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)

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INTRODUCTION

Baltimore's 300-Foot Ban violates Article 24. The Framers understood that Article 24 secured Marylanders' common-law rights, including the right to practice one's trade. From the founding, this Court honored that understanding by "protect[ing] the life, liberty and property of the citizen from violation, in the unjust exercise of legislative power,"[1] including acts meant to hobble one person's trade to enrich another private party.

The 300-Foot Ban is such an act. It creates a zone around every brick-and-mortar retailer in Baltimore. Vendors within that zone who sell "the same type" of product as the retailer—whatever that means—commit a crime. Its purpose is to hobble vendors' trade to enrich brick-and-mortar retailers. The Framers would be aghast at the idea that such a blatantly anti-competitive act comports with Article 24. This Court should be as well. In the end, the record evidence shows that the Ban furthers no legitimate interest and rests on terms so vague that they leave officials free to subjectively interpret and enforce the Ban as they see fit.

The City's response ignores these points. It ignores Article 24's unique text, structure, and history. Instead, it says this Court should lash itself to a federal standard it calls "perfunctory review"—even though Article 24 is Maryland's own, and how another sovereign chooses to interpret its own organic document is

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[1] *Regents of Univ. of Md. v. Williams*, 9 G. & J. 365, 408 (1838).

irrelevant. It says this Court must credit the City's post-hoc speculation that the Ban's protectionism might somehow benefit the public. And it continues to argue that no court should have considered Petitioners' challenge whatsoever.

These arguments miss the mark. As Petitioners' opening brief shows, this Court's duty is to apply Article 24 as the Framers intended, not as some kind of federal surrogate. Under that intent, the 300-Foot Ban fails the substantive-due-process and equal-protection guarantees of Article 24 because it is a legislative attempt to take from A and give to B. The Ban is vague not because of Petitioners' supposed "self-serving testimony," but because the City had *four* contradictory ways to interpret and enforce the Ban. No "reasonable person" standard could fix this vagueness, given that the City admitted that the Ban's terms have no objective meaning.

The City's procedural arguments are no more persuasive. The trial court was empowered to consider vagueness, which arose from facts in Petitioners' complaint as well as extensive evidence and argument at trial. The City claims the trial court couldn't consider vagueness because Petitioners didn't violate the Ban. But numerous decisions show that pre-enforcement vagueness challenges are common no matter whether the challenged law infringes upon a "fundamental" constitutional right. Lastly, this Court should reject the City's request to "avoid the merits by ruling simply that the Food Trucks' claims are not ripe for review."

Resp't's Br. 50. The City admits to actively enforcing the Ban and, in response, both Petitioners largely avoided operating in Baltimore. Nothing more is required.

In sum, the 300-Foot Ban is an impermissibly vague restriction, intentionally designed to squelch competition, and whose active enforcement undermines its purported goals. This Court should not interpret Article 24 as abiding such restrictions as "classic economic regulations" subject merely to "perfunctory review." This Court should reverse and declare Baltimore's 300-Foot Ban unconstitutional.

ARGUMENT

As Petitioners show below, the City's response misses the mark for three basic reasons. First, the Framers understood Article 24 to prohibit naked economic protectionism, which the City admits it designed the 300-Foot Ban to accomplish. Second, the City's own testimony shows that the Ban's terms are unconstitutionally vague. And third, Petitioners' case is ripe for review because, as the City admits, the 300-Foot Ban is "actively enforced" and Petitioners reacted by largely avoiding operating in the city rather than being labeled criminals.

I. BALTIMORE'S 300-FOOT BAN VIOLATES THE DUE-PROCESS AND EQUAL-PROTECTION GUARANTEES OF ARTICLE 24.

Petitioners' opening brief established that "Article 24's language came directly from Magna Carta, and . . . broadly defined . . . [includes] rights protected at common law against arbitrary government interference." Pet'rs' Br. 19–20.

"Chief among those common law rights," Petitioners showed, "is the right to pursue a lawful trade." *Id*. at 22. Centuries of Maryland history and jurisprudence show the Framers intended for this Court to vindicate that right by invalidating anti-competitive acts like the 300-Foot Ban.

The City makes no real attempt to take on this extensive history and jurisprudence. Instead, it insists that the Framers silently intended for Article 24 to be interpreted identically to how the City thinks federal courts currently interpret the Fourteenth Amendment. Second, the City claims that even if Article 24 used to be independent, that is no longer the case because of *Governor v. Exxon*. Both arguments are addressed below.

A. This Court Should Reject the City's Request That It Interpret Article 24 in "Lockstep" with the Fourteenth Amendment.

The City does not challenge Petitioners' extensive discussion of Article 24. Nor could it, really. It instead suggests, with no historical support, that Maryland's Framers intended Article 24 to be interpreted just like the City believes federal courts interpret the Fourteenth Amendment today. *See* Resp't's Br. 30–31.

