committing a crime. Pizza di Joey, after experiencing enforcement of the 300-foot ban firsthand, E.81, largely stopped operating in Baltimore. E.75.

But to the CSA, none of this mattered. It held that "a facial vagueness challenge can be made only when the challenged statute implicates a fundamental constitutional right." App. 60. Because it felt that Petitioners' rights were not "fundamental," it said they could only challenge the ban's vagueness as applied to their own conduct. And the only way that could happen, the CSA said, would be

for them to violate the ban and raise vagueness as a defense. That conclusion is wrong.

The Court of Special Appeals' confusion arose from its conflating facial challenges with the overbreadth doctrine. Overbreadth is a "rule of standing which allows a defendant to challenge the validity of a statute even though the statute as applied to the defendant is constitutional." *Galloway v. State*, 365 Md. 599, 617 (2001). The court was correct that the overbreadth doctrine does not apply here, but Petitioners never suggested it did. Petitioners' challenge is not to an ordinance that is clear as applied to them but vague as applied to others. The 300-foot ban is vague for Petitioners *and* everyone else. In *no* instance does a vendor receive fair notice of what the ban prohibits. And in *every* instance, officials enforce the ban based on their own subjective belief of what it prohibits. Given this, *anyone* whom the ban directly affects may sue on vagueness grounds.

Indeed, this Court has often considered pre-enforcement facial vagueness challenges. In *Tidewater/Havre de Grace, Inc. v. Mayor & City Council of Havre de Grace*, 337 Md. 338 (1995), for instance, this Court evaluated whether an ordinance imposing docking and storage fees was vague. Marinas sued shortly after the town enacted the ordinance, arguing it was "so 'riddled with uncertainties' that it violates the constitutional guarantee of due process." *Id*. at 350. No violation had occurred, but this Court reached the merits. Twenty years earlier in

Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 238–40 (1975), this Court considered a pre-enforcement facial vagueness challenge several businesses brought to a bottle-deposit ordinance. This is no outlier: Individuals and businesses in other states have brought and won pre-enforcement facial vagueness challenges no matter if the challenged laws impinged their "fundamental" rights. *See, e.g.*, *Lexington Fayette Cty. Food & Beverage Ass'n v. Lexington-Fayette Urban Cty. Gov't*, 131 S.W.3d 745, 756 (Ky. 2004) (holding portion of anti-smoking law facially vague in pre-enforcement challenge).

The decision below also conflicts with holdings by federal courts. Indeed, the Supreme Court's foundational vagueness case, *Connally v. General Construction Co*., 269 U.S. 385, 390 (1926), was a pre-enforcement facial challenge. And individuals and businesses have won such challenges in federal appellate[14] and district courts.[15]

Accordingly, this Court should reaffirm that people need not break the law to get their day in court. In fact, leaving the holding below intact would result in a judicially created constitutional injury. Eliminating Marylanders' right to bring pre-enforcement facial vagueness challenges would cause their rights to fall

[14] *See, e.g.*, *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1022 (9th Cir. 2013) (holding Arizona solicitation statute facially vague in pre-enforcement challenge).
[15] *See, e.g.*, *Houston Balloons & Promotions, LLC. v. City of Houston*, No. CIV.A. H-06-3961, 2009 WL 1811224, at *7–8 (S.D. Tex. June 24, 2009); *Music Stop, Inc. v. City of Ferndale*, 488 F. Supp. 390, 392–94 (E.D. Mich. 1980) (holding drug paraphernalia ordinance facially vague in pre-enforcement challenge).

beneath the standards laid out in cases like *Abbott Laboratories v. Gardner*, where the Supreme Court held in a pre-enforcement challenge that "[w]here the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . ***must be permitted***." 387 U.S. 136, 153–54 (1967) (emphasis added), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

The Supreme Court has invalidated vague penal laws three times in the past five years. In each case, the law handed "responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people's ability to oversee the creation of the laws they are expected to abide." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019). Baltimore's 300-foot ban suffers from that same fatal flaw. Its terms are indeterminate, its reach bounded only by officials' imaginations. Given this, neither Petitioners nor anyone else could comport their behavior to avoid being called a criminal. Because "[i]n our constitutional order, a vague law is no law at all," *id*. at 2323, this Court should reverse and hold that Baltimore's 300-foot ban violates Article 24.

CONCLUSION

For the foregoing reasons, this Court should reverse.

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
Counsel for Petitioners		

PERTINENT CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, OR REGULATIONS

Maryland Constitution, Declaration of Rights, Article 24

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

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

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

Baltimore City Code, Article 15, § 17-42: Criminal Penalties

> A person who violates any provision of this subtitle or of a rule or regulation adopted under this subtitle is guilty of a misdemeanor and, on conviction, is subject to a penalty of $500 for each offense.

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

> (a) *Authorized suspension or revocation.*
>
> The Department of General Services may suspend or revoke a license if the licensee violates any provision of:
>
> (1) this subtitle;
> (2) the rules and regulations adopted under this subtitle;
> or
> (3) any other applicable law of the State or City.
>
> (b) *Mandatory revocation.*
>
> On a street vendor's 3rd violation of any provision of Part III of this subtitle within any 1-year period, the Department must revoke that street vendor's license.

(c) *Application following revocation.*

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

(d) *Stay of operations.*

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

Maryland Rules, Rule 8–131: Scope of Review

(a) Generally. The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

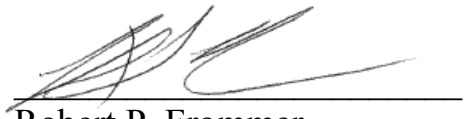
. . .

