STATE OF WISCONSIN CIRCUIT COURT DOOR COUNTY

WHITE COTTAGE RED DOOR, LLC
8813 State Highway 42
Fish Creek, WI 54212

CHERRY CREEK INVESTMENTS, LLC
8813 State Highway 42
Fish Creek, WI 54212

Plaintiffs,

vs.

TOWN OF GIBRALTAR
4097 State Highway 42
P.O. Box 850
Fish Creek, WI 54212

Defendant.

Case No.: 18-CV-191
Case Codes: 30701, 30704

Oral Argument Requested

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Milad Emam*
Robert P. Frommer*
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Email: memam@ij.org, rfrommer@ij.org

Randall J. Nesbitt
DOOR KEWAUNEE MUNICIPAL LAW S.C.
6528 Barrick Rd.
Sturgeon Bay, WI 54235
Email: Randy@dkmuni.com

**Admitted Pro Hac Vice*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Codes & Statutes

Pursuant to Wis. Stat. § 802.08 and this Court's January 22, 2020 Order, Plaintiffs White Cottage Red Door, LLC, and Cherry Creek Investments, LLC, through their counsel, respectfully move for summary judgment for the reasons stated below, in Plaintiffs' separate Statement of Facts, and in accompanying affidavits and exhibits.

INTRODUCTION

Three years ago, a family of four entrepreneurs in Gibraltar painstakingly refurbished a cherry orchard and opened a business there named White Cottage Red Door.[1] Through the business, they operate a brick-and-mortar store that sells "everything cherry," including baked goods prepared in a commercial kitchen. White Cottage Red Door wanted to offer its customers sandwiches, burgers, and barbecue too, so it opened a food truck in the store's parking lot after earning county and state authorization to do so.

But the Gibraltar Town Board—chaired by the owner of a brick-and-mortar restaurant—had other ideas. On Plaintiffs' first day operating a food truck, Defendant tried to shut them down at brick-and-mortar restaurateurs' behest. When that failed, Defendant demanded that Door County's land-use department revoke Plaintiffs' zoning permit. After the County refused, Defendant banned mobile vending entirely in a 2018 ordinance. Shortly after Plaintiffs filed suit, Defendant amended this ordinance in 2019 to replace its total vending ban with a ban on vending in areas containing brick-and-mortar restaurants. Even to operate in the small pockets of town outside these areas, though, state-licensed mobile vendors must obtain a Town license. This

[1] These entrepreneurs—Lisa Howard, Kevin Howard, Jessica Hadraba, and Christopher Hadraba—are the owners of Plaintiff White Cottage Red Door, LLC, which is the official corporate form for the White Cottage Red Door business. Lisa and Kevin Howard also own Plaintiff Cherry Creek Investments, LLC, which owns the real property where the business operates.

license requirement imposes several onerous conditions that do not apply to brick-and-mortar restaurants.

Defendant's 2018 and 2019 vending legislation eliminated mobile vending in Defendant's jurisdiction, protecting brick-and-mortar restaurants from competition. But, as the Wisconsin Supreme Court has held, this sort of protectionism is not a legitimate use of public power. Accordingly, Defendant's anticompetitive vending restrictions are unconstitutional. And because Wisconsin comprehensively regulates and licenses "mobile restaurants" at the state level, Defendant's 2018 blanket ban and 2019 license requirements are also preempted by state law.

FACTUAL BACKGROUND[2]

For more than two years, Defendant has engaged in a sustained campaign to eliminate mobile vending throughout the Town of Gibraltar. From the day Plaintiffs opened their mobile restaurant, Defendant tried to shut it down. Unable to do so immediately, Defendant next tried to invalidate their county authorization to operate. When that gambit failed, Defendant enacted a wholesale vending ban to stop Plaintiffs. And, in the middle of this lawsuit, Defendant replaced its *de jure* ban with a new *de facto* ban that continues to block Plaintiffs from vending.

After Satisfying Applicable Requirements, Plaintiffs Operated Their Mobile Restaurant.

For as long as Lisa Howard, her husband Kevin Howard, Lisa's brother Christopher Hadraba, and Christopher's wife Jessica Hadraba have been in business together in Fish Creek, mobile vending has been an integral part of their business plan. SOF ¶ 18. The quartet's business—White Cottage Red Door—operates a brick-and-mortar store on property owned by

[2] A fuller factual background is set forth in Plaintiffs' Separate Statement of Uncontroverted Materials Facts ("SOF"). For this Court's reference, Plaintiffs have provided a streamlined factual background here.

the Howards' other company, Cherry Creek Investments, LLC ("Cherry Creek Investments"). *Id*. ¶¶ 4, 8–9, 14. Their plan has been to operate a mobile restaurant, managed by Christopher, solely on private property. *Id*. ¶¶ 21, 36, 166. They would like to vend primarily on White Cottage Red Door's parking lot. *Id*. ¶¶ 33, 171. They have also reached an agreement with the owners of a downtown Fish Creek bicycle-rental store—Edge of Park Rentals—to periodically vend in its parking lot. *Id*. ¶¶ 33–35.

To make their vending dream a reality, Plaintiffs complied with applicable county and state requirements. They have a zoning permit from the Door County Planning Department that authorizes them to have a mobile restaurant on their property. *Id*. ¶ 24. White Cottage Red Door also earned a state-required mobile-restaurant license after passing an inspection for compliance with Wisconsin's comprehensive mobile-restaurant regulations. *Id*. ¶¶ 25–27. (In fact, White Cottage Red Door even earned a separate state approval for its custom-built barbecue smoker. *Id*. ¶ 32.) Plaintiffs also satisfy the state's requirement that mobile restaurants employ a "certified food manager"—Christopher Hadraba earned a "ServSafe Food Protection Manager" certificate after passing a state-recognized food-safety examination. *Id*. ¶ 23; Wis. Stat. § 97.33(1r); Wis. Admin. Code ATCP § 75 App. 2-102.11(B). With county and state authorization in hand, on September 2, 2017, White Cottage Red Door opened its mobile restaurant for business on its store's parking lot. SOF ¶ 28.

Defendant Tried to Stop Plaintiffs' Vending on Their First Day of Operation.

Defendant has endeavored to stop White Cottage Red Door's mobile restaurant since the day it began vending. After getting a complaint about Plaintiffs' food truck from Tom Young—the owner of the "Gibraltar Grill" restaurant—then-Supervisor Brian Hackbarth asked then-Chairman Richard Skare to "shut down" the food truck. SOF ¶ 68–69. (Like Young, Hackbarth

and Skare have a financial interest in stopping mobile vending: Hackbarth is a corporate controller for Gibraltar's "Wild Tomato" restaurant; and Skare owns "The Cookery" restaurant nearby. *Id*. ¶¶ 43–44, 50–51.) On September 2, 2017, Hackbarth and Skare sent Gibraltar's police chief to Plaintiffs' store. *Id*. ¶¶ 65, 70. Later that day, Skare visited the store himself. *Id*. ¶ 73. But as the police chief and Skare learned, Plaintiffs' food truck had permits to operate. *Id*. ¶¶ 71–73. Unable to shut Plaintiffs down immediately, the constable and Skare left Plaintiffs' property. *Id*. ¶¶ 72–73.

However, Defendant's campaign against mobile vending was just getting started. Within hours of the police chief's visit to White Cottage Red Door, Hackbarth sent a text message addressed to "Gibraltar Restaurant Owners," lamenting that, though the police chief "went to shut [Plaintiffs' food truck] down," he "was met with a [p]ermit [i]issued [b]y [Door] County." *Id*. ¶ 74. Hackbarth's message rallied Gibraltar's restaurateurs to make "a [l]ot of complaint calls or [t]exts" to "Gibraltar Board Members" regarding Plaintiffs' food truck. *Id*.

Defendant (Unsuccessfully) Tried to Get Door County to Ban Vending in Gibraltar.

Despite learning about Plaintiffs' permits to operate, the Gibraltar Town Board still tried to eliminate mobile vending. At the Gibraltar Town Board's September 6, 2017 meeting, after Skare introduced the topic of food trucks, his fellow Board members publicly sympathized with brick-and-mortar restaurants against their competitors:

- Hackbarth fretted about the possibility of food trucks "competing against restaurants." SOF ¶ 179.
- McKesson defended "people that have put heart and soul into restaurants" against the threat of "somebody [who] can come in [o]n a trailer." *Id*. ¶ 177. She said, "we need to put our hands up here and say we're not in favor of this" vending "at all." *Id*.
- Current Town Chairman Steve Sohns said that he wanted to "hear from" Gibraltar's "restaurant owners" and had "asked the[se] people to come." *Id*. ¶¶ 58, 180.

