No. 123123

IN THE
SUPREME COURT OF ILLINOIS

LMP SERVICES, INC.,

Plaintiff-Appellant,

v.

CITY OF CHICAGO,

Defendant-Appellee.

On Appeal From The Appellate Court of Illinois, First District,
No. 1-16-3390,
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division
No. 12 CH 41235
The Honorable Anna H. Demacopoulos, Judge Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLEE

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago
30 N. LaSalle St., Suite 800
Chicago, Illinois 60602
(312) 744-8519
suzanne.loose@cityofchicago.org
appeals@cityofchicago.org

BENNA RUTH SOLOMON
Deputy Corporation Counsel
MYRIAM ZRECZNY KASPER
Chief Assistant Corporation Counsel
SUZANNE M. LOOSE
Senior Counsel
Of Counsel

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Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

NATURE OF THE CASE

LMP Services, Inc., challenges two Chicago regulations pertaining to food trucks. Under the first, food trucks may not, in general, operate within 200 feet of the principal customer entrance of a restaurant located at street level. Municipal Code of Chicago, Ill. § 7-38-115(f); A1. LMP challenged this provision under the Due Process and Equal Protection Clauses of the Illinois Constitution. Under the second, food trucks must be equipped with a Global Positioning System ("GPS") device that sends real-time data to a service that has a publicly-accessible application programming interface ("API"). Id. § 7-38-115(l); A2. LMP challenged this provision as a violation of the right under the Illinois Constitution to be free from unreasonable searches.

The City moved to dismiss the complaint, and the circuit court dismissed LMP's equal protection claim, but not its other claims. The circuit court later granted the City summary judgment. The appellate court affirmed.

LMP appeals. No questions are raised on the pleadings.

ISSUES PRESENTED

1. Whether the requirement that food trucks operate at least 200 feet from the main entrance of a street-level restaurant is rationally related to the legitimate governmental interests of ensuring that both restaurants and food trucks thrive in Chicago; controlling sidewalk congestion; and encouraging food trucks to serve areas underserved by retail food

establishments.

2. Whether the requirement that food trucks be equipped with a GPS device amounts to an unreasonable search when it requires only that licensees maintain GPS records of location; the City has not accessed those records; food truck locations are not private; and the requirement is necessary to, and limited to the scope necessary for, proper enforcement of health and safety regulations.

JURISDICTION

On December 18, 2017, the appellate court issued an opinion affirming judgment for the City. LMP App. A451. This court extended the time for LMP to petition for leave to appeal to February 19, 2018, and LMP filed a petition on that date. The petition was granted on May 30, 2018. This court has jurisdiction under Ill. Sup. Ct. R. 315.

ORDINANCE AND REGULATION INVOLVED

Relevant portions of the Chicago Municipal Code and Chicago Board of Health Rules & Regulations for Mobile Food Vehicles are included in the appendix to this brief.

STATEMENT OF FACTS

Food Truck Ordinance and Regulations

On July 25, 2012, the Chicago City Council passed an ordinance to expand food truck operations in Chicago. Chicago City Council, Journal of

Proceedings, July 25, 2012, at 31326. The ordinance allows food preparation on food trucks and establishes regulations governing location, operation, and inspection of food trucks. C1523. The ordinance authorizes the Commissioner of Transportation to establish fixed stands where parking space for food trucks is reserved. Municipal Code of Chicago, Ill. § 7-38-117(c). The ordinance requires a "minimum of 5 such stands" in each community area with "300 or more retail food establishments." Id. Those community areas are the Loop, Near West, Near North, Lincoln Park, Lakeview, and West Town. C1671.

Food trucks may park in legal parking spots on the street for up to two hours. Municipal Code of Chicago, Ill. § 7-38-115(b). Food trucks may not park within 20 feet of a crosswalk, 30 feet of a stop light or stop sign, or adjacent to a bike lane. Id. § 7-38-115(e). In addition:

> No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m.

Id. § 7-38-115(f). "Restaurant" is defined as:

> [A]ny public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops.

Id.

Food trucks are also subject to regulations designed to ensure safe and

sanitary operations, including requirements for food preparation; storage; plumbing; cleaning; and temperature control. Municipal Code of Chicago, Ill. §§ 7-38-132 & 7-38-134. Each food truck must be linked to a commissary for daily supplies, cleaning, and servicing. Id. § 7-38-138. The Chicago Board of Health is authorized to enact rules and regulations to implement those requirements, id. § 7-38-128, and the Department of Public Health ("DPH") conducts inspections, id. § 7-38-126. The ordinance also requires:

> Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device.

Municipal Code of Chicago, Ill. § 7-38-115(l).

The Board promulgated Rules and Regulations for Mobile Food Vehicles. A5. Rule 8 provides that the GPS device be an "active," not "passive," permanently installed device that sends real-time location data to a GPS service provider, and accurate no less than 95% of the time. A6. The device must function during business operations and while at a commissary, and transmit GPS coordinates at least once every five minutes. A6. The City will request GPS information if it has the licensee's consent, a warrant, or court authorization; for the purpose of investigating a complaint of unsanitary or unsafe conditions, a "food-related threat to public health," or compliance with food truck regulations; or for "emergency preparation or

response." A6-A7. Rule 8(C) clarifies that, while GPS providers must "be able to provide" an API "that is available to the general public," licensees need not "provide the appropriate access information to the API" unless the City establishes a website to display food truck locations and the licensee chooses to participate. A7. The licensee "is not required to provide such information or otherwise allow the City to display the vehicle's location." A8.

LMP's Lawsuit

LMP filed this lawsuit challenging the 200-foot rule and GPS requirement. C3, 195. The parties adduced the following evidence at summary judgment.