In so doing, the City calls for "lockstepping," a doctrine that has been attacked by judges and commentators. Justice William J. Brennan, Jr., for instance, noted that "[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." *State Constitutions and the Protection of Individual*

Rights, 90 Harv. L. Rev. 489, 491 (1977). For this reason, Sixth Circuit Judge Jeffrey Sutton has acknowledged that "lockstepping" is "[a] grave threat to independent state constitutions." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 174 (2018). Sutton attacks lockstepping's intellectual foundations, noting that nothing supports the idea that "the meaning of a federal guarantee . . . proves the meaning of an independent state guarantee." *Id*. at 175. Moreover, lockstepping ignores the whole purpose behind a dual-sovereign constitutional system. *Id*. In other words, "[t]here is no reason to think, as an interpretive matter, that constitutional guarantees of independent sovereigns . . . must be construed the same way." *Id*. at 174. To Sutton, the doctrinal basis for lockstepping, if one exists, "is rarely explained and often seems inexplicable." *Id*. at 175.[2]

It is particularly inexplicable here, given Maryland's ancient and rich constitutional pedigree. The City hardly addresses the historically important distinctions between Maryland and federal constitutional law (beyond stating there are none). But still the City asks this Court to ape whatever standard it thinks happens to prevail currently in federal courts. Its argument boils down to the fact

[2] *See also* Mike Raskys, *State Constitutional Law—Due Process—The Court of Appeals of Maryland Remains in Lockstep with the United States Supreme Court*, 43 Rutgers L.J. 853, 870 (2013) ("[T]he textual differences [between Article 24 and the Federal Due Process Clauses] represent meaningful evidence that the provisions are indeed distinct and entitled to separate interpretation.").

that Article 24 and the Fourteenth Amendment both "derive from Magna Carta." From that, it leaps to the conclusion that Maryland's Framers had no desire "to preserve different common law rights than those embodied in the federal provisions." *See* Resp't's Br. 31.

But it is not just what rights the Framers intended Article 24 to preserve that matters. Just as important—if not more important—was their intent about how diligent this Court should be in securing those rights. As Petitioners showed, the rights Maryland's Framers enshrined in Article 24 were those recognized at English common law. Pet'rs' Br. 19–25. The idea that those rights' vibrancy turns on what the Fourteenth Amendment's framers did a century later makes no sense. Hans Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380 (1980) ("State bills of rights are first in two senses: first in time and first in logic."). Even less plausible is the idea that Maryland's Framers intended for this Court's evaluation of potential infringements of Article 24 to wax or wane based on how vigilant federal courts would be in guarding federal rights almost 250 years later. *See* Brennan, 90 Harv. L. Rev. at 502 ("The decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law . . . and state court judges and the members of the bar seriously err if they so treat them."). Indeed, this Court held long ago that "[w]hatever 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." *Anderson v. Baker*, 23 Md. 531, 549 (1865). Its statement nearly one century later that "the principles of the constitution are unchangeable," *Johns Hopkins University v. Williams*, 199 Md. 382, 386 (1952), shows that the Framers did not intend to set Marylanders' rights adrift on such an uncertain future.[3]

This Court has recognized "[i]t is the sacred duty of the Courts to preserve inviolate the integrity of the [Maryland] Constitution," Pet'rs' Br. 36 (quoting *Johnson v. Duke*, 180 Md. 434, 442 (1942)). Article 24 and the Fourteenth Amendment are independent, and "governmental action may be unconstitutional under the authority of Article 24 alone." *E.g., Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 622 (2002); *Frankel v. Bd. of Regents*, 361 Md. 298, 313 (2000); *Attorney Gen. v. Waldron*, 289 Md. 683, 715 (1981). This is because Article 24's unique purpose is "to vindicate important personal rights protected by the *Maryland Constitution* or those recognized as vital to the history and traditions of the people of *this State*." *Waldron*, 289 Md. at 715 (emphasis added).

[3] *See also* Raskys, 43 Rutgers L.J. at 871 ("Reconciling the notion that the two provisions—one which predated the other by ninety years and contains substantially different text—can nonetheless receive identical judicial treatment demands tortured logic.").

The City's plea for "perfunctory review" really asks this Court to forsake its duty to "marshal[] [Maryland's] distinct state text[] and histor[y] and draw[] [its] own conclusions." Sutton at 177. But Maryland's Constitution is its own. To simply parrot federal doctrine would diminish this Court's role to that of a federal surrogate. This Court has historically rejected such subordination and should do so here.