To prevent mobile vending from "ever happen[ing] again," Hackbarth successfully moved the Town Board to "retain[ ]" consultant Robert Kufrin to get Plaintiffs' zoning permit revoked. *Id.* ¶ 78.

To this end, Kufrin tried three different strategies. First, he wrote a draft letter in Skare's name objecting to Door County's decision to authorize Plaintiffs' food truck. *Id.* ¶ 82. (The Gibraltar Town Board sent the County an edited copy of this letter on September 19, 2017, demanding that the County revoke Plaintiffs' zoning permit. *Id.* ¶ 83.) Second, Kufrin drafted a proposed county zoning provision on "transient sales," which would have prohibited food trucks in Gibraltar outside of Town-permitted festivals. *Id.* ¶ 87. Third, Kufrin tried to separately ban food trucks in the Town of Gibraltar's sign code, which was part of Door County's zoning ordinance. *Id.* ¶¶ 88–89. Before September 2017, Kufrin had been working on a draft of the sign code, but none of his proposals (besides a generally applicable advertising provision) had concerned mobile vending at all. *Id.* ¶¶ 89–90. Under orders from the Gibraltar Plan Commission, though, Kufrin buried at least three different food-truck prohibitions deep in his draft sign code. *Id.* ¶¶ 88, 91–92.

All three of Kufrin's efforts failed. In an October 2017 letter, the County rejected the Board's September 19 demand. *Id.* ¶ 84.[3] And the County did not adopt any of Kufrin's proposed vending bans, including his proposed sign code. *Id.* ¶ 93.

To Stop Plaintiffs' Food Truck, Defendant Completely Banned Mobile Vending.

After the Gibraltar Town Board's first demand to the County failed, Defendant was still undeterred. To stop Plaintiffs from operating their food truck on their own private property,

[3] In May 2018, Defendant again demanded that the County revoke Plaintiffs' zoning permit, prompting another rejection by the County. SOF ¶¶ 85–86.

Defendant amended a 1982 town ordinance to ban mobile vending entirely. Unlike the original ordinance—which prohibited only "street hawking and peddling" of certain goods—the amended, January 2018 ordinance prohibited the sale of "*any* goods . . . from a vehicle, truck, trailer, cart, pushcart or handcart *at any place whatsoever* in the Town of Gibraltar." Emam Aff. Ex. 30 ("2018 Ordinance") § 1 (emphasis added); *see also* SOF ¶¶ 94–102. Violations of the ordinance were subject to fines of $500 per day. 2018 Ordinance § 3.

This ordinance destroyed Plaintiffs' mobile-restaurant operation. Faced with the threat of ruinous fines, Plaintiffs stopped vending and transferred their mobile restaurant to another owner. SOF ¶ 110. On May 9, 2018, Plaintiffs submitted a Notice of Claim asking the Town to restore the status quo. *Id*. ¶¶ 112–113. Nearly four months later, Defendant disallowed their Notice, forcing Plaintiffs to file suit. *Id*. ¶ 115.

After Being Sued, Defendant Replaced Its Explicit Vending Ban with a *De Facto* Ban.

After enacting the 2018 Ordinance, Defendant continued scheming to suppress mobile-restaurant competition. For example, two days after Plaintiffs submitted their Notice of Claim, brick-and-mortar restaurateur Christie Weber advised Gibraltar Town Member Barbara McKesson on how to handle Plaintiffs' claims. SOF ¶¶ 122–23. Weber suggested that Defendant restrict mobile vendors to a "small rural (undesirable) zoning area" that would (in her view) "avoid a lawsuit." *Id*. ¶ 124. Because Weber thought mobile vendors presented "unfair price competition" to restaurants in Defendant's "downtown area," she proposed that Defendant "zone out food trucks" from its "'commercial center' where [the] costly restaurants are located." *Id*. McKesson circulated Weber's proposal to rest of the Town Board. *Id*. ¶ 122.

It was therefore little surprise that, in April 2019, Defendant replaced the 2018 Ordinance with a new version that closely tracks Weber's recommendation. This 2019 ordinance prohibits

"mobile food establishments" from operating in a "designated area" where at least a dozen brick-and-mortar restaurants operate. *Id*. ¶¶ 125, 128; *see also* Emam Aff. Ex. 34 ("2019 Ordinance") § 8(a)(1).[4] The 2019 Ordinance also prohibits mobile restaurants, but not brick-and-mortar restaurants, from operating within 500 feet of Clark Park, Sunset Beach Park, and Peninsula State Park. *See* 2019 Ordinance § 8(c)(5); SOF ¶¶ 130, 132. Predictably, given Weber's advice, 88.9% of Gibraltar's restaurants are either within the "designated area" or 500 feet of Peninsula State Park.[5] (And Edge of Park Rentals is within both areas. SOF ¶¶ 129, 133.)

Even in the small pockets of Gibraltar outside these areas, like White Cottage Red Door's location, the 2019 Ordinance subjects mobile vendors to numerous arbitrary burdens not shared by brick-and-mortar restaurants. For instance, the ordinance prohibits mobile restaurants from operating unless they have "obtained an approved license" from Defendant, even though brick-and-mortar restaurants need not obtain any similar Town license. 2019 Ordinance §§ 3(a), 4; SOF ¶¶ 139, 146. Moreover, the Town's license imposes several onerous requirements on mobile restaurants that brick-and-mortar restaurants so not bear. For example:

- the 2019 Ordinance says that a "mobile food vendor shall comply if asked to leave" even "private property by . . . a Town official" for any reason whatsoever;

[4] The 2019 Ordinance defines a "Mobile Food Establishment" as "a restaurant or retail food establishment where food is served or sold from a movable vehicle, trailer or cart which periodically or continuously changes location and requires a service base to accommodate the unit for servicing, cleaning, inspection and maintenance or except as specified in the Wisconsin Food Code." 2019 Ordinance § 2(a). (Throughout this brief, Plaintiffs refer to "mobile food establishments," "mobile restaurants," and "food trucks" interchangeably.)

[5] To the best of Plaintiffs' knowledge, there are 18 brick-and-mortar restaurants in Gibraltar and 16 of them are either within the "designated area" or 500 feet of Peninsula State Park (or both). SOF ¶¶ 128, 132, 134. When Plaintiffs asked Defendant if there were any other restaurants outside these two areas, Defendant testified that it was not aware of any. *Id*. ¶ 134.

- the 2019 Ordinance demands that, even if a mobile restaurant operates at its service base,[6] it must leave weekly to go somewhere (where that somewhere is, precisely, is unspecified);
- unlike brick-and-mortar restaurants, mobile restaurants cannot operate for more than 8 hours per day at a stationary location;
- unlike brick-and-mortar restaurants, mobile restaurants cannot operate before 8:00 a.m. or after 8:00 p.m.;
- unlike brick-and-mortar restaurants, mobile restaurants cannot have outdoor seating;
- unlike brick-and-mortar restaurants, mobile restaurants cannot play music.

2019 Ordinance §§ 7(e)(5), 8(a)(5), 8(a)(6), 8(a)(11), 8(b)(2), 8(c)(4); SOF ¶¶ 147–58. Vendors who violate these, or any of the ordinance's other, provisions are subject to fines of $500 per day and revocation of their Town license. *See* 2019 Ordinance §§ 5, 10; SOF ¶¶ 161, 165.

The 2019 Ordinance's restrictions amount to a *de facto* vending ban. Zero vendors are authorized to operate in Gibraltar, and none have even dared apply for permission under the ordinance's discriminatory terms. SOF ¶¶ 143–44. This status quo is no surprise: The 2019 Ordinance categorically bans vending on 88.7% of Gibraltar's commercially zoned parcels. *Id.* ¶ 137. And, even in the small area left, the ordinance systematically disadvantages vending. Through these restrictions, the 2019 Ordinance protects brick-and-mortar restaurants from mobile-restaurant competition, just like the 2018 Ordinance did.

SUMMARY OF THE ARGUMENT

From the day Plaintiffs began operating a food truck, Defendant has engaged in a systematic campaign to eliminate mobile vending. Defendant enacted both the 2018 Ordinance and the 2019 Ordinance (collectively, the "Vending Ordinances") to protect brick-and-mortar restaurants from competition. But protectionism—*i.e.*, the use of public power to suppress

[6] A "service base" is a brick-and-mortar location used for cleaning, discharging wastes, and replenishing supplies.

competition for a private party's financial benefit—is an illegitimate government interest under Wisconsin Supreme Court precedent. The Vending Ordinances are thus unconstitutional.

Even if the Vending Ordinances were not protectionist—which they are—they would still violate substantive due process and equal protection as applied to private property. Defendant asserts three pretexts for the Vending Ordinances: preservation of its town "character"; "public safety"; and protection of its property-tax base. As the Wisconsin Supreme Court has instructed, this Court should be skeptical that these are Defendant's actual motives. But, even if they are, the evidence shows that Defendant's discrimination against mobile vendors operating on private property makes no sense. As Defendant's own statements show, these vendors do not pose a unique threat to town character, public safety, or Defendant's property-tax base. Accordingly, the ordinances' application to them is not rationally related to Defendant's asserted interests.