LMP is licensed to do business only in Chicago, C3024, where it has "been making good sales," C3030, at ten locations in the Chicago Loop that LMP's president, Laura Pekarik, regularly schedules in advance, C3028-29.[1] LMP also sells in Hyde Park, West Loop, near the University of Illinois at Chicago campus, River North, and Streeterville. C3030. Pekarik's business has been "pretty successful"; within three years, she was able to open a brick-and-mortar bakery and another food truck. C3025.

Balancing the Interests of Food Trucks and Restaurants. The 200-foot rule is designed to "foster this growing [food truck] industry," while also "protect[ing] traditional restaurants." C1521. The food and beverage industry is significant in Chicago, which has more than 7,300 restaurants.

[1] The "Loop" is the area bounded by Lake Michigan on the east, Chicago River on the north and west, and Congress Avenue on the south. C3027.

See https://www.cityofchicago.org/city/en/about/facts.html (last visited Nov. 13, 2018). Those restaurants provide strong support to Chicago's economy. In 2011, visitors spent roughly $3 billion on food and beverage in Chicago, accounting for 25% of all visitor spending. C2697. In a 2013 study, Chicago ranked as the fourth most popular American city for culinary travelers. C2769.

Aarti Kotak, the Managing Deputy Commissioner for the City's Bureau of Economic Development, explained that brick-and-mortar restaurants are "critical parts of the commercial corridor" in neighborhoods, attracting tourism, generating tax dollars, and adding jobs to the community. C2103. In the United States between February 2010 and May 2014, food services and drinking places "added 1.3 million jobs, accounting for 80 percent of leisure and hospitality jobs added over this time." C2649. These job gains occurred almost entirely "in restaurants and other eating places." C2649. In addition, restaurants can "increase the stability of neighborhoods" and give them a "community feel." C2086.

LMP's expert, Renia Ehrenfeucht, co-authored a publication that explained how the owners of property abutting a sidewalk make up a "special category of sidewalk users" who tend to be concerned about "negative impacts – noise, litter, congestion, or violence" – on those sidewalks. C2884. These business owners sometimes participate in "initiatives with wider benefits," like neighborhood watch programs, or private security, and tree planting. C2886-88. They invest in the upkeep and maintenance of sidewalks, such as

clearing snow or making repairs, C2885, and are concerned about maintaining curb appeal, including an entrance free of waste or litter, C2100; see also C3043 (Pekarik) ("The appearance of my storefront is always a concern."); C3093 (Herrera) ("[I]f you see a trashy area, you're not going to want to hang out in that area, let alone order food."). They are also concerned about "unfair competition" that arises when a mobile vendor without the same overhead costs opens up and sells the same items for less in the public space just outside its business. C2932; see also 2972 (Institute for Justice publication comparing cost of brick-and-mortar sandwich shop ($750,000) to comparable food truck ($50,000)).

Sidewalk Congestion. Another purpose of the 200-foot rule is to "safeguar[d] communities from congestion." C1524. Chicago's streets and sidewalks are designed with a "pedestrian-first" policy, under which "[t]he walking public will be given primacy in the design and operation of all Chicago Department of Transportation projects and programs." C3367. CDOT's guidelines state: "Downtowns, commercial districts, and entertainment areas attract high volumes of pedestrian activity and demand a high quality walking environment." C3433.

Luann Hamilton, Deputy Commissioner of CDOT's Division of Project Management, testified that food trucks present a pedestrian congestion concern because the "phenomenon is . . . based on letting people know that your truck draws crowds of people and that's why others should want to go there." C3189. Food trucks frequently post photographs of long lines at their

trucks. C3192-95. The City's concerns include safe passage, pedestrian comfort, traffic, and potential conflicts. C3170-71. Hamilton testified that "localized congestion," which is sidewalk congestion that arises at a particular address, C3174; 3181, can affect the whole length of the sidewalk along a block and even around a corner or across an intersection, C3178-79. Food trucks can cause sidewalk congestion even when they operate on private property, since "the truck would try and get as close to the public way as possible because it would be more visible there." C1668.

Other factors can affect congestion outside restaurants, such as sidewalk cafes that take up sidewalk space, C3173, 3346, or "long lines extending out onto the public way," C3076. Peter Lemmon, a traffic engineer, explained that pedestrians heading to restaurants often walk in clusters, C3346; see also C3349 (observing "[m]any lunchers come to Pret in groups"), which are "more significantly impacted by obstructions in the sidewalk, such as food truck lines, versus individuals or randomly distributed pedestrian flows," C3346.

Pekarik testified she wants to park within 200 feet of a restaurant because that is where "the action is" and "people congregate." C3034. Pekarik "feel[s] that there is a higher foot traffic in areas that are within two [hundred] feet of a restaurant." C3041.

Ehrenfeucht, an academic whose research focuses on use of public space, was retained by LMP to study the impact of food trucks on sidewalk congestion and litter in Chicago. C2582-83. Her study was based on

observations of seven food-truck sites in the Loop and Near North, during thirty-seven observation periods, C2583, usually from 11 a.m. to 1:30 p.m., C2584. Observers noted numerous instance of congestion. For example, at one food stand located within 200 feet of a restaurant, C2584, one observer noted that "[t]he sidewalk was disrupted by the line extending into the street multiple times," forcing pedestrians to "go around" or "wal[k] through the middle of the line," C4406. Other lines "slowed down and blocked the flow," C4406, or formed a group "so big that they blocked the entire sidewalk, forcing pedestrians to slowly navigate between customers or pass behind the line between the adjacent building and its pillars," C4398. Other observations included: "a long line," on average "15 feet long," that "interrupted the traffic of [passersby] on the sidewalk," C4410; lines "spill[ing] out" and "blocking 90% of the sidewalk," C4415; a line "jutt[ing] perpendicular to the side of the truck and completely block[ing] the entire sidewalk," which "continued to get worse," C4417; a line blocking "most of the street," and causing "groups of more than one (also strollers for instance) to stop and wait for the line to open or veer to the awning," C4421.