B. *Governor v. Exxon* Did Not Establish That Article 24 Should Be Indistinguishable from the Fourteenth Amendment.

The City's limited engagement with Petitioners' constitutional history undermines its argument that no meaningful distinction exists between Maryland and federal constitutional law. The City concedes that Maryland law and federal law differed until (at the very least) this Court's decision in *Governor v. Exxon*, 279 Md. 410 (1977). Resp't's Br. 26 ("In the 1977 case of [*Exxon*], . . . this Court 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.") (quoting *Pizza di Joey, LLC*, 241 Md. App. 139, 169 (2019), *rev. granted*, 466 Md. 192). Thus, the City admits that Article 24 and the Fourteenth Amendment *had been* independent historically, but that this Court should now ignore any distinction.

That is because, the City argues, everything changed in 1977. Relying heavily on the Court of Special Appeals' discussion below, the City argues that

Exxon quietly announced the end of Article 24's doctrinal independence. But as Petitioners' opening brief showed, that vastly overstates *Exxon*'s importance. Pet'rs' Br. 32–36. In fact, even the City recognizes that the form of review *Exxon* purportedly ended has appeared in many decisions since. Resp't's Br. 27–34.

In reality, *Exxon* stands for the unremarkable position that the legislature may act if "there is an evil at hand for correction" and its action is "necessary to preserve competition." 279 Md. at 426–27 (citation and quotation marks omitted). In *Exxon*, the record was replete with evidence of the problem the government was correcting. *Id*. at 418–21. Not so here. The record reveals no "evil at hand" for Baltimore to correct, just post-hoc speculation that real-world evidence contradicts. Moreover, rather than being "necessary to preserve competition," the City admits the Ban is meant to *destroy* perceived competition between restaurants and food trucks. Nothing in the Maryland Constitution supports such actions.

C. Maryland's Real and Substantial Test, However Titled and Defined, Does Not Permit Pure Speculation.

Petitioners argue that Article 24 requires meaningful scrutiny—whether called "real and substantial," "fair and substantial," or "rational basis." No matter the nomenclature, such a standard "pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose." *Waldron*, 289 Md. at 713. The City, on the other hand, calls for only "perfunctory review." *See, e.g.*, Resp't's Br. 33.

But the 300-Foot Ban fails under any standard. The City speculates that the Ban's animus against restaurants' perceived competitors might somehow prevent urban decay. But "[t]he right to engage in a chosen calling . . . has long been recognized to enjoy a preferred status," *Waldron*, 289 Md. at 718, and this Court has refused to ride the range of conceivable interests when such a right is on the line. In Subsection 1, Petitioners explain that the City's justification is rank speculation that the real and substantial test and equivalent forms of review do not credit. And in Subsection 2, Petitioners explain that, even under "perfunctory review," the City's speculation fails because it is provably false.

1. Under Meaningful Review, This Court Must Not Credit Speculation and Conjecture, Particularly in the Face of Actual Facts.

The City seemingly acknowledges that meaningful review (whether labeled the "real and substantial test" or otherwise) remains a viable analytical framework. It simply argues that framework does not apply here and that meaningful review would apply only if "the 300-foot rule [wa]s . . . an outright ban on mobile vending." Resp't's Br. 32.

But this misreads *Waldron*, where this Court explained that when a regulation "imposes a severe burden" that "*effectively denies* persons the ability to pursue their chosen vocation . . . [it] cannot be sanctioned." 289 Md. at 727–28 (emphasis added). An outright ban, therefore, is not required; instead, meaningful

scrutiny applies whenever a government regulation "effectively denies persons the ability to pursue their chosen vocation." *Id.* at 727; *see also Verzi v. Baltimore Cty.*, 333 Md. 411, 427 (1994) (applying similar scrutiny where the county's regulation "*effectively control[led]* [who] will receive business and wh[o] will not") (emphasis added).

The 300-Foot Ban effectively denied Petitioners the right to operate in Baltimore. As their opening brief shows, the City admitted the Ban makes operating in many areas of Baltimore impossible, Pet'rs' Br. 40, and fear of criminal sanctions ultimately forced both Pizza di Joey and Madame BBQ to stop operating in Baltimore altogether. Pet'rs' Br. 14, 16.

Given the Ban's restrictiveness, the analysis this Court employed in cases like *Waldron* and *Verzi* is appropriate. Those cases show that where a law impinges on "important personal rights" like "the ability to pursue [one's] chosen vocation," this Court should not credit abject speculation. *Waldron*, 289 Md. at 722, 727–28. Instead, it should "pursue[] the actual purpose of a statute . . . and seriously examine[] the means chosen to effectuate that purpose." *Id.* at 713. In *Verzi*, for instance, the county claimed its towing restriction would minimize fraud and traffic congestion. 333 Md. at 425–26. This Court meaningfully scrutinized—and ultimately rejected—those justifications as pretexts for the restriction's true

purpose: to "confer[] the monopoly of a profitable business upon" a preferred segment of an industry. *Id*. at 427.