Last, state law preempts much of the Vending Ordinances. Wisconsin's Department of Agriculture, Trade and Consumer Protection ("DATCP") licenses "mobile restaurants" and subjects them to a uniform and comprehensive state regulatory scheme. The Wisconsin Supreme Court has repeatedly held that municipalities cannot forbid what the state has expressly licensed. In fact, the Court of Appeals has held that state law preempted a village from imposing even a mere *registration requirement* on state-licensed nursing homes. Under these courts' controlling precedents, Wisconsin state law preempts the 2018 Ordinance's total prohibition on state-licensed mobile restaurants and the 2019 Ordinance's *de facto* prohibition.

Plaintiffs request that this Court rule that the Vending Ordinances are unconstitutional and that state law preempts the 2018 Ordinance and the 2019 Ordinance's municipal licensing requirements. Plaintiffs require a court order so that they can resume their original business plan by vending again, this time safe from Defendant's anticompetitive restrictions.

LEGAL STANDARD

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to a judgment as a matter of law. *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 355, 286 N.W.2d 831 (1980).

ARGUMENT

In Section I, Plaintiffs explain why the Vending Ordinances are unconstitutional. In Section II, Plaintiffs explain how state law preempts the 2018 Ordinance and the 2019 Ordinance's licensing requirements.

I. THE VENDING ORDINANCES ARE UNCONSTITUTIONAL.

As set forth below, the Vending Ordinances violate the Wisconsin Constitution's guarantees of substantive due process and equal protection because they are economically protectionist. Even if they were not economically protectionist, though, the Vending Ordinances are nonetheless irrational—and, thus, unconstitutional—as applied to private property.

A. The Vending Ordinances Are Unconstitutional Because Defendant Enacted Them to Protect Brick-and-Mortar Restaurants from Competition.

Because protecting one group from competition is an illegitimate government interest, both the Wisconsin Supreme Court and other courts have held protectionist laws to be unconstitutional. Indeed, the Wisconsin Supreme Court has gone even further and instructed that courts must regard public-welfare justifications for protectionist laws with "skepticism." Below, Plaintiffs discuss this precedent and the record evidence, which shows that the Vending Ordinances are protectionist measures that brick-and-mortar restaurateurs—led by then-Chairman Richard Skare—encouraged.

1. Protectionism is an illegitimate government interest in Wisconsin.

A law violates the Wisconsin Constitution when its primary or sole purpose is to protect

one group from competition. *State ex rel. Grand Bazaar Liquors, Inc. v. City of Milwaukee,* 105 Wis. 2d 203, 313 N.W.2d 805 (1982)*; State ex rel. Week v. Wis. State Bd. of Exam'rs,* 252 Wis. 32, 36, 30 N.W.2d 187 (1947) (invalidating a continuing education requirement for chiropractors when only one association could offer the educational program, as "the state was acting for the benefit of the association primarily, which is not within the legitimate exercise of police power"); *Wis. Wine & Spirit Inst. v. Ley*, 141 Wis. 2d 958, 966, 416 N.W.2d 914 (Wis. Ct. App. 1987) ("We reject the proposition that purely economic reasons justify a perpetual exception from a police power regulation.").

The Wisconsin Supreme Court's decision in *Grand Bazaar Liquors* is instructive. There, Milwaukee enacted an ordinance requiring that, to be eligible for liquor licenses, applicants would have to make half of their profits or more from liquor. 105 Wis. 2d at 204. This meant that liquor stores could get a license, but grocery stores could not. *Id*. at 205. Unsurprisingly, "the ordinance was supported by special interest groups," *id*. at 209, including a trade association of liquor retailers, *id*. at 210 n.5, "as an anti-competitive measure to keep large retail stores out of the retail liquor business." *Id*. at 209–10.

When a grocery store challenged the ordinance, the City of Milwaukee predictably denied that the law was protectionist and "hypothesize[d]" *post hoc* rationales. *Id.* at 210. Counsel for the city imagined that if a license holder had more than half of its income at stake, it would be more likely to protect its license by diligently enforcing and obeying liquor laws. *Id*. at 208. Counsel likewise speculated that the requirement would reduce the total number of places where people could buy alcohol. *Id.* at 210.

But the Wisconsin Supreme Court was not so easily swayed. It declared that it "should receive with some skepticism" city counsel's two "post hoc hypotheses about legislative

purpose." *Id.* at 211 (quotation marks and citation omitted). With this skepticism in mind, the Court noted that there was no evidence that the challenged ordinance "accomplish[ed] [its] articulated goals." *Id*. at 212 (finding "glaring absence in the record"). Specifically, the Court held that the ordinance was not reasonably connected to Milwaukee's interest in promoting compliance with liquor laws, especially considering that some retailers that were ineligible for liquor licenses "appear[ed] equally, if not more" law-abiding than those eligible. *Id*. at 212–13. Similarly, the Court rejected Milwaukee's argument that the challenged ordinance reduced the number of places where alcohol was available, as the challenged ordinance did not actually limit the number of liquor licensees. *Id* at 212. The Court thus invalidated the ordinance as unconstitutionally protectionist under both substantive due process and equal protection. *Id*. at 218.

Several other courts around the nation have likewise invalidated restrictions motivated by protectionism.[7] In each of these cases—just like in *Grand Bazaar Liquors*—the government had asserted pretextual justifications for the challenged laws. And in each case, courts rejected these asserted justifications after finding that the real purpose motivating the laws was instead

[7] *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (finding law that allowed only licensed funeral directors to sell caskets to lack a rational basis and instead just protect funeral directors from competition); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Merrifield* v. *Lockyer*, 547 F.3d 978, 990–92 (9th Cir. 2008) (finding licensing scheme for pest controllers that exempted those dealing with certain pests lacked a rational basis and have the primary purpose of protectionism); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (finding regulations on moving companies lacked a rational basis and were instead just protectionist); *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (finding ban on jitneys lacked a rational basis and was "economic protectionism in its most glaring form"); *California v. Ala Carte Catering, Co.* 159 Cal. Rptr. 479, 484 (Cal. App. Dep't Super. Ct. 1979) (finding law that prohibited food trucks from operating near restaurants lacked a rational basis and was instead a "naked restraint of trade.").

economic protectionism.[8] The Court should do the same here.

2. The evidence shows that protectionism motivates the Vending Ordinances.

As the record demonstrates, the Vending Ordinances are—like the license restriction in *Grand Bazaar Liquors*—economically protectionist. The history of their passage, including the Gibraltar Town Board's comments, reflects this protectionist intent.

a. Gibraltar's brick-and-mortar restaurateurs are responsible for Defendant's vending restrictions.

Defendant's efforts to restrict mobile vending are the product of anticompetitive machinations by Gibraltar's brick-and-mortar restaurateurs. When Gibraltar Grill owner Tom Young complained about Plaintiffs' food truck, he found a sympathetic ear in then-Chairman—and fellow restaurateur—Richard Skare. SOF ¶¶ 68–70. With decades of experience as a Gibraltar Town Board member, Skare was Gibraltar's most politically powerful person. *Id.* ¶¶ 40–42. As another Town Board member put it, Skare "r[a]n the show" and "control[led] the agenda" in town. *Id.* ¶¶ 56–57.

Skare wielded this political power to Plaintiffs' detriment (and his restaurant's benefit). On Plaintiffs' first day vending, he instructed the town's constable to investigate Plaintiffs, and paid them a visit himself. *Id.* ¶¶ 28, 70, 73. Then he introduced the topic of food trucks to the Town Board, prompting the Board to demand that Door County revoke Plaintiffs' zoning permit. *Id.* ¶¶ 77–78, 83. After the County rejected the Board's demand, Skare and his fellow Board

[8] And, in some of these cases, the court rejected the government's asserted justifications at the summary-judgment stage. *See, e.g.*, *Bruner*, 997 F. Supp. 2d at 700–02; *Santos*, 852 F. Supp. at 607–09. In other words, defendants' mere assertion of legitimate rationales did not create genuine issues of material fact that defeated the plaintiffs' summary-judgment motions. In Wisconsin state court, too, plaintiffs have won constitutional challenges to protectionist laws at summary judgment. *See, e.g.*, Institute for Justice, Victory for Wisconsin Home Bakers, https://ij.org/press-release/victory-wisconsin-home-bakers; *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*, 839 F.3d 613, 614–15 (7th Cir. 2016) (describing state-court ruling striking down Milwaukee's taxicab ordinance on equal-protection and substantive-due-process grounds).

members enacted the 2018 Ordinance, prohibiting Plaintiffs' food truck from operating on their own property. *Id*. ¶¶ 84, 96, 100–02, 106–08.