At the intersection of Clark and Washington, C2584, food trucks were sometimes within 200 feet of a restaurant, C2588. Observers noted: "a bottleneck effect," C4569; a line "obstructing the sidewalk," C4576; and a "long line of nine" that "took up nearly the entire sidewalk," C4578. Observers at other locations made similar observations. E.g., C4612 (line "began to create issues for pedestrians passing through"; "pedestrians would

frequently have to stop, slow down, or sharply change course"); C4498 (line formed "entirely across the sidewalk" and "stayed this way" for an hour); C4510 (lines "blocked the entire sidewalk" while people waiting for food were "also disrupting the pedestrian flow"); C4508 ("disruptions to pedestrian flow by food truck customers" was "constant").

Ehrenfeucht concluded there were, on average, 1.6 "incidences of pedestrian crowding" per observation period. C2004. She found no differences in pedestrian crowding based on whether a food truck was within 200 feet of a restaurant. C2588. "Pedestrian crowding," as she defined it, occurred simply when a food truck line extended into the sidewalk area. She did not measure "the number of pedestrians who were exposed to the disruption incidences," C2009, or even "whether actual pedestrians were disrupted" at all, C2004. Nor did she measure the impact of food trucks parked within 200 feet of a restaurant with a sidewalk café. C2023. While observers sometimes reported a significant number of disruptions, and for long durations, Ehrenfeucht's report did not reflect those. C3343 (20 reported "disruptions" not included, and 1½ hours of line-blocking recorded as three five-minute crowding incidents).[2] Although Ehrenfeucht's observers

[2] Lemmon noted other flaws. Ehrenfeucht did not measure pedestrian volume or sidewalk widths, or consider physical conditions; provided subjective and inconsistent criteria; used overly-long observation periods; did not conduct the study during warmer months with higher pedestrian volume; and confined observations to locations with wider sidewalks. C3339-47. Dr. Krock added that the study was not based on statistical sampling; was too small; was not geographically representative; did not produce reliable or testable results; involved ad hoc adjustments; and lacked quality control.

reported no instances of litter on the public way, C2587, the City has received at least one complaint of food truck litter, C3994.

Incentive to Spread Retail Food Options. Kotak also testified about neighborhoods underserved by retail food options. A neighborhood is underserved if it lacks enough retail food businesses within geographical proximity to the neighborhood's population, or if there is limited diversity in the businesses. C2089. A Citywide Retail Market Analysis used to help identify underserved areas divides the City into 16 submarkets. C2090, 2147, 2167-83, 2189. In the category of "food services and drinking places," the study reports that demand exceeds supply in the following submarkets: Bronzeville/South Lakefront, Stony Island, Calumet, Far Southwest Side, South Side, and West Side, C2169-73, 2178, including the Beverly, Morgan Park, South Shore, Englewood, Auburn Gresham, and West Humboldt neighborhoods, C2088.

Dr. Joseph Krock, an economist and expert for the City, explained why "it may be socially desirable to encourage low-cost food trucks to locate outside of congested, well-served areas to less congested, underserved areas." C3950. The relevant area may be as small as a city block or as large as the areas defined in the Retail Market Analysis. C3942. As one Institute for Justice publication states, food trucks can "offer convenience and variety to customers" with "limited time for lunch and only a few nearby dining

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C3959-62.

options." C3162. Another Institute for Justice publication observes that "street vendors can help to increase a community's quality of life by improving access to food" in "food deserts." C2974.

Dr. Krock explained that having too many competitors at the same location is "socially sub-optimal, because costs to consumers are highest at this equilibrium," C3948, and "[l]ower cost entrants can drive incumbent firms out of business," C3950. The 200-foot rule helps by creating "incentives for food trucks to move away from congested brick-and-mortar retail food markets to areas with fewer brick-and-mortar options by decreasing the search costs for finding appropriate parking." C3953.

LMP offered the opinion of Dr. Henry Butler, an economist and lawyer, who opined that economic theory "predicts that the 200-foot rule cannot and will not achieve the City's stated goal of encouraging food trucks to operate in community areas lacking sufficient retail food options." C2517. He also conducted a factual inquiry into whether mobile food vehicles have actually operated in underserved areas, by tallying food truck locations posted on Twitter between November 2013 and November 2014. C2524. He counted 3,364 stops in the Loop, and 327 stops in Hyde Park; in underserved communities, he counted at least four in Auburn Gresham, three in Beverly, four in Englewood, three in Humboldt Park, five in Morgan Park, and eight in South Shore. C2527-35.[3] Dr. Butler acknowledged that "the 200-foot rule

[3] Dr. Krock noted errors in Dr. Butler's analysis, including the lack of a random sample, errors in selecting tweets to count, and failure to capture the

can be characterized as a cost" that "food trucks would take into account." C4081; see also C4077. He also acknowledged that his analysis "does not prove that food trucks do not go to underserved areas," C4098, and his count of Twitter posts shows they sometimes do, C4099. He could not tell whether the underserved-area stops were due to reasons other than the 200-foot rule. C4098. And even though the Loop, Near North, and Near West neighborhoods are not generally underserved, the 200-foot rule would have "the effect of bringing a retail food option to a spot in that area that did not previously have a retail food option." C4083.