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

CERTIFICATION OF WORD COUNT AND COMPLIANCE WITH RULE 8-112

1. This brief contains 12,536 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 and was prepared in 14-point Times New Roman.

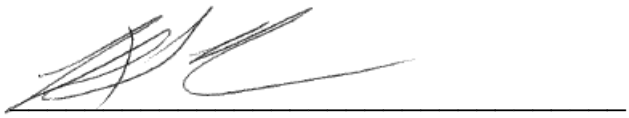


Robert P. Frommer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 2019, two copies of the Brief for the Petitioners were served, via UPS Ground Transportation, to:

Mark J. Dimenna
Assistant City Solicitor
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Baltimore, Maryland 21202
Attorney for Respondent



Robert P. Frommer
Counsel for Petitioners

APPENDIX

TABLE OF CONTENTS

Appendix Page

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.

Respectfully Submitted,

ANDRE M. DAVIS
City Solicitor

JEFFREY P. HOCHSTETLER
Assistant City Solicitor
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Baltimore, Maryland 21202
Phone: 410-396-8186
Fax: 410-837-1152
Jeffrey.Hochstetler@baltimorecity.gov
Attorney for the City

(w/ permission by JPH)

MARK J. DIMENNA
Assistant City Solicitor
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street

Baltimore, Maryland 21202
Phone: 410-396-3926
Fax: 410-837-1152
Mark.Dimenna@baltimorecity.gov
Attorney for the City

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:

Gregory R. Reed
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
Attorney for Plaintiffs

Robert Frommer
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
Attorney for Plaintiffs

Glenn E. Bushel
100 E. Pratt Street, 26th Floor
Baltimore, Maryland 21202
Attorney for Plaintiffs

JEFFREY P. HOCHSTETLER

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.

Respectfully Submitted,

ANDRE M. DAVIS
City Solicitor

JEFFREY P. HOCHSTETLER
Assistant City Solicitor
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Baltimore, Maryland 21202
Phone: 410-396-8186
Fax: 410-837-1152
Jeffrey.Hochstetler@baltimorecity.gov
Attorney for the City

MARK J. DIMENNA
Assistant City Solicitor
BALTIMORE CITY LAW DEPARTMENT
100 North Holliday Street
Baltimore, Maryland 21202
Phone: 410-396-3926
Fax: 410-837-1152
Mark.Dimenna@baltimorecity.gov
Attorney for the City

(w/ permission by JPH)

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.	*	

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

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.

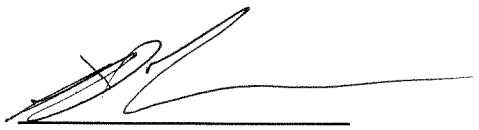
INSTITUTE FOR JUSTICE		TYDINGS & ROSENBERG LLP
Robert P. Frommer* Gregory R. Reed 901 N. Glebe Road, Ste. 900 Arlington, VA 22203 Tel: (703) 682-9320 Fax: (703) 682-9321 Email: rfrommer@ij.org greed@ij.org	Ari Bargil One Biscayne Tower 2 S. Biscayne Blvd., Ste. 3180 Miami, FL 33131 Tel: (305) 721-1600 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
Counsel for Plaintiffs		

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:

Mark J. Dimenna
Assistant City Solicitor
Baltimore City Law Department
100 North Holliday Street
Baltimore, Maryland 21202
Attorney for Defendant

Jeffrey P. Hochstetler
Assistant City Solicitor
Baltimore City Law Department
100 North Holliday Street
Baltimore, Maryland 21202
Attorney for Defendant



Robert P. Frommer
Counsel for Plaintiffs

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

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

DECLARATORY JUDGMENT ACT – LIBERAL CONSTRUCTION – JUSTICIABILITY

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

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

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

CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS

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

CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS

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

CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS

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

CONSTITUTIONAL LAW – RATIONAL BASIS – ARTICLE 24 RATIONAL BASIS

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

CONSTITUTIONAL LAW – VAGUENESS – FACIAL VAGUENESS CHALLENGE

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

CONSTITUTIONAL LAW – VAGUENESS – AS-APPLIED VAGUENESS CHALLENGE

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

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

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2411

September Term, 2017

PIZZA DI JOEY, LLC, ET AL.

v.

MAYOR AND CITY COUNCIL OF BALTIMORE

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

JJ.

Opinion by Nazarian, J.

Filed: May 30, 2019

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

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

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

I. BACKGROUND

A. The 300-Foot Rule

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

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

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

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

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

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

---

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

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

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

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

B. The Food Trucks

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

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

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

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

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

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

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

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

C. The Lawsuit

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Although there was some uncertainty about whether the Food Trucks had

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

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

II. DISCUSSION

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2011).

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Judicial deference to legislative judgment is appropriate when reviewing legislation dealing with economic problems. . . . **We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies**, who are elected to pass laws. . . . We are not concerned [] with the wisdom, need, or appropriateness of the legislation**. Legislative bodies have broad scope to experiment with economic problems** . . . . We refuse to sit as a superlegislature to weigh the wisdom of legislation . . . . **[T]he wisdom of [the challenged statute] is not for us to judge as it is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.**

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

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

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

b. Article 24 rational basis

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 427 (cleaned up).

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

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

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

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

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

---

laws).

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

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

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

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

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

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

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

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

Salisbury Beauty Schools, 268 Md. at 47.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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