Like Skare, fellow Board member and restaurateur Brian Hackbarth used his political power to Plaintiffs' detriment (and his restaurant's benefit). Specifically, he moved the Town Board to demand that Door County's land-use department revoke Plaintiffs' zoning permit and tried to shut down Plaintiffs' food truck after receiving Tom Young's complaint. *Id*. ¶¶ 68–69, 78. After the constable failed to shut down Plaintiffs' food truck, Hackbarth rallied his fellow restaurateurs in a text addressed to "Gibraltar Restaurant Owners." *Id*. ¶¶ 71–74. Later, Hackbarth supported the 2018 Ordinance's vending ban. *Id*. ¶ 98.

Brick-and-mortar restaurateurs also had a hand in the 2019 Ordinance. Like Skare, who voted for both ordinances, Christie Weber did her part to eliminate mobile-restaurant competition. *Id*. ¶¶ 122–24. Immediately after Plaintiffs submitted their Notice of Claim, Weber messaged Barbara McKesson to advise the Gibraltar Town Board that it could avoid a lawsuit by prohibiting mobile vending in Defendant's "downtown area" where "restaurants are located" and restricting mobile vendors to a "small rural (undesirable) zoning area." *Id*. ¶ 124. Through the 2019 Ordinance, which completely bans mobile vending in downtown Fish Creek areas where 88.9% of Gibraltar's brick-and-mortar restaurants operate, Defendant enacted Weber's proposal. *Id*. ¶¶ 125–34.

Given the role Skare, Hackbarth, and their fellow "Gibraltar Restaurant Owners"—like Young and Weber—played in Defendant's enactment of vending restrictions, Defendant's protectionist intent is clear. *See Grand Bazaar Liquors*, 105 Wis. 2d at 209–10 (holding that law was protectionist in intent where it was "supported by special interest groups as an anticompetitive measure").

b. The Gibraltar Town Board has made its protectionist intent clear.

The Gibraltar Town Board's comments regarding mobile vending also evince its protectionist intent. Skare is a case in point. In his notes, he wrote that the "object" of Defendant's 1982 vending ordinance "was to protect local business from short term vending of various goods" and that the Town Board "update[d]" that ordinance in order to "cover[ ] all goods sold by vendors." SOF ¶ 175. In other words, Defendant's Vending Ordinances simply extended and broadened a prior ordinance which was itself rooted in protectionism. Skare separately wrote that Gibraltar enacted the 1982 ordinance after "local business owners were so concerned they brought those concerns to the Town Board" and that, now, "similar concerns have [a]risen as they did in 1982[,] therefore the updated version" of the 1982 ordinance. *Id.* ¶ 176. In Skare's telling, then, Defendant's vending restrictions have been protectionist since 1982, and its Vending Ordinances are no different in intent.

Public comments by the Gibraltar Town Board's members also demonstrate the Board's protectionist intent. For instance, at the Board's September 6, 2017 meeting, after Skare introduced the topic of food trucks:

- Hackbarth fretted about the possibility of food trucks "competing against restaurants." *Id.* ¶ 179.
- McKesson defended "people that have put heart and soul into restaurants" against the threat of "somebody [who] can come in [o]n a trailer." *Id.* ¶ 177. She said, "we need to put our hands up here and say we're not in favor of this" vending "at all." *Id.*
- Current Town Chairman Steve Sohns said that he wanted to "hear from" Gibraltar's "restaurant owners" and had "asked the[se] people to come." *Id.* ¶ 180.

When the Board was considering the 2018 Ordinance four months later, Sohns warned that brick-and-mortar restaurants should fear mobile-restaurant competition. He said that, after

eating a food truck's Italian beef sandwich that was "out of this world," he understood why brick-and-mortar restaurants "should be up in arms" about food trucks. *Id.* ¶ 181.

As all this evidence shows, the Vending Ordinances were enacted to financially benefit restaurants by eliminating even the smallest hint of competition. Because this economic protectionism is not a legitimate government interest, the Vending Ordinances are unconstitutional. *See, e.g.*, *Wis. State Bd. of Exam'rs,* 252 Wis. at 36 (finding requirement unconstitutional where the state was acting for a private party's benefit).

B. The Vending Ordinances Violate Substantive Due Process.

The evidence shows that protectionism motivated the Vending Ordinances. Now that it is in court, though, Defendant claims that the ordinances are really about "[t]own's character," "public safety," and property taxes. SOF ¶¶ 182, 192, 196–97. Given the evidence of protectionism here, this Court should be skeptical that these are Defendant's actual motives for the Vending Ordinances. *See Grand Bazaar Liquors*, 105 Wis. 2d at 211 (maintaining that Court "should receive with some skepticism" the government's "post hoc hypotheses about legislative purpose") (citation omitted).

But, even absent this skepticism, the Vending Ordinances would *still* be unconstitutional as applied to what Plaintiffs want to do: vend on private property. To be constitutional under Wisconsin's substantive due process doctrine, a law must have a rational connection to a legitimate government interest. The Vending Ordinances cannot clear this bar as to private property because—as Defendant's own statements show—food trucks parked on private property do not harm the Town of Gibraltar's character, public safety, or property-tax base.

1. Substantive Due Process requires a rational connection between a challenged restriction and a legitimate government interest.

The Vending Ordinances warrant constitutional scrutiny. Plaintiffs would like to earn an honest living and execute an integral part of their business plan by operating a food truck in the Town of Gibraltar. SOF ¶¶ 18, 33. As the Wisconsin Supreme Court has long recognized, the Wisconsin Constitution protects this right of Plaintiffs (and others) to an honest living free of unreasonable government regulations. *See, e.g.*, *State v. Withrow*, 228 Wis. 404, 407, 280 N.W. 364 (1938) ("[A]ny person is at liberty to pursue any lawful calling.") (citation omitted). That is because Article I, Section 1 of the Wisconsin Constitution protects Wisconsinites' "inherent rights," including "life, liberty and the pursuit of happiness." By infringing on Plaintiffs' right to earn an honest living through mobile vending, the Vending Ordinances implicate Article I, Section 1.

When adjudicating substantive due process challenges to restrictions on this right, Wisconsin courts use the state's rational basis test, which requires that the law have a reasonable connection to legitimate objectives. *E.g.*, *Peppies Courtesy Cab Co. v. City of Kenosha*, 165 Wis. 2d 397, 401, 475 N.W.2d 156 (Wis. 1991); *Grand Bazaar Liquors*, 105 Wis. 2d at 212; *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 383 Wis. 2d 1, 914 N.W.2d 678 (2018); *Porter v. State*, 382 Wis. 2d 697, 913 N.W.2d 842 (2018).

Rational-basis review, far from a "blind[] rubber stamp," is a meaningful standard. *Grand Bazaar Liquors*, 105 Wis. 2d at 218 ("[W]e should not blindly rubber stamp legislation enacted under the guise of the city's police power[.]"). In *Grand Bazaar Liquors*, for example, the Wisconsin Supreme Court carefully examined record evidence in ruling that an ordinance flunked this level of scrutiny.

Even where there is no evidence of protectionism, though, Wisconsin courts have

repeatedly used the rational basis test to strike down laws that did not reasonably further a legitimate interest. In *Peppies*, for instance, the Wisconsin Supreme Court invalidated a law requiring taxi drivers to adhere to a dress code and certain grooming requirements. 165 Wis. 2d 397, 399, 404, 475 N.W.2d 156 (Wis. 1991) (holding that the code lacked a rational basis because it was "adopted only on the basis of the subjective complaints of members of the police department and its officials"). Earlier, in *Clark Oil & Refining Corp. v. City of Tomah*, the Wisconsin Supreme Court invalidated a town law that prohibited high-capacity fuel trucks from delivering gas or otherwise parking in town because the record provided "too thin a basis for legislative action." 30 Wis. 2d 547, 550–51, 557, 141 N.W.2d 299 (Wis. 1966). *See also Chicago & N.W. Ry. v. La Follette*, 43 Wis. 2d 631, 652, 169 N.W.2d 441 (Wis. 1969) (holding unconstitutional requirement of a three-man crew for single train engines operating outside railroad yards because "safety considerations" could not "justif[y]" it).

In *Peppies*, *Clark Oil*, and *La Follette*, the Wisconsin Supreme Court found that facts and evidence in the record showed no rational connection between the challenged restrictions and the government's asserted justifications. The facts and evidence here command the same finding.