The City leans on the Court of Special Appeals' opinion in this case to try to diminish *Verzi*'s importance. Resp't's Br. 33. But *Verzi* shows this Court need not blindly accept the City's justifications if they are "spurious" in light of what is "more reasonable and probable." 333 Md. at 426, 427. This has been true throughout Maryland's history. *Long v. State*, 74 Md. 565 (1891) (holding that while the legislature can "pass laws and regulations necessary for the protection of the health, morals, and safety of society," the duty to decide whether a regulation is reasonable "must be necessarily judicial questions") (internal quotations and citations omitted).

Here, the City admits creating the Ban to hobble restaurants' perceived competitors—food trucks. It admits the Ban's protectionist intent, but asks this Court to accept its pretextual, post-hoc speculation that stacking the deck in restaurants' favor might benefit the public. But that speculation is too illusory, contrary to common sense, and demonstrably false to satisfy any level of constitutional scrutiny.

2. Even Under "Perfunctory Review," the City's Arguments Fail Because Evidence Shows That the 300-Foot Ban Undermines Public Welfare.

The City argues it should prevail under "perfunctory review" because "the record amply demonstrates that the 300-foot rule 'serves the legitimate purpose of promoting the City's general welfare' 'by ensuring the vibrancy of commercial districts.'" Resp't's Br. 35. Except the record does not (and could not) establish that.

The sole "evidence" the City put forward is testimony from Anirban Basu. It tries to insulate that testimony by claiming the trial court adopted it as factual findings. Resp't's Br. 36; *see also id. at* 13 ("The Food Trucks challenge none of the circuit court's well-supported factual findings"). This is wrong: The trial court's opinion carefully cabined its "findings of fact" to facts about Petitioners' businesses, the structure of the City's mobile vending regulations, and that violating the Ban is a crime. E.797–99. Those findings included none of Mr. Basu's musings.

In any case, Petitioners do challenge Mr. Basu's testimony. Mr. Basu is neither an expert on food truck policy, *see* E.312, nor the restaurant economy, *see* E.314–15. He admitted his testimony simply reflected his musings about those industries. He came up with a series of cascading hypotheticals he said could conceivably befall Baltimore without the 300-Foot Ban. But this speculation—on

which the City's entire case rests—is a series of guesses, all drawn on the City's behalf, that Mr. Basu came up with after "looking for . . . sources of quick information." E.350.

As an applied economist, Mr. Basu knew how to use data to analyze public policy issues. But Mr. Basu didn't try to see if the Ban boosted the number of Baltimore restaurants. E.325–26. He didn't see if the Ban led restaurants to stay in Baltimore. E.319. Nor did he see if the Ban affected the city's mobile vendor population. E.328. Despite admitting that while "there are instances in which one can appeal to mere logic, [] I find that to be dangerous," E.327, Mr. Basu's speculation is just that.[4]

The City seems to recognize that its argument that food truck competition will lead to urban downfall is a series of hypothesized harms. Even as its introduction claims the issue is one of grave importance, the City can muster only references to abstract harms and unsubstantiated social ills:

- "The City's 300-foot rule rationally addresses the *potential* for pecuniary harm[.]" Resp't's Br. 2;
- "A food truck *could* unfairly take advantage of the customers that the retail establishment's investments attracted[.]" *Id.*;

[4] At trial, Mr. Basu referred to his own experience in testifying that anticompetitive animus, rather than a desire to promote competition or the general welfare, explains the 300-Foot Ban. E.270 (32:8–12 ("I certainly don't want other economic consultancies opening up . . . in Baltimore . . . I'm supposed to say I want it because competition brings out the best in me**. I don't want the best of me. I don't want to have to compete."**)) (emphasis added).

- "[A] food truck *could* . . . undercut the restaurant on price [and] siphon customers away[.]" *Id*. at 3; and

- "*If* brick-and-mortar restaurants cannot recoup their investments . . . the City, its neighborhoods, and its residents will suffer the loss of the economic benefits that those retail establishments *would have* provided." *Id*. (emphases added).

Of course, the City does not argue these things *have* happened in Baltimore—they have not—only that they *might* happen. Nor does the City point to any other locale where its imaginings have occurred—because no such locales exist.