GPS Requirement

The City requires GPS data because "mobile food vehicle location via GPS logs" may be necessary to conduct an administrative investigation. C3639. In addition, a truck's GPS data "may be useful in a trace back" when the City is investigating a foodborne illness. C2289. DPH inspects all food establishments to prevent the spread of foodborne illnesses, such as E. coli, salmonella, Norwalk, hepatitis A, and staph. C2268-69. DPH investigators check more than fifty aspects of food truck operations, ranging from food storage to sanitation. C2273. Inspections involving the "operational process" should occur at the vending location. C3639.

The City has used methods other than GPS to find food trucks, but

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entire population of food trucks. C3954-57. Also, he did not account for the cost of finding parking in congested areas, C3112, or vast cost differentials that would enable food trucks to operate profitably in locations where restaurants could not, C3107-08.

"[t]hey have proven not to be very effective." C2283. See also C2285 (investigator tried to call and went to two Twitter locations and food truck was not there). Food trucks can be "difficult to find," C2350, because they "don't stay stationary for very long times," C2438, and "don't always have time to tweet about where they are," C2438-39. In addition, "people don't always tweet accurately"; commissary logs have been indiscernible; and food trucks "don't always answer" the phone or provide accurate numbers. C2283; see also C3089.

Food truck owners do not regard the location of their operations to be private. C2290, 3204. They use social media to publicize the location of their trucks. C3200-01, 2271. LMP is no exception. C3019. Pekarik wants her customers "to know where" her truck is. C3039. LMP has posted over 10,000 messages on Twitter and amassed more than 4,000 followers on Twitter and Facebook. C3038. Pekarik regularly posts schedules of stops on her website, emails schedules to customers, and gives out truck location by phone. C3027-28, 3037. LMP uses a GPS device supplied by TruckSpotting, which can display locations on a map on the TruckSpotting website and telephone application. C2331, 2362, 3905. While TruckSpotting could keep a truck's location off the map, no one, including LMP, has asked for that. C2393. No City employee has ever requested or ordered TruckSpotting to provide a food truck's GPS data, outside of the subpoena in this lawsuit. C2467.

The "publicly-accessible" API required by ordinance refers to a technology that enables third parties to potentially gain internet access to a

GPS provider's computer server and obtain data on that server. C1567, 2366. The City does not require food trucks or the GPS service provider to allow public access to the API; both may deny third-party access. C1567. Instead, Rule 8(C) requires that the GPS service provider "be able" to provide an API available to the public. C2622; A7. Under Rule 8(D), if the City were to create a website displaying food truck locations, each truck "may choose to provide appropriate access information to the API of its GPS to enable the posting of the vehicle's location on such website," but "is not required to provide such information or otherwise allow the City to display the vehicle's location." C2623; A7-A8.

Circuit Court Decision

The circuit court granted the City's motion for summary judgment. C5191. The court rejected LMP's argument that the 200-foot rule's effect on competition makes it unconstitutional, finding that the rule rationally serves the City's interest in balancing community interests by accommodating different types of food businesses. C5158-61. And the court found that the 200-foot rule is rationally related to the City's interest in managing sidewalk congestion. C5164.

The court ruled that the GPS requirement does not violate the Illinois Constitution's proscription on unreasonable searches because there is no search at all where LMP's data was never requested, C5165; there "was no physical trespass to LMP's food truck," C5166; and LMP has "no reasonable expectation of privacy" in its food truck's location, C5168. Even regarding the

GPS requirement as a "search," it is reasonable because the City has a substantial interest in ensuring food safety; the GPS data is necessary to find food trucks; and Board rules appropriately limit the circumstances under which the City will obtain the information. C5167-68.

Appellate Court Decision

The appellate court affirmed, holding that the 200-foot rule is a rational means of serving the City's "critical interest in maintaining a thriving food service industry of which brick-and-mortar establishments are an essential part." LMP Services, Inc. v. City of Chicago, 2017 IL App (1st) 116330, ¶ 3. The court rejected LMP's argument that the City may not protect restaurants from competition, and held that the City could do so where those restaurants provide "critical economic benefits," including payment of a variety of taxes, that "promot[e] the general welfare of the City." Id. ¶ 32.

The appellate court also rejected LMP's challenge to the GPS requirement, holding that it is not an unreasonable "search" where the City "has not physically trespassed on LMP's property," 2017 IL App (1st) 116330, ¶ 52, and LMP has no "reasonable expectation of privacy" in the location of its business operations, id. ¶ 53. Moreover, because licensees operate on public property, the City may condition that license on a GPS device that provides location information. Id. ¶¶ 54-56.

LMP appeals. C5171.

ARGUMENT

In 2012, the Chicago City Council paved the way for food trucks by removing restrictions on onsite food preparation and, since then, many food truck owners, including LMP, have successfully operated in Chicago. LMP nevertheless challenges two food truck regulations – the 200-foot rule and the GPS requirement. The appellate court properly rejected both challenges.

A facial challenge is "the most difficult challenge to mount successfully because an enactment is invalid on its face only if no set of circumstances exists under which it would be valid." People v. One 1998 GMC, 2011 IL 110236, ¶ 20. The food truck ordinance, like all legislation, "carr[ies] a strong presumption of constitutionality." Segers v. Industrial Commission, 191 Ill. 2d 421, 432 (2000). The party raising the constitutional challenge bears the burden of establishing a clear constitutional violation, and all doubts are resolved in favor of the challenged regulations. Granite City Division of National Steel Co. v. Illinois Pollution Control Board, 155 Ill. 2d 149, 164-65 (1993).