2. Defendant's restrictions on private-property vending are not rationally related to its pretextual justifications.

With respect to Plaintiffs—and others who, like them, want to vend on only private property—Defendant's "character," "public safety," and property tax justifications simply do not hold water. Because food trucks do not (according even to Defendant) harm "character" when simply parked, they cannot harm it when parked and profitable. And, given that Defendant's latter two justifications are (at most) limited to public property, they also fail as to Plaintiffs and others vending on private property. Accordingly, the Vending Ordinances are unconstitutional as applied.

a. The Vending Ordinances are not rationally related to Defendant's professed interest in preserving town "character."

Defendant justifies the Vending Ordinances on the grounds that mobile vending would supposedly harm its town's "rural character." SOF ¶¶ 201–02. Given how amorphous the term "character" is, it is hard to understand what Defendant means by it. When pressed to explain, Defendant has pointed to Gibraltar's aesthetic "landscape of unique beauty" and related image with tourists. *Id*. ¶¶ 203, 212.

Even if Defendant's "character" were an ascertainable governmental interest, Defendant's argument would fail. Defendant concedes that mobile vendors do not hurt its "landscape of unique beauty" when they are not operating. Thus, they cannot plausibly hurt it when operating either. And there is no evidence supporting Defendant's conjecture that they harm Gibraltar's image. Under binding precedent, this speculation about town image cannot survive even rational-basis review.

i. Defendant's discrimination against mobile vending is not rationally related to aesthetics.

According to Defendant, mobile vendors do not harm the Town of Gibraltar's character when they are not operating. Specifically, Defendant admits that a food truck that is "not selling food" is not a "threat to the town's character." SOF ¶¶ 204–05. Indeed, mobile vendors can legally park throughout the Town of Gibraltar. *Id*. ¶ 206. For example, even after Defendant enacted the Vending Ordinances, Plaintiffs could park their food truck on their private property at White Cottage Red Door. *Id*. ¶ 207. They just could not use the food truck to serve customers there. *Id*. ¶¶ 108, 145.

Given Defendant's admission that nonoperating food trucks are benign, Defendant cannot logically argue that an operating food truck would somehow harm the town's "rural character" as

a "landscape of unique beauty." After all, if a food truck was consistent with the town's "beauty" when just parked, it is inconceivable that it would morph into a hideous blight just by serving customers. Indeed, Defendant concedes that extensive commerce does not hurt its rural character. Defendant admits that even 30 "open and active and profitable" restaurants would be perfectly "consistent with the rural character of [its] town." *Id*. ¶¶ 208–09. Defendant also admits that Taco Cerveza—a restaurant in downtown Fish Creek that is "all outside except for the kitchen"—comports with the town's character. *Id*. ¶¶ 128, 210–11. Because neither parked food trucks nor sales threaten town character in themselves, they cannot do so in combination either.

ii. Defendant's discrimination against mobile vending is not rationally related to protection of Gibraltar's image.

Defendant's argument that mobile vending would hurt its image also does not withstand scrutiny. Under analogous facts involving a different municipality's perceived image, the Wisconsin Supreme Court struck down an ordinance under the rational basis test. *Peppies*, 165 Wis. 2d at 399–401. There, a municipality's justification for its dress and grooming code for taxicab drivers was "to further the cleaning up of the image of the city." *Id*. at 404 (internal quotation marks omitted). Because there was no evidence that taxicab drivers hurt the city's image, the Wisconsin Supreme Court rejected the government's argument. As the Court pointed out, "[t]here were no studies conducted which showed the cab drivers were responsible for any tarnished image of the city" and "[n]o data . . . indicating that visitors to the city felt they would enjoy their time . . . more" if the drivers followed the city's code. *Id*. Without such "extrinsic evidence," the code had no "reasonable or rational relationship to the public good" and was thus unconstitutional. *Id*.

Here too, Defendant's evidence-free speculation about "character" fails for the same

reason. Nothing suggests that mobile vendors harm the Town of Gibraltar's character, including with tourists. Plaintiffs asked Defendant to identify any documents supporting its contention, but Defendant did not identify any.[9] Though Defendant speculates that mobile vendors could hurt its image with tourists, it admits that it has no relevant studies or other analyses on point. SOF ¶ 213. Nor is Defendant aware of studies by anyone else reaching such a conclusion. *Id*. Also, when pressed to explain why it thinks mobile vendors threaten town character even though other retail businesses do not, Defendant admits it has no "bas[i]s in statistics." *Id*. ¶ 214. Ultimately, Defendant's speculation rests on the same rationale rejected in *Peppies*—subjective belief.

Meanwhile, there is evidence that mobile vending is consistent with Door County municipalities' image. Unlike Gibraltar, neighboring towns in Door County—like Baileys Harbor—have mobile vendors. *Id*. ¶ 216. In fact, the Town of Baileys Harbor allows mobile vendors to operate without needing any town permission. *Id*. ¶ 215. And it is—according to Architectural Digest—the "prettiest town in Wisconsin." *Id*. ¶ 217. There is no reason to think Gibraltar would ruin its image with tourists by following Baileys Harbor's example with respect to restaurants on wheels. Indeed, one of the brick-and-mortar businesses that Defendant says exemplifies its town character—the White Gull Inn—sells coffee and baked goods from a wheeled cart. *Id*. ¶¶ 218–21. Considering this record, there is no rational connection between Defendant's asserted "character" interest and its discrimination against mobile vending.

[9] In responses to an interrogatory that asked Defendant to "identify all documents, correspondence, and other information that you claim support or tend to support the contention that Amended and Restated Ordinance No. 1982-05 advances or may advance" governmental interests Defendant asserted, Defendant merely identified Gibraltar Town Board meeting minutes and a "Comprehensive Plan" that referred to town character. SOF ¶ 185. It later produced a "Waterfront Master Plan" that also referred to "character." *Id*. ¶ 188. But none of these documents explain how mobile vendors hurt town character. *See* Emam Aff. Exs. 19, 46, 47. In fact, only the meeting minutes mention vending at all. *See id*.

b. The Vending Ordinances' application to private property is not rationally related to public safety.

In addition to invoking "character," Defendant contends that the Vending Ordinances further "public safety," which it further defined as "pedestrian, motor vehicle[,] and bicycle" safety.[10] SOF ¶ 193; *see also id.* ¶¶ 222–26. According to Defendant, its basis for this contention is that "a single highway"—Highway 42—"runs through [Gibraltar]," resulting in periods of supposed "extreme vehicle and pedestrian congestion," especially in downtown Fish Creek. *Id.* ¶¶ 183–84, 245. Defendant speculates that this congestion could result in "accidents" on "*public* thoroughfares." *Id.* ¶ 227 (emphasis added). When Plaintiffs asked Defendant for evidence supporting this conjecture, Defendant pointed only to a traffic study (that does not mention mobile vendors at all). *Id.* ¶ 200. In deposition, Defendant also speculated that vendors encourage jaywalking, but admitted to not having any corroborating "study" or "documented" evidence. *Id.* ¶¶ 230, 232.

Even if Defendant's argument about public-property vending actually had evidentiary support, though, the Vending Ordinances would still not further public safety on *private property*. As discussed in further detail below, there are four reasons why. First, when operating on private property, mobile vendors do not threaten public safety—as Defendant itself has admitted, replacing a downtown Fish Creek brick-and-mortar restaurant, like Taco Cerveza, with a food truck would not affect public safety. Second, even if private-property vending did raise safety concerns, which it does not, the Vending Ordinances are still irrationally overbroad. That

[10] At a deposition, one of the Defendant's representatives also mentioned propane safety but clarified that she was speaking "personally" rather than on Defendant's behalf. SOF ¶ 223. Also, in deposition, Defendant for the first time included "food safety" in its definition of "public safety." *Id.* ¶ 222. This interest in "food safety" is clearly pretextual, given that the DATCP already inspects mobile vendors for compliance with state food-safety standards and that Defendant does not (and cannot) do so. *Id.* ¶¶ 260–64.

is because the ordinances apply even in places that could not plausibly affect public safety, like Plaintiffs' location on the outskirts of Gibraltar. Third, the Vending Ordinances are unconstitutionally underinclusive because they do not address certain activities that would logically pose the same hypothetical safety concerns as those restricted. Finally, Defendant has actual tools at its disposal to guard against any safety concerns. The fact that Defendant banned vending despite these tools shows that its goal is not to protect public safety but, rather, to protect brick-and-mortar restaurants' bottom lines.

i. Defendant irrationally singles out mobile vendors operating on private property as public-safety concerns.

Though Defendant speculates that mobile vendors threaten public safety, its own statements show that mobile vendors are no different than brick-and-mortar restaurants when operating on private property. Thus, Defendant's discrimination against them is arbitrary and irrational.