This Court need not accept the City's unsupported speculation, particularly in light of a brief submitted by several prominent economists, including Professor Rajshree Agarwal at the University of Maryland's Robert H. Smith School of Business and Professor Emeritus Stephen J.K. Walters, Ph.D., from Loyola University Maryland. They analyzed the City's imagined harms and found them unmoored from reality. They explain that "[t]here is no evidence that the 300-foot ban protects existing markets—it merely stifles creation of new markets." Economists' Br. 13. They further explain that when restaurants close—invariably for reasons unrelated to municipal food-truck regulations—it does not lead to the City's imagined wave of cascading social ills. *Id*. at 15 ("[H]igh rates of restaurant failure in the most desirable areas of town do not lead to urban blight."). Simply

put, "[c]ontrary[] to the City's theory, real-life economics shows that restaurant turnover . . . does not bring vacant storefronts and societal decay." *Id.* at 16.

The economists further explain why the Ban's purpose—to protect restaurants from "free-riding" food trucks—misunderstands what free-riding is. As they state, "the City's 'free rider' theory is built around a false premise. The restaurants themselves are not creating the demand; they're responding to the demand, just like food trucks." *Id.* at 14. And when food trucks respond to that demand, they "sell a different product to a different customer base. In other words, food trucks appeal to food truck customers; they do not 'free ride,' 'solicit,' 'convert,' or otherwise poach the clientele of brick-and-mortar restaurants." *Id.* As in *Verzi*, these economic realities are far "more reasonable and probable [than the] . . . spurious" hypotheses the City has "offered as a justification." 333 Md. at 426–27 (citation and quotation marks omitted).

Finally, the City suggests the Ban is a "valid economic regulation[] targeted at curbing unfair competition," Resp't's Br. 24 (quotation marks omitted), and that because "the 300-foot rule is a classic economic regulation," it is not "deserving of more protection than perfunctory review." *See, e.g.*, Resp't's Br. 33 (quoting *Waldron*, 289 Md. at 713). But the City cannot sanitize the 300-Foot Ban's protectionist purpose through misleading branding.

"Unfair competition" is a term of art; it doesn't simply mean "operating too close to a business the City likes more." As this Court has held, the point of regulating "unfair competition. . . . [i]s to prevent dealings based on deceit and dishonesty." *Baltimore Bedding Corp. v. Moses*, 182 Md. 229, 236 (1943). For instance, "[f]alse and misleading advertising . . . amounts to unfair competition." *Id*. at 242. So does misrepresenting who made an item, *Edmondson Vill. Theatre v. Einbinder*, 208 Md. 38, 44 (1955), or making "sales below cost with intent to injure competitors and to destroy competition." *Blum v. Engelman*, 190 Md. 109, 115 (1948). But none of those situations exists here, particularly since "food trucks sell a different product to a different customer base." Economists' Br. 14. For the reasons stated here and in Petitioners' opening brief, the 300-Foot Ban violates Article 24's due-process and equal-protection guarantees.

II. THE 300-FOOT BAN IS VAGUE.

Petitioners' opening brief explained why the trial court held the Ban vague. It recognized that the Ban's vagueness was a dispositive legal issue about which the parties argued and presented evidence. That evidence, particularly the City's own testimony, showed the court that the Ban's terms—"type of food product" and "primarily engaged in"—had no objective meaning. Indeed, City officials had *four* distinct, conflicting ways to interpret and enforce the Ban, including one that opposing counsel first came up with at trial. Pet'rs' Br. 10–11. After its ruling, the

trial court rejected the City's motion to amend its judgment by inserting a "reasonable person" standard into the terms, concluding that "a reasonable person would not have fair notice of what the ordinance intended." App. 20 (Mem. Mot. Alter or Amend J. 3).

Rather than take on these facts, the City claims the trial court should have never considered the issue and was powerless to act. But Petitioners' claim was properly before the court, arose from facts in Petitioners' complaint, and the court's decision gave Petitioners the relief they sought. It argues that because the City never prosecuted Petitioners, no vagueness inquiry could proceed, *see* Resp't's Br. 42. But as Petitioners' opening brief shows, pre-enforcement vagueness challenges are commonplace. The City contends that a law cannot be facially vague unless it implicates the First Amendment or is vague in every application, *see id*. at 42–43. But recent U.S. Supreme Court decisions say the exact opposite. And, on the merits, the City focuses on Petitioners' supposedly "obtuse and self-serving testimony," *id*. at 47, while ignoring its own damning statements.

A. The Trial Court Appropriately Countenanced the Vagueness Issue.

Petitioners' opening brief showed that the trial court had inherent authority to decide vagueness. Pet'rs' Br. 49–50 (citing *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) (holding that once "an issue or claim is properly before the

court, the court is not limited to the particular legal theories advanced by the parties”)). No one contests that the 300-Foot Ban’s constitutionality was an “issue” before the trial court, which empowered that court to act. Instead, the City focuses on the word “claim” and suggest that a claim must be tied to a particular legal theory. This is the opposite of what both *Kamen* and this Court have said.