The circuit court granted summary judgment to the City. That judgment is reviewed de novo, Schultz v. Illinois Farmers Insurance Co., 237 Ill. 2d 391, 399-400 (2010), and is appropriate when "the pleadings, affidavits, depositions, admissions and exhibits on file, when viewed in the light most favorable to the non-moving party, show that there is no genuine issue as to any material fact and that the movant is clearly entitled to judgment as a

matter of law," id. at 399.

Under these standards, the food truck regulations should be upheld. The 200-foot rule does not violate due process because it is rationally related to at least three legitimate governmental objectives. First, the rule strikes an appropriate balance to ensure the success of both food trucks and brick-and-mortar restaurants, since both make important economic contributions. Second, the rule aims to reduce sidewalk congestion around restaurant entrances. Third, the rule creates an incentive for food trucks to provide service in areas with fewer food options.

The GPS requirement should be upheld, too. The requirement itself authorizes no search at all – it is a record-keeping requirement. In addition, the requirement is not a search because food truck owners have no reasonable expectation of privacy in the location of their operations, and the City engages in no trespass to track location. Even if considered a search, the GPS requirement is reasonable because food truck location is necessary for the City to perform its regulatory function, and the requirement is limited in scope.

I. THE 200-FOOT RULE DOES NOT VIOLATE DUE PROCESS.

Under the Illinois Due Process Clause, economic legislation is reviewed under the same "rational basis" standard that applies under the United States Constitution. McLean v. Department of Revenue, 184 Ill. 2d 341, 354 (1998). Under that standard, legislation must bear a reasonable relationship to a public interest. Id. And that is the exact standard of review this court

has applied to a law restricting the location of food trucks on the public way. Triple A Services, Inc. v. Rice, 131 Ill. 2d 217, 226 (1989). Under the rational-basis standard, it is not the government's burden to show that a regulation is reasonable; it is the plaintiff's burden to show that a regulation is unreasonable. Cutinello v. Whitley, 161 Ill. 2d 409, 422 (1994). LMP has not met that burden here.

Rational-basis review is "highly deferential," and "not concerned with the wisdom of the statute or with whether it is the best means to achieve the desired result." Village of Lake Villa v. Stokovich, 211 Ill. 2d 106, 125-26 (2004). "So long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest, the law must be upheld." Id. at 126. The "conceivable basis" standard is firmly rooted in decades of this court's precedent. E.g., Wauconda Fire Protection District v. Stone Wall Orchards, 214 Ill. 2d 417, 434 (2005); Stokovich, 211 Ill. 2d at 126; People ex rel. Lumpkin v. Cassidy, 184 Ill. 2d 117, 124 (1998); Jacobson v. Department of Public Aid, 171 Ill. 2d 314, 324 (1996); Cutinello, 161 Ill. 2d at 418; Potts v. Illinois Department of Registration & Education, 128 Ill. 2d 322, 332 (1989); Harris v. Manor Healthcare Corp., 111 Ill. 2d 350, 368 (1986); Chicago National League Ball Club, Inc. v. Thompson, 108 Ill. 2d 357, 366-71 (1985). Under this standard, courts do not inquire into the legislative record, or whether the rule works in practice. Rather, the court may "hypothesize reasons for the legislation, even if the reasoning advanced did not motivate the legislative action." Lumpkin, 184 Ill. 2d at 124.

LMP does not even acknowledge the conceivable-basis test as the controlling standard, much less establish that the 200-foot rule is unconstitutional under it. Instead, LMP focuses on cases that say the rational-basis test requires a "real" or "definite and substantial relationship" to the public health, safety, morals or general welfare." LMP Br. 15, 20, 32. But LMP invokes this language without addressing the appellate court's holding that this language does not create "a 'heightened' rational basis test." LMP Services, 2017 IL App (1st) 163390, ¶ 28. As this court explained in Napleton v. Village of Hinsdale, 229 Ill. 2d 296 (2008), the term "substantial relationship" in the rational-basis test does not signify heightened scrutiny; rather, it is simply "an alternate statement of the rational basis test," id. at 315. So if LMP's reliance on the words "real and substantial," and its complete avoidance of the conceivable-basis standard, is meant to urge a more rigorous level of scrutiny, the argument should be rejected for the same reasons as in Napleton.

As we next explain, the 200-foot rule is rationally related to at least three legitimate governmental objectives, any one of which suffices to sustain the rule. The rule balances the interests of food trucks and brick-and-mortar restaurants; controls sidewalk congestion; and encourages food trucks to go where demand for food services is not met. Although the appellate court relied solely on the first justification, this court may affirm on any ground supported by the record, In re Veronica C., 239 Ill. 2d 134, 151 (2010).

A. The 200-Foot Rule Is Rationally Related To The City's Legitimate Objective Of Balancing The Interests Of Food Trucks And Restaurants.

The City's food truck ordinance balances the interests of food trucks and brick-and-mortar restaurants so that both can thrive and benefit Chicago. As one of the very press releases LMP relies upon explains, the 200-foot rule reflects a legislative "compromise" developed to "support this innovative industry right alongside our world-renown[ed] restaurants," C1521, by safeguarding those who have invested considerable time and money to open brick-and-mortar restaurants, while allowing space for food trucks to operate at a distance from those restaurants.[4] Each of LMP's attempts to avoid this straightforward application of rational-basis review fails. The 200-foot rule serves the public interest because it protects an important job-producing, revenue-generating industry from an unfair method of competition. It is settled that the City may regulate for that purpose. The cases LMP cites are inapposite – they involved laws that promoted private, not public, interests.