As the Wisconsin Supreme Court held in *Grand Bazaar Liquors*, the government cannot justify a restriction on one group unless it poses a unique concern. 105 Wis. 2d at 212–13. As discussed *supra*, the law at issue in that case limited liquor licenses to retailers who made half or more of their profits from liquor. *Id*. at 204. The government defended this provision by positing that these retailers were more law abiding than others. *Id*. at 208. But the Court rejected this argument because retailers without liquor licenses "appear[ed] equally, if not more" law abiding than licensees and that there was no evidence to the contrary. *Id*. at 212–13. Because both types of retailers had a similar interest in complying with the law, the government's discriminatory restrictions against one of these groups had no rational basis.

The holding of *Grand Bazaar Liquors* rings just as true here given that, by Defendant's own admission, food trucks operating on private property are virtually identical to brick-and-

mortar restaurants. When asked if "congestion" and "safety" would be any different if Taco Cerveza's brick-and-mortar kitchen downtown were replaced with a food truck, Defendant admitted that there would be no difference. SOF ¶¶ 128, 234–35. Yet, in both Vending Ordinances, Defendant banned mobile restaurants from operating on Taco Cerveza's private property. *Id*. ¶¶ 100, 102, 125, 128. As Defendant's own statements show, the ordinances' application to private lots, like Taco Cerveza's, has no connection to public safety.

ii. The Vending Ordinances are irrationally overinclusive.

Even if mobile vendors posed a unique public-safety concern on private property—which they do not—the Vending Ordinances would still be irrational as public-safety measures. That is because they are massively overinclusive.

The Wisconsin Supreme Court's decision in *Clark Oil & Refining Corporation v. City of Tomah* helps demonstrate why overly broad laws violate due process. In that case, one of the challenged requirements prohibited parking fuel trucks anywhere in Tomah, regardless of whether they were "loaded or empty." 30 Wis. 2d at 551. The government contended this provision protected the city's "public safety and welfare." *Id*. But, according to the Court, Tomah's parking ban was irrationally overinclusive, as an empty fuel truck posed "no more danger . . . than an ordinary truck or automobile." *Id*. at 558. Because the challenged parking law applied even to empty vehicles, it was not rationally related to the government's asserted safety interest. *Id*.

Like the parking restriction struck down in *Clark Oil*, the Vending Ordinances are irrationally overinclusive. Since their inception, they have both applied on private property *everywhere* in Gibraltar. As noted above, Defendant has conceded that a food truck would pose no safety concern at Taco Cerveza, which is (according to Defendant) in the most congested area

of town. SOF ¶¶ 128, 235. Given this concession, Defendant's "public safety" rationale is inapplicable to food trucks operating on private property elsewhere in Gibraltar. For example, as Defendant itself has conceded, Plaintiffs' location two miles away from downtown Fish Creek did not "give rise to [the] congestion" that supposedly triggers Defendant's safety concerns. *Id*. ¶ 242. But both Vending Ordinances prohibited Plaintiffs' operation of a food truck there nonetheless. *Id*. ¶¶ 108, 145. That prohibition is irrational.

iii. The Vending Ordinances are irrationally underinclusive.

In addition to being irrationally overinclusive, the Vending Ordinances are also irrationally underinclusive. Outdoor restaurant operations fall outside the ordinances' scope, even though they would equally implicate Defendant's asserted public safety interests.

Once again, the Wisconsin Supreme Court's decision in *Clark Oil* is instructive. One of the challenged restrictions in that case prohibited fuel trucks that carried more than 1,500 gallons from delivering fuel to gas stations. 30 Wis. 2d at 551. According to the government, these high-capacity trucks were a fire hazard since they were supposedly likelier than other trucks to tip over. *Id*. at 554. As the court noted, though, this risk was "minor" considering that smaller trucks had to make more trips to deliver the same amount of fuel as high-capacity trucks. *Id*. at 556–57. Because the government's size restriction left smaller trucks' hazard untouched, the government's ban was "without rational basis." *Id*. at 553.

Just like the size restriction in *Clark Oil*, the Vending Ordinances are irrationally underinclusive—they fail to address restaurant operations that implicate the government's claimed interests as much as mobile vending supposedly does.[11] After all, many brick-and-

[11] The 2018 Ordinance, in particular, was underinclusive in two additional ways. First, it did not apply to outdoor donations—like free samples—even though those would theoretically implicate public safety to the same degree as mobile vendors' sales. SOF ¶ 240. Second, the

mortar restaurants throughout Gibraltar have lines outside as well as outdoor seating, including on Highway 42 in downtown Fish Creek. SOF ¶¶ 234, 236–39. For instance, The Cookery and Wild Tomato have outdoor seating, and Taco Cerveza is "all outside except for the kitchen." *Id.* ¶¶ 153–54, 234, 237. If mobile vendors operating on private property could theoretically harm public safety so too would these restaurants. But Defendant does not restrict brick-and-mortar restaurants' outdoor lines, seating, or other activities. This shows how the Vending Ordinances are an irrationally underinclusive way of addressing Defendant's supposed safety concerns.

iv. Defendant has better tools for addressing public safety.

Beyond being overinclusive and underinclusive, the Vending Ordinances are an especially indirect and unusual way of addressing Defendant's purported safety concerns. As the Wisconsin Supreme Court's *Grand Bazaar Liquors* decision shows, the existence of direct paths for advancing legitimate interests can undercut the government's argument that a circuitous path is rational.

As discussed *supra*, *Grand Bazaar Liquors* involved a circuitous path to pretextual ends. There, Milwaukee claimed it just wanted licensees to obey liquor laws, but its method for ensuring that was to limit licenses to retailers that made half or more of their profits from liquor. 105 Wis. 2d at 204. But, as the Court recognized, the government had a much simpler, direct means of ensuring compliance with liquor laws: "simply not renew[ing the] license" of a bad

---

ordinance arbitrarily applied to some outdoor sales from wheeled devices, but not others. According to Defendant, the ordinance was inapplicable to a restaurant that wheeled carts of food outside and billed diners using a single check at the end of their meal. *Id.* ¶ 104. However, Defendant states that the ordinance would have prohibited restaurants from using these same outdoor carts to sell food on a per-item basis. *Id.* If outdoor carts actually posed a threat to public safety, that threat would be the same regardless of whether customers paid those carts on a per-item basis or not. Defendant's arbitrary distinction between prohibited sales and legal sales exposes the 2018 Ordinance's irrationality.

actor. *Id*. at 213. Given this direct tool, the Court held that Milwaukee's circuitous and tortured approach was "not rationally related to the objective of encouraging adherence to the liquor laws." *Id*. at 214; *see also Craigmiles*, 312 F.3d at 227 (recognizing that "[t]he Supreme Court, employing rational basis review, has been suspicious of a legislature's circuitous path of legitimate ends when a direct path is available").

Here too, the Town of Gibraltar has ample direct means at its disposal to safeguard public safety. As Defendant has testified, it has speed limits, as well as parking restrictions on oversized vehicles. SOF ¶ 247. It admitted that, if someone was blocking the sidewalk or stopping traffic, the Town has tools at its disposal to address "th[at] impediment." *Id*. ¶ 248. There is, for example, Defendant's traffic ordinance, which prohibits "park[ing] a vehicle on or upon, or so as to cross or obstruct or in any manner intrude upon, or over any part of any public sidewalk, public walkway, public median area, or public park area." *Id*. ¶ 249. In addition, Defendant has a nuisance ordinance, through which it may abate a "public nuisance," which includes "a thing, act, occupation, condition or use" that "obstruct[s] or tend[s] to obstruct or render dangerous any street, alley, highway . . . or other public way." *Id*. ¶ 250.

Given that Defendant could rely on these direct tools to deal with any mobile vendor that posed an actual safety concern, *even on public property*, Defendant's circuitous restrictions on *private property vending* are irrational. Indeed, considering Defendant's direct tools, Defendant's Vending Ordinances have nothing to do with public safety, and everything to do with protectionism.

c. The Vending Ordinances' application to private property is not rationally related to Defendant's professed interest in protecting its property-tax base.

Just as "character" and "public safety" are unavailing pretexts for applying the Vending Ordinances to private property, so is Defendant's interest in protecting its property-tax base.

Whereas Defendant invoked only the first two pretexts in response to an interrogatory asking what its asserted interests were, Defendant raised property taxes in deposition testimony. SOF ¶¶ 182, 196. According to Defendant, because Gibraltar has "restaurants that pay high property tax," it is concerned about "food truck[s] that can come in and the[n] pay no property tax." *Id.* ¶ 255.

Whatever the merits of this argument as applied to public property, it would be still be an unavailing basis for applying the Vending Ordinances to private property. Defendant itself admits that "a food truck operating on private property is" not "somehow a threat to [its] property tax[es]." *Id.* ¶ 256. As Defendant put it, "[i]f they were paying property tax," there is "not going to be a problem." *Id.* And Plaintiffs—and other property owners in Gibraltar—do pay property tax. *Id.* ¶¶ 11–12. Accordingly, the Vending Ordinances' application to their property is not rationally related to Defendant's interest in collecting property taxes.