Under Maryland Rule 2-305, a claim for relief consists of only two things: 1) “a clear statement of the facts necessary to constitute a cause of action,” and 2) “a demand for judgment for the relief sought.” Rule 2-303(b) also shows that a claim need not be tied to a particular legal theory, stating that “[a] pleading shall contain only such statements of fact as may be necessary to show the pleader’s entitlement to relief.” Nor does Black’s Law Dictionary define “claim”—“[t]he assertion of an existing right; any right to payment or to an equitable remedy”—as being tied to a precise legal theory. *Claim*, Black’s Law Dictionary (11th ed. 2019). Indeed, in *Huber v. Nationwide Mutual Insurance Co.*, 347 Md. 415, 420 (1997), this Court held “that where, as here, a claimant presents a number of legal theories, but will be permitted to recover on one of them at most, he or she has but a single claim for relief.” *See also East v. Gilchrist*, 293 Md. 453, 459 (1982) (“Different legal theories for the same recovery, based on the same facts or transaction, do not create separate ‘claims’ . . . .”).

Petitioners' complaint raised a single claim against the 300-Foot Ban—that it violated Petitioners' rights under Article 24. *Ashton v. Brown*, 339 Md. 70, 97 (1995) (holding that "a vague penal statute violates citizens' rights to due process of law, rights protected by . . . Article 24"). It contained facts showing how the Ban violated those rights. The relief it sought for that violation was a declaration and permanent injunction. Petitioners' claim was properly before the trial court, and that court was free to resolve that claim using a slightly different legal theory that arises under the same constitutional provision and turns on exactly the same facts.

B. A Law Need Not Implicate the First Amendment or Be Vague in Every Application to Be Facially Void for Vagueness.

The City also errs in claiming that Petitioners could not argue that the Ban was vague. It argues, for instance, that an as-applied challenge would first require Petitioners to violate the Ban—a misdemeanor—and be prosecuted. It then says that a facial vagueness challenge can proceed only if the law touches upon First Amendment freedoms or is invalid in every application. Each argument is incorrect as a matter of law.

First, as Petitioners' opening brief made clear, people who are directly affected by a penal law like the 300-Foot Ban need not break that law to challenge it. Pet'rs' Br. 50–51. Many pre-enforcement vagueness challenges from this and other Courts show this point. Second, the City's contention that facial vagueness

challenges may arise only when a statute implicates a fundamental right, including First Amendment rights, Resp't's Br. 42 n.13 (quoting *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003) (additional citations omitted)), is incorrect and *Klecker*'s holding on this point is no longer good law. Although the City notes that *Klecker* was overruled on other grounds in *McFadden v. United States*, 135 S. Ct. 2298 (2015), it neglects to mention that *Johnson v. United States*, 135 S. Ct. 2551 (2015), expressly rejected the idea that a law must infringe on one's "fundamental" rights in order to countenance a facial vagueness challenge. Following suit, the Fourth Circuit abrogated its statement in *Klecker*, announcing that "[a]fter *Johnson*, at least, we know that a statute that doesn't raise First Amendment problems may nevertheless be impermissibly vague on due process grounds." *United States v. Larson*, 747 F. App'x 927, 930 (4th Cir. 2018). The City's position that a facial vagueness challenge must implicate the First Amendment or some other "fundamental" right is simply wrong.

Similarly flawed is the City's argument that the 300-Foot Ban cannot be impermissibly vague unless Petitioners show that "it is impermissibly vague in all of its applications." Resp't's Br. 43 (internal citations omitted). In *Johnson*, the U.S. Supreme Court explained that "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 135 S. Ct. at 2560–61. The Court

explained, for example, that it had held a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness "even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable." *Id*. at 2561 (citation omitted).

The same rationale holds true here. Even if Joey knew that he could not park near a pizzeria, and even if Nikki knew that she could not park near a barbeque restaurant, that does not mean that the Ban's terms—"primarily engaged in" and "same type of food product"—are any less vague.[5] Indeed, the Supreme Court has said just the opposite.

C. Just Like Petitioners, the City Itself Did Not Know How to Interpret the 300-Foot Ban.

The City also claims that its Ban is not vague, and that the trial court's contrary conclusion turned solely on Petitioners' "professed confusion." It says that court credited Petitioners' "obtuse and self-serving testimony" and excused their failure to "apply[] the everyday, commonsense definitions of the statutory phrases." Resp't's Br. at 47.