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[4] Regulations requiring mobile vendors to maintain a distance from brick-and-mortar businesses are common in Illinois, e.g., Municipal Code of Springfield § 110.356.01(1) (300 feet, or 50 feet in downtown); Evanston Code of Ordinances § 8-23-3(c) (100 feet from two categories of restaurants), and other States, e.g., Atlanta Code of Ordinances § 30-1471(a)(10) (200 feet when on private property); Municipal Code of Baltimore § 15-17-33 (300 feet); Municipal Code of Las Vegas § 6.55.090(E) (150 feet); Minneapolis Code of Ordinances §§ 188.485(5); 295.30(c) (100 feet); Pittsburgh Code of Ordinances § 719.05A(b) (100 feet); Portland City Code § 17.26.050(I) (100 feet); San Francisco Public Works Code § 5.8.184.85(b)(4) (75 feet); Seattle Municipal Code § 15.17.130-C.2 (50 feet).

1. The 200-foot rule serves public interests.

The 200-foot rule supports the City's vibrant restaurant industry, which greatly benefits the public. The City's interest is not in protecting restaurant owners as such, but in ensuring that the restaurant industry continues to succeed because of those benefits. Unlike food trucks, brick-and-mortar restaurants establish roots in a community, and add value above and beyond an occasional meal. Their owners invest in the neighborhood; pay property and other taxes; create jobs; support tourism; and maintain property, including adjacent sidewalks. C2103, 2649, 2885. Without the proximity restriction, restaurant owners could be dissuaded from opening or continuing businesses where there is a risk that food trucks will park near their entrances, potentially siphoning off customers, sullying the restaurant's curb appeal with garbage and noise, or interfering with comfortable use of the entrance because of sidewalk congestion. C2884, 2932, 3042. That would, of course, harm the public interest, since restaurants are a vital component of the City's economy and culture. C2103. It is, therefore, rational to regulate food trucks in a manner that addresses restaurant owners' concerns about "unfair competition" when food trucks operate just outside their doors. C2932.

As the appellate court recognized, tax revenue is a vital component of restaurants' contribution to the public interest. Restaurants and food trucks are different industries, LMP Br. 28, and City Council can reasonably speculate about their relative tax contributions. After all, Chicago's brick-

and-mortar restaurants generally have longer, fixed hours, and operate only in Chicago. With more than 7,300 restaurants in Chicago, and billions spent on food and beverages each year, C2697, City Council could rationally – indeed, confidently – speculate that the restaurant industry generates significantly more property, sales, utility, and other tax revenue than food trucks.[5]

LMP ignores the significance of the brick-and-mortar restaurant industry to Chicago's economy, and legitimate concerns about food trucks' impact on that industry. Instead, LMP attempts to recast the 200-foot rule as serving only private interests, as a "monopolistic trade restrictio[n]," LMP Br. 16, the "cumulative effect" of which is "prohibitory," id. at 30, because it "effectively prevent[s] [LMP] and others from vending in the vast majority of the northern part of the Loop," id. at 31. There are several problems with that perspective. To begin, the term "monopoly" does not even come close to fairly describing the effect of the 200-foot rule. As the appellate court explained, a monopoly exists when "one supplier or producer" gains control "over the commercial market within a given region." 2017 IL App (1st) 163390, ¶ 43. The term is, thus, generally used to refer to a single entity, or just a few, that dominates a market. See, e.g., City of New Orleans v. Dukes, 427 U.S. 297, 305 (1976) (two vendors); Suburban Ready-Mix Corp. v. Village

[5] LMP asserts that food trucks pay taxes on fuel and contribute to property and utility taxes through fees paid to commissaries. LMP Br. 23 n.7. But food trucks are not required to buy fuel or use commissaries in Chicago. In fact, LMP's commissary is not in Chicago. C3035-36.

of Wheeling, 25 Ill. 2d 548, 550 (1962) (one ready-mix concrete company). The 200-foot rule gives no restaurant, nor any small group of restaurants, that sort of control in Chicago. On the contrary, there are thousands of competitors among Chicago's restaurants.

Nor does the 200-foot rule operate to exclude food trucks. The 2012 ordinance actually expanded opportunities for food trucks by allowing food preparation on the trucks. C1523. LMP's claim that food trucks are squeezed out is thoroughly undermined by LMP's own witnesses. Pekarik testified that LMP's food truck regularly operates at ten locations in the Loop. C3028-29. LMP's expert counted thousands of food truck stops in the Loop over the course of one year. C2527-28. LMP identifies no neighborhood where it, or any food truck, could not find a suitable location to operate. This court should, therefore, reject LMP's extreme position that the 200-foot rule excludes food trucks.

Rather than focus on the testimony of LMP's own witnesses, it relies on a map created by its counsel that purports to show where food trucks cannot operate, which LMP claims is "the vast majority of the northern part of the loop." LMP Br. 31; C4195. The affidavit accompanying the map, however, does not explain how it was created, C4016.[6] LMP's counsel purports to rely on "data provided by the City" concerning retail food licenses, C4016; but that information would make the map over-inclusive because not

[6] LMP first used this map in its counterstatement of facts, after discovery had closed, so the City had no opportunity to depose the affiant. C4016, 4195.

every retail food licensee is a "restaurant," or located at street level. C5133. Moreover, the map does not depict the ten food truck stands in the Loop, where spots are reserved for food trucks regardless of the 200-foot rule, or any of the areas where, under another exception, food trucks could serve construction sites. Municipal Code of Chicago, Ill. §§ 7-38-115, 7-38-117. Nor does the map account for other reasons why street parking is unavailable – such as fire hydrants, parking for disabled persons, and other parking restrictions – and so does not fairly represent unavailability because of the 200-foot rule. The map is not useful and LMP's own experience, along with Dr. Butler's Twitter counts, contradicts the illusion LMP is attempting to create with the map. Food trucks are able to operate in Chicago, even while brick-and-mortar restaurants are protected.