In fact, Defendant's property-tax argument is just protectionism in another guise. Defendant is essentially arguing that brick-and-mortar restaurants should—thanks to their (allegedly) higher property-tax contributions—be preferred to mobile restaurants, entitling the former to protection from the latter. But, as discussed at length in Section I(A), this protectionism is not a "legitimate exercise of police power" in Wisconsin. *Wis. State Bd. of Exam'rs,* 252 Wis. at 36.

***

As Plaintiffs demonstrated above, Defendant's asserted interests are not rationally related to the Vending Ordinances' application to private property. This is not surprising, since evidence shows that Defendant's actual interest in banning vendors was to financially benefit Gibraltar's brick-and-mortar restaurants. The Vending Ordinances thus violate substantive due

process as applied to private property.

C. The Vending Ordinances Also Violate Equal Protection.

The Vending Ordinances are also unconstitutional in another respect. Just as Article I, Section 1 of the Wisconsin Constitution protects substantive due process, it also guarantees equal protection.

As discussed in Section I(A), Defendant enacted the Vending Ordinances for brick-and-mortar restaurants' benefit. Even if one trusts that Defendant's asserted interests are sincere, though, the Vending Ordinances still violate equal protection as applied to those vendors who, like Plaintiffs, wish to operate solely on private property.

In equal-protection challenges, Wisconsin courts will find a law unconstitutional if it treats similarly situated people differently without a rational reason. This analysis breaks down into three steps, asking: (1) whether the law creates a "distinct class[]," (2) whether the law treats that class and others similarly situated "significantly differently," and (3) whether that disparate treatment has a rational basis. *Metro Assocs. v. City of Milwaukee*, 332 Wis. 2d 85, ¶ 23, 796 N.W.2d 717 (2011).

With respect to mobile restaurants on private property, the Vending Ordinances fail this three-part test. *First*, the ordinances each created a distinct class. The 2018 Ordinance prohibited the sale of goods "from a vehicle, truck, trailer, cart, pushcart or handcart," but not from brick-and-mortar counterparts. 2018 Ordinance § 1. Likewise, the 2019 Ordinance only applies to "mobile food establishments" (*e.g.*, "mobile restaurants") but not to brick-and-mortar restaurants. *Id*. §§ 3(a), 8. Given the ordinances' application to mobile vendors—but not others—they created distinct classes.

Second, the Vending Ordinances treat mobile restaurants and similarly situated brick-and-mortar restaurants "significantly differently." Mobile restaurants share several key traits

with brick-and-mortar restaurants. For example, they are often selling the same goods. *See Grand Bazaar Liquors*, 105 Wis. 2d at 212 (finding law violates equal protection where it discriminated between different classes of liquor retailers). After all, Plaintiffs' mobile restaurant sold sandwiches and burgers, as do Skare's and Hackbarth's brick-and-mortar restaurants—"The Cookery" and "Wild Tomato." SOF ¶¶ 31, 43–45, 50–52. Gibraltar's mobile restaurants and brick-and-mortar restaurants are also similar in that both are subject to the same state regulatory requirements. Both types of restaurants must be licensed and inspected by the DATCP for compliance with state restaurant regulations, including the Wisconsin Food Code. *See* Wis. Stat. §§ 97.30(2)(a), 97.30(2)(c); Wis. Admin. Code §§ ATCP 75.05, 75.102. Also, they must both employ a "certified food manager" to supervise food safety. Wis. Stat. § 97.33(1r). And seven chapters of the Wisconsin Food Code—including provisions regulating employees, food safety, sanitation, waste management, physical facilities, and public health—apply to both. *See* Wis. Admin. Code § ATCP 75.102; *id*. § ATCP 75 App. 9-101.10. As these requirements show, "mobile restaurants" must be a lot like brick-and-mortar restaurants to comply with Wisconsin law, rendering the two classes especially similar.

But the Vending Ordinances treat these similarly situated groups "significantly differently." The 2018 Ordinance prohibited mobile restaurants entirely, while Defendant allows brick-and-mortar restaurants to operate without limit. SOF ¶¶ 100–102, 146. Similarly, the 2019 Ordinance imposes numerous burdens on mobile restaurants that do not apply to brick-and-mortar restaurants. For example:

- mobile restaurants are categorically prohibited from certain zones—comprising most of Gibraltar's commercially zoned area—even though 88.9% of the town's brick-and-mortar restaurants operate in these zones;
- unlike brick-and-mortar restaurants, mobile restaurants must be licensed by Defendant to operate;

- unlike brick-and-mortar restaurants, mobile restaurants cannot operate for more than 8 hours per day at a stationary location;
- unlike brick-and-mortar restaurants, mobile restaurants cannot operate before 8:00 a.m. or after 8:00 p.m.;
- unlike brick-and-mortar restaurants, mobile restaurants cannot have outdoor seating;
- unlike brick-and-mortar restaurants, mobile restaurants cannot have music.

2019 Ordinance §§ 3, 4, 5, 7(e)(5), 8(a)(1), 8(a)(5), 8(a)(6), 8(a)(11), 8(b)(2), 8(c)(4) & 8(c)(5); SOF ¶¶ 125–40, 147–58.

Third—as demonstrated in Plaintiffs' due process discussion—there is no rational basis for the Vending Ordinances' discrimination. For disparate treatment to be rational, it must survive each part of a five-prong inquiry. *See, e.g.*, *Metro Assocs.*, 332 Wis. 2d 85, ¶ 64. Relevant to this case are prongs 1, 2, and 5, which require that:

> (1) "All classifications must be based upon substantial distinctions which make one class really different from another";
>
> (2) "The classification adopted must be germane to the purpose of the law";
>
> (5) "The characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation."

Id.[12] If a law fails any one of these factors, it is unconstitutional.

As applied to mobile restaurants operating on private property, the Vending Ordinances can satisfy neither prongs 1, 2, nor 5. They fail the first prong because no real difference exists between brick-and-mortar restaurants and mobile restaurants that are operating on private property. For a distinction between two classes to be "substantial" enough to make them "really different," one class must pose unique problems. *See, e.g.*, *Nankin v. Vill. of Shorewood*, 245

[12] The third prong of this inquiry requires that "classification[s] . . . not be based upon existing circumstances only" and the fourth prong requires that a law "apply equally to each member" of "whatever class" it applies to. *Metro Assocs.*, 332 Wis. 2d 85, ¶ 64.

Wis. 2d 86, ¶ 41, 630 N.W.2d 141 (2001) (holding that difference between counties' population size was insubstantial since "populous counties d[id] not present any special problems or concerns," and that disparate treatment of the counties was consequently irrational). As discussed above, there is no "special" problem that mobile restaurants pose when operating on private property. For example, by Defendant's own admission, replacing Taco Cerveza's brick-and-mortar restaurant with a mobile restaurant would not impact public safety. SOF ¶ 235. Indeed, the only difference between the former and the latter is that one has wheels, rendering them not "meaningfully different" at all.

As to vendors operating on private property, Defendant's discrimination also fails the second prong. Under this prong, a classification is not "germane" to any legitimate purpose where the classification "is not rationally related" to the government's "articulated purposes." *See, e.g.*, *Grand Bazaar Liquors*. 105 Wis. 2d at 216. As Plaintiffs demonstrated in discussing substantive due process, the Vending Ordinances do not further any of Defendant's articulated purposes of character, safety, or property-tax collection on private property. Rather, this application is "germane" to just one (illegitimate) purpose—economic protectionism. *Supra* 13–16.

Finally, the Vending Ordinances' application to private property fails the fifth prong. Similar to the first prong, the fifth prong requires that two classes have material differences that "suggest at least the propriety, having regard to the public good, of substantially different legislation." *Nankin*, 245 Wis. 2d 86, ¶ 39. Given that there is no material difference between brick-and-mortar restaurants and mobile restaurants that are operating on private property, *supra* 23–24, the "regard to the public good" does not "suggest . . . the propriety" of "substantially different legislation" for the two groups. Indeed, the Vending Ordinances have nothing to do

with helping the public good at all; but they have everything to do with protecting private parties like incumbent restaurants from competition.

***

As Plaintiffs showed in Section I(A), the Vending Ordinances are protectionist measures. And, even if they were not, the record evidence demonstrates that the ordinances nonetheless violate both substantive due process and equal protection as applied to private property, like Plaintiffs' location and other private lots where they are invited.