This argument ignores a basic truth: That it was the City's *own testimony*, wherein *its own officials* swore they had no objective way to interpret and enforce

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[5] As the Economists' Brief also explains, these terms are impossible to understand perhaps because they are such "an extraordinarily poor proxy for competition." Indeed, the terms deployed by the City "disregard[] virtually all aspects of how food vendors actually compete." Economists' Br. 8.

the 300-Foot Ban, that led the court to hold the Ban vague. The trial court's opinion makes this clear. It based its ruling on "*voluminous* evidence regarding the ambiguity of the 300-foot rule," E.811 (Opinion 16) (emphasis added), and focused on testimony from the City's Rule 2-412 representatives Babila Lima and Gia Montgomery—the Ban's principal author and chief enforcement official, respectively. As described in Petitioners' opening brief, each testified that the Ban's critical terms lacked fixed definitions, that officials had interpreted and applied those terms differently, and that deciding if a violation had occurred was a "subjective" inquiry. Pet'rs' Br. 8–11. The City's own testimony and its counsel's arguments at trial revealed *four* conflicting, contradictory ways that a vendor could break the law. *Id*. at 10–11. It was that testimony that led the trial court to hold that the Ban was vague. *See* E.816 (Opinion 21 (holding that the Ban "simply does not provide constitutionally required fair notice and adequate guidelines for enforcement officials, brick-and-mortar establishments, or food trucks")).

That same testimony led the trial court to reject the City's suggested solution of inserting a "reasonable person" standard into the Ban's terms. As the court held, "[t]hrough testimony in the record it was clear that even the City Officials involved in drafting this Code did not have a clear understanding of these terms, nor did they have a way to define them." App. 19–20 (Mem. Op. on Mot. to Alter or Amend 2–3). Since those officials could not objectively define and delineate

the Ban's contours, "a reasonable person would not have fair notice of what the ordinance intended." App. 20. The trial court's decision was firmly rooted in the trial evidence, particularly the evidence from the City itself. That evidence showed that the 300-Foot Ban, to which criminal penalties attach, is hopelessly vague.

III. PETITIONERS' CLAIM IS RIPE.

The City would rather this Court not reach the merits, so it once more insists that Pizza di Joey and Madame BBQ do not have a ripe claim. But the City almost immediately undermines its own argument.

The City's response argues that "in order for an issue to be a justiciable controversy, a litigant must allege and prove that they have been prosecuted for a crime or that there is a credible threat of prosecution under the contested statute." Resp't's Br. 15 (citing *State v. G & C Gulf, Inc.*, 442 Md. 716, 731 (2015)) (cleaned up). Four sentences later, though, the City admits that it "actively enforces the 300-foot rule," *id*. at 16. *See also* E.470 (Baltimore DOT official stating that "[w]e do enforce this rule").

This should be dispositive. Yet the City argues that since Pizza di Joey and Madame BBQ responded to that active enforcement by ceasing operations in Baltimore, they have no claim. In other words, they could press their case only if they violated the Ban and were prosecuted.

That is not how ripeness works. Maryland precedent shows that people who wish to challenge a penal law that directly affects their exercise of a constitutional right—here, the right to practice their trade—need not expose themselves to jeopardy by breaking that law, being prosecuted, and challenging the law's constitutionality as a defense. *Davis v. State*, 183 Md. 385, 389 (1944) ("[I]f a person is directly affected by a statute, there is no reason why he should not be permitted to obtain a judicial declaration that the statute is unconstitutional."); *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, *he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief*.'") (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973) (emphasis added)).

Bowie Inn, Inc. v. City of Bowie, 274 Md. 230 (1975), is illustrative. There, Bowie enacted a mandatory bottle-deposit law, the violation of which was a misdemeanor. Retail merchants, bottlers, and distributors brought a pre-enforcement suit against Bowie, arguing in part that the law was vague. *Id*. at 232–33. Maryland courts adjudicated that suit on the merits, since Bowie's law forced the businesses to either change their behavior or risk criminal sanctions. The same is true in *Davis*, where a doctor chose to avoid violating the law and

therefore stopped "advertising rather than run the risk of having his license revoked." *See* 183 Md. at 392–93. As a consequence, "he was unable to allege that he had been threatened" with enforcement. *See id.* But that did not matter, said this Court; what mattered was that Davis wished to engage in a course of action forbidden by law and would do so if the law was declared invalid. The same is true of Petitioners, whose complaint identified specific locations from which they would operate but for the Ban. *See also Salisbury Beauty Schs. v. State Bd. of Cosmetologists*, 268 Md. 32, 41-42 (1973) (noting that beauty schools could challenge business restriction although they had not received a citation or been subject to any direct enforcement threat); *Bruce v. Dir., Dep't of Chesapeake Bay Affairs*, 261 Md. 585, 595 (1971) (holding that oystermen and crabbers had standing to proceed with their [ultimately successful] challenge to a law barring them from operating in certain locations).