2. Protecting businesses that are important to Chicago's economy is a legitimate governmental interest.

The 200-foot rule fits comfortably within the type of protective regulation that this court has long recognized serves legitimate governmental interests. In Triple A, this court upheld a ban on food trucks from an entire district in order to "preserve," "attract," and "facilitate the growth and development" of medical facilities in that district, and to "protect against a decline in property values." 131 Ill. 2d at 227-28. This court recognized the incompatibility of food trucks and medical facilities because food trucks had the potential to "detract from the professional atmosphere," and to generate "litter and congestion in the streets." Id. at 234. Much like the ban in Triple

A, the 200-foot rule restricts one industry to support another.

In Napleton, too, this court upheld a restriction on one industry to promote the development of other, tax-generating businesses. This court upheld a zoning law that banned ground-floor financial institutions from two business districts as "an appropriate balance between businesses that provide sales tax revenue and those that do not." 229 Ill. 2d at 315. See also One World One Family Now v. City and County of Honolulu, 76 F. 3d 1009, 1013 (9th Cir. 1996) (upholding ban on street vending as a "legitimate preoccupation of local government . . . to attract and preserve business," which cities rely on "for their tax base, as well as for the comfort and welfare of their citizens").

LMP attempts to distinguish Napleton by pointing out that the zoning regulation was designed to achieve "a mix of businesses" and "relative gain to the public" by considering "how much revenue a use generates." LMP Br. 26. But these are all ways in which the 200-foot rule is similar to – not different than – the zoning regulations in Napleton. Napleton plainly upholds regulating the location of businesses – like food trucks – to maximize public benefits, including tax revenue.

Moreover, this court has long recognized the public interest in protecting industries from harmful competition. In Yellow Cab Co. v. City of Chicago, 396 Ill. 388 (1947), this court addressed taxicab regulations enacted during the depression, when the number of taxicabs and taxicab rates resulted in "unprofitable operations," id. at 391. This court upheld a series of

ordinances that: limited the number of taxicabs; called for a voluntary surrender of taxicab licenses; and gave priority to those who surrendered licenses when the City issued more permits. Id. at 391-92, 398-99. These measures restrained competition by taking more than 1,000 taxicabs out of service and giving priority to two taxicab companies that owned the "vast majority" of licenses. Id. at 398. The regulations nevertheless served the public interest by controlling traffic, enabling many taxicab drivers to earn a living, and supporting the continuation of taxi service to the general public.

This court has even upheld governmental restrictions that keep competitors from operating too close together. LMP Br. 30. In Cohn v. Smith, 14 Ill. 2d 388 (1958), this court upheld an agency's denial of a license application for a currency exchange because several currency exchanges were already serving the same community. Even though the license denial suppressed competition, "it was in the public interest that the financial stability of currency exchanges be assured." Id. at 394. That is because it would not serve the public interest "to have weak and financially uncertain exchanges" that may close because of insolvency or decreased profits. Id.

Similarly, in General Motors Corp. v. State Motor Vehicle Review Board, 224 Ill. 2d 1 (2007), this court upheld an agency's decision rejecting GM's efforts to locate two new Buick automobile dealerships within the same "relevant market area" as other existing Buick dealers, id. at 7. The agency's statutorily defined purpose was to balance the interests of the existing dealers, the manufacturer, and the public; to meet consumer needs; to protect

private investments and property. Id. at 14. This court applied rational-basis review to GM's equal protection and special legislation challenges and upheld the statute, holding that the agency's decision served the legitimate purpose of protecting existing businesses and the public from "harmful franchise practices." Id. at 31.

In other contexts as well, Illinois courts have long recognized that it is permissible to enact economic regulations that, in effect, promote one competitor over another. See Illinois Commerce Commission v. Chicago Railways Co., 362 Ill. 559, 566 (1936) (upholding regulation "to control . . . competition" between bus and trolley companies to avoid "ruinous competition"); Illinois Power Co. v. Illinois Commerce Commission, 316 Ill. App. 3d 254, 260 (5th Dist. 2000) (General Assembly has "substantial interest" in regulating joint advertising and marketing to prevent "unfair advantage"); Potter v. Judge, 112 Ill. App. 3d 81, 87 (3d Dist. 1983) (upholding statute authorizing municipal bonds to finance private business projects even though the projects would "undoubtedly create a competitive impact on already existing businesses"). The 200-foot rule falls neatly in line with this Illinois precedent.

Numerous decisions of the United States Supreme Court also demonstrate that the government may constitutionally suppress competition when it serves the public interest. These cases are significant because the due process clauses in the Illinois Constitution and United States constitutions are "cognate provisions," so this court "follow[s] United States

Supreme Court precedent construing the due process clause." One 1998 GMC, 2011 IL 110236, ¶ 21. As the Court has explained, "conditions or practices in an industry" sometimes make "unrestricted competition an inadequate safeguard of the consumer's interests, produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public, or portend the destruction of the industry itself." Nebbia v. New York, 291 U.S. 502, 538 (1934). Under these types of circumstances, "states may rationally believe that protecting a particular industry from competition benefits the general population of the state." Katharine M. Rudish, Unearthing the Public Interest: Recognizing Intrastate Economic Protectionism as a Legitimate State Interest, 81 Fordham L. Rev. 1485, 1522 (2012).[7]

City of New Orleans v. Dukes, 427 U.S. 297 (1976), is particularly on point. LMP's silence about this case is surprising, since the appellate court relied upon it, 2017 IL App (1st) 163390, ¶ 34, and this court endorsed the same approach in Triple A, 131 Ill. 2d at 227. In Dukes, the Court upheld an ordinance prohibiting food carts in the French Quarter, except for those that had been in operation for eight or more years, as a legitimate means to

[7] Rudish's article provides a helpful synopsis of the Supreme Court decisions supporting intrastate protection from competition when doing so favors the public welfare. See generally Rudish, 81 Fordham L. Rev. 1485. See also Melanie DeFiore, Where Techs Rush in, Courts Should Fear to Tread: How Courts Should Respond to the Changing Economics of Today, 38 Cardozo L. Rev. 761 (2016) (supporting traditional deference to state and local governments to determine when intrastate economic protectionism is appropriate in light of developments in "Sharing Economy").