II. STATE LAW PREEMPTS THE 2018 ORDINANCE AND THE 2019 ORDINANCE'S LICENSING REQUIREMENTS.

Just as the Wisconsin Constitution limits Defendant's authority, so does state law. Wisconsin has a comprehensive and uniform scheme for regulating, inspecting, and licensing mobile restaurants. Under controlling precedent, municipalities like Defendant cannot ban what the state has expressly licensed under such schemes, even through modest burdens like registration requirements. Accordingly, state law preempts the 2018 Ordinance—which is an explicit vending ban—as well as the 2019 Ordinance's licensing requirements, which amount to a *de facto* vending ban.

A. Under Controlling Precedent, a Municipality Cannot Ban What Wisconsin Has Comprehensively Licensed.

Wisconsin municipalities' authority is strictly limited by state law. Under the Wisconsin Constitution, municipalities "may determine their local affairs and government," but this authority is "subject" to the Constitution and "to such enactments of the legislature of statewide concern as with uniformity shall affect every [municipality]." Wis. Const. art. XI, § 3(1). Municipal ordinances that are "in the same field and on the same subject covered by state legislation" must "not conflict with, but rather complement, the state legislation." *DeRosso*

Landfill Co. v. City of Oak Creek, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996) (quoting *Fox v. Racine*, 225 Wis. 542, 546, 275 N.W. 513 (1937)).

The Wisconsin Supreme Court uses a four-part test in determining whether there is a conflict with state legislation that "invalidates a local ordinance." *Id*. A municipal ordinance is preempted if: (1) the state legislature has expressly withdrawn the power of municipalities to act; (2) it logically conflicts with state legislation; (3) it defeats the purpose of state legislation; or (4) it violates the spirit of state legislation. *Id*. at 651–52 (citing *Anchor Sav. & Loan Ass'n v. Equal Opportunity Comm'n*, 120 Wis. 2d 391, 397, 355 N.W.2d 234, 238 (1984)).

Under this test, a "municipality cannot lawfully forbid what the legislature has expressly licensed." *E.g.*, *DeRosso*, 200 Wis. 2d at 651 (quoting *Fox*, 225 Wis. at 545). The Court of Appeals' decision in *Volunteers of America Care Facilities v. Village of Brown Deer* is illustrative. 97 Wis. 2d 619, 294 N.W.2d 44 (Wis. Ct. App. 1980). There, a nursing home challenged a village's registration and food-handling-license requirements for nursing homes as preempted. *Id.* at 623. Although these were modest additional requirements, state law gave the Wisconsin Department of Health and Social Services "comprehensive regulatory authority . . . to provide uniform statewide licensing, inspection and regulation" of nursing homes. *Id*. at 625. Because the village's registration and food-handling-license requirements enabled it to shutter state-licensed nursing homes, the requirements were "in direct conflict" with state law and infringed on the law's "spirit." *Id*. Accordingly, these requirements were preempted by state law. *Id*.

Similarly, in *Lake Beulah Management District v. Village of East Troy*, the Wisconsin Supreme Court held that state law preempted a lake-protection district's requirement that water wells authorized by the Wisconsin Department of Natural Resources ("DNR") obtain an

additional permit. 335 Wis. 2d 92, 99–103, 799 N.W.2d 787 (2011). Since that permit requirement could potentially prohibit a well authorized by the DNR from operating, it impermissibly conflicted with state law. *Id*. at 101–02.

As this precedent shows, where the state of Wisconsin has expressly licensed people to do an activity, municipalities cannot erect even minor barriers if they could potentially stop licensees from doing what the state has authorized. *See also Wis. Carry, Inc. v. City of Madison*, 373 Wis. 2d 543, 588, 892 N.W.2d 233 (2017) (holding that state's concealed-carry statute preempted city's ban on carrying guns onto buses).

B. Wisconsin Law Preempted the 2018 Ordinance.

Just as the relevant state regulatory schemes preempted municipal restrictions in the precedents above, Wisconsin's mobile-restaurant regulations preempted the 2018 Ordinance. *Village of Brown Deer* is instructive. There, the Court of Appeals found it critical that the state's regulation of nursing homes was comprehensive and uniform. 97 Wis. 2d at 625. The state's regulation of mobile restaurants is similar.

First, Wisconsin's regulation of mobile restaurants is just as comprehensive as the state regulatory scheme in *Village of Brown Deer*. The State of Wisconsin licenses, inspects, and regulates mobile restaurants, just as it licenses, inspects, and regulates nursing homes. *Supra* 30.

Also, Wisconsin's laws and regulations for mobile restaurants are uniform statewide, like the nursing-home statute in *Village of Brown Deer*. The only entities authorized to license mobile restaurants are the DATCP itself or "agent" cities and counties that enter written agreements with the DATCP. Wis. Stat. §§ 97.30(1)(a), 97.30(2)(a), 97.41(1m). "[T]o ensure *uniformity* in the enforcement" of Wisconsin's laws and regulations, the DATCP "provide[s] education and training to agents designated [by the DATCP]." *Id*. § 97.41(3) (emphasis added).

Likewise, local health departments granted agent status by the DATCP must act consistently with DATCP regulation. *Id*. § 97.41(2).

Defendant is not one of these agents, but its 2018 Ordinance nonetheless prohibited mobile restaurants licensed under this scheme and, thus, impermissibly conflicted with state law. SOF ¶ 261. And even if it were a DATCP agent, its regulations would have to be consistent with the state's licensing authority.

Defendant's 2018 Ordinance was inconsistent with this authority. After all, the registration requirements in *Village of Brown Deer*, the permit requirement in *Lake Beulah*, and the narrow ban on carrying guns onto buses in *Wisconsin Carry* were all preempted even though they conflicted far less with state law than a total ban does. In completely banning what the state expressly licensed, the 2018 Ordinance's total ban on mobile restaurants was also preempted.

C. Wisconsin Law Preempts the 2019 Ordinance's Licensing Requirements.

Just as state law preempted the 2018 Ordinance *de jure* vending ban, it also preempts the 2019 Ordinance's *de facto* vending ban. Under the new ordinance's licensing conditions, mobile restaurants are explicitly banned on 88.7% of Gibraltar's commercially zoned parcels. This leaves the vast majority of the town's commercially zoned property off-limits to mobile restaurants. And, in the small pockets remaining, mobile restaurants are subject to a host of restrictions that their brick-and-mortar competitors need not bear. Unsurprisingly, these restrictions have left Gibraltar with zero mobile restaurants, just like when the 2018 Ordinance forced Plaintiffs to close operations. Given this effect, the 2019 Ordinance's licensing conditions amount to a *de facto* ban, which is preempted for the same reasons that Defendant's *de jure* 2018 ban was.

Even if the 2019 Ordinance's licensing requirements were not a *de facto* ban, however, they would still be preempted by state law. As *Village of Brown Deer* and *Lake Beulah* show, municipalities cannot impose additional licensing requirements on businesses that have already passed through a comprehensive statewide licensing scheme. That is because, otherwise, municipalities would be able to forbid state-licensed operations through local requirements. *See Vill. of Brown Deer*, 97 Wis. 2d at 625 (ruling that village licensing and registration requirements on state-licensing nursing home were preempted because they "could effectively close down a nursing home facility by the village without reference to [the state's] authority"); *Lake Beulah*, 335 Wis. 2d at 101–02 (holding that a lake-protection district's permit requirement was preempted where it "may prohibit the operation of a high capacity well that is authorized by the [state]").

Like the preempted licensing requirements in *Village of Brown Deer* and *Lake Beulah*, the 2019 Ordinance's licensing requirements impermissibly conflict with state law. State-licensed mobile restaurants are prohibited in Gibraltar if Defendant has not separately licensed them. In fact, Defendant requires these state licensees "to leave" even "private property" *whenever* asked to do so by a "Town official." 2019 Ordinance § 8(c)(4). These requirements give Defendant the power to "effectively close down" mobile restaurants "without reference" to the DATCP's authority. Accordingly, the 2019 Ordinance's licensing requirements are preempted by state law.

CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court rule that: (1) the Vending Ordinances are unconstitutional, under both substantive due process and equal protection; and (2) state law preempts the 2018 Ordinance and Sections 3, 4, and 5 of the 2019 Ordinance.

Dated this 18th day of March, 2020.

Respectfully submitted,

Electronically Signed by Milad Emam
Milad Emam (Va. Bar No. 83861)*
Robert P. Frommer (Va. Bar No. 70086)*
Institute for Justice
901 N. Glebe Road, Suite 900
Arlington, VA 22203
Phone: (703) 682-9320
Fax: (703) 682-9321
Email: memam@ij.org; rfrommer@ij.org

**Lead Counsel for Plaintiffs; admitted pro hac vice*

Randall J. Nesbitt (Wis. Bar No. 1000013)
Door Kewaunee Municipal Law s.c.
6528 Barrick Rd.
Sturgeon Bay, WI 54235
Tel: (920) 493-0783
Email: Randy@dkmuni.com

Local Counsel for Plaintiffs