The City also says Petitioners' claims are not ripe because they have not proven a direct, quantifiable financial harm. *See* Resp't's Br. 17–19. But Maryland law requires no such showing—only that the law governs and alters a person's actions under threat of criminal sanction.[6] In *Maryland State Board of*

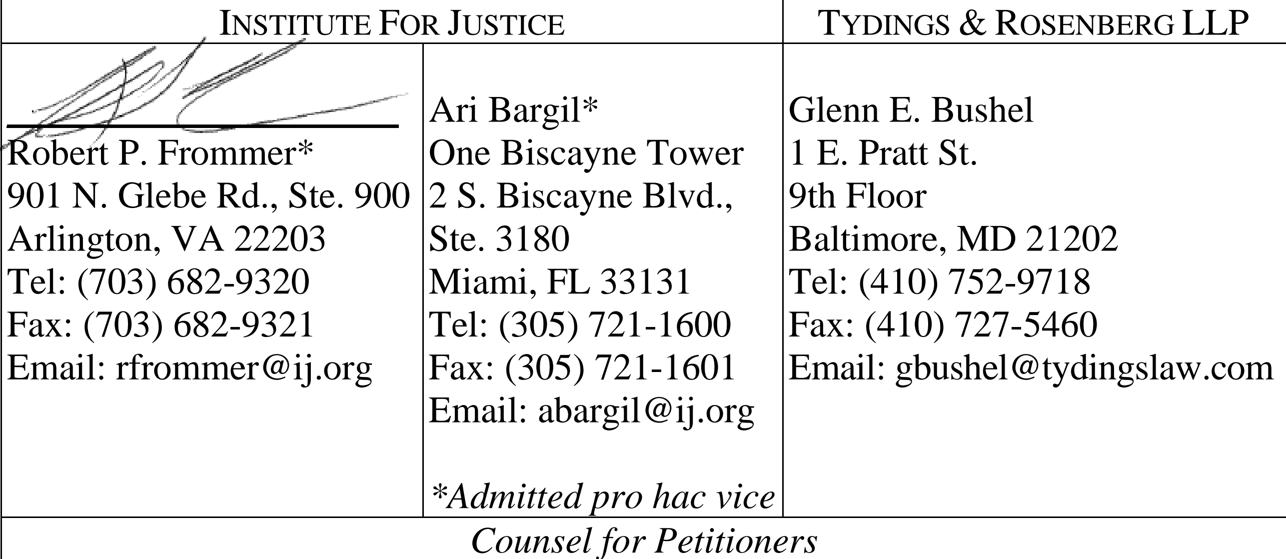
[6] On a more practical level, what the City is asking for is literally impossible. Given that the Ban predates Petitioners' businesses, trying to quantify their financial injuries would mean comparing their revenues to a hypothetical world in which the Ban never existed.

Barber Examiners v. Kuhn, for example, cosmetologists brought a pre-enforcement challenge against a law that prohibited them from cutting men's hair. They did not try to quantify how much financial harm they suffered from that law, nor did they have to. As this Court held, all that mattered was that a violation "could result in the loss of their licenses and in criminal prosecution." 270 Md. 496, 501 (1973). The same is true of the 300-Foot Ban.

In the end, the City seems to acknowledge that a party need only show that he or she "was directly affected by the statute." Resp't's Br. 17 (citations omitted). Given the extensive testimony from both Joey Vanoni (who had to debate one location's legality with a police officer and largely stopped operating in Baltimore afterwards) and Nikki McGowan (who ceased operating her food truck virtually anywhere in Baltimore), there is substantial evidence that both Pizza di Joey and Madame BBQ were both "directly affected by" the 300-Foot Ban.

CONCLUSION

Based on the foregoing, Petitioners respectfully request that this Court reverse and declare that the 300-Foot Ban violates Article 24 of the Maryland Declaration of Rights.



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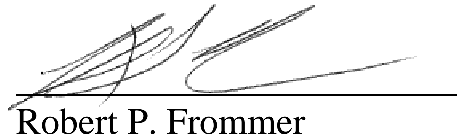

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of January, 2020, two copies of the Reply Brief for the Petitioners were served, via UPS Ground Transportation, to:

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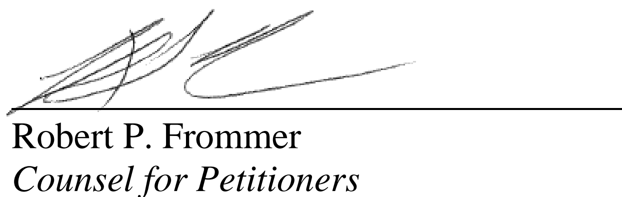

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