"ensure the economic vitality" of the area, 427 U.S. at 305. The Court explained that the city could "make the reasoned judgment that street peddlers and hawkers tend to interfere with the charm and beauty of a historic district," id. at 304, particularly those of "more recent vintage" that may lack the same "distinctive character and charm," id. at 305. In the same way that New Orleans could protect established food carts in Dukes, Chicago can protect brick-and-mortar restaurants here.

Other Supreme Court decisions upholding laws that suppress competition abound. See also Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) (upholding statute prohibiting petroleum producers from operating retail service station in the State, and requiring producers' temporary price reductions be applied uniformly); Williamson v. Lee Optical, 348 U.S. 483, 487 (1955) (upholding law prohibiting optician from fitting lenses without optometrist or ophthalmologist prescription); Nebbia, 291 U.S. at 530 (upholding statute that fixed the price of milk to "protec[t] the industry and the consuming public" from "destructive and demoralizing competitive conditions and unfair trade practices").[8]

Perhaps LMP avoids instructive Supreme Court cases in the hope that this court will take a different approach under the Illinois constitution's due

[8] Tax laws, too, may constitutionally favor one type of business over another. E.g., Fitzgerald v. Racing Association of Central Iowa, 539 U.S. 103, 109 (2003) (upholding slot machine tax that was "harmful to the racetracks [but] helpful to the riverboats"); Nordlinger v. Hahn, 505 U.S. 1, 17-18 (1992) (upholding law that taxed new buyers of real estate more heavily than existing owners).

process clause. But there is no legal basis for doing so "unless there is something in the language of our constitution, or in the debates and the committee reports of the constitutional convention, which would indicate that the due process provision within our state constitution was intended to be construed differently." Hope Clinic for Women, Ltd. v. Flores, 2013 IL 112673, ¶ 50. LMP does not identify any such language in our constitution or support in the debates and reports from the convention.

3. LMP relies on cases in which the challenged regulations protected only private, not public, interests.

LMP claims that the appellate court "broke with [a] decades-long string of precedent," LMP Br. 13, striking down zoning laws, proximity restrictions, or licensing requirements that served to "burden one business in order to financially benefit its competitor," id. at 10. In most of the cases LMP cites, however, the courts determined that the regulations at issue benefitted only private, not public, interests.[9] For example, in Suburban Ready-Mix, this court struck down a zoning amendment that served to protect the lone ready-mix concrete company in the village, 25 Ill. 2d at 550.

[9] LMP's reliance on Thunderbird Catering Co. v. City of Chicago, No. 83 L 52921 (Cook County Cir. Ct. Oct. 15, 1986), LMP Br. 17, should be disregarded because it is not precedential. Also, LMP does not actually rely on the order, but on a newspaper's characterization of it. Id. Worse still, the newspaper's description conflicts with the order, which says nothing about "an illegal infringement on competition," id., and instead states that the ordinance is "vague and unenforceable," C1520. Whatever vagueness existed in that ordinance does not bear on whether the current ordinance survives rational-basis review.

Similarly, in Lazarus v. Village of Northbrook, 31 Ill. 2d 146 (1964), this court rejected a challenge to a zoning law as applied to a hospital that would have protected a "competing establishmen[t]," but not "the community as a whole," id. at 152.

In a similar vein, the apprentice statute in Church v. State, 164 Ill. 2d 153 (1995), served private interests by giving the existing private alarm industry complete control over entrance into that industry, id. at 168. LMP's other licensing cases involved the same problem. E.g., People v. Johnson, 68 Ill. 2d 441, 450 (1977) (statute gave licensed plumbers control over entry into trade); Illinois Hospital Service, Inc. v. Gerber, 18 Ill. 2d 531, 537 (1960) (statute gave hospitals control over hospital service provider plans). By contrast, the appellate court upheld a private investigator's licensing law that did not give exclusive control to existing licensees. Weipert v. Illinois Department of Professional Regulation, 337 Ill. App. 3d 282, 289 (4th Dist. 2003). As in Weipert, the 200-foot rule does not give existing restaurants control over entry into the food service or food truck industry.

LMP relies most heavily on Chicago Title & Trust Co. v. Village of Lombard, 19 Ill. 2d 98 (1960), and disputes the significance of the appellate court's point that Chicago Title & Trust was "decided before 1970," when the Illinois constitution was amended to confer home-rule authority on certain municipalities, giving municipalities "the 'same powers as the sovereign.'" LMP Br. 18. According to LMP, the advent of home rule is irrelevant because Chicago Title & Trust nevertheless resolved the same question presented

here: "whether the Illinois Constitution permits the police power to be used purely for protectionism." Id. That is incorrect. Chicago Title & Trust resolved whether the zoning ordinance was a "reasonable exercise" of the village's *statutory* authority to regulate gas stations. 19 Ill. 2d at 103-04. The appellate court, therefore, followed Triple A, where this court rejected a mobile food vender's reliance on cases decided before home rule because those cases turned on whether an ordinance was "a reasonable exercise of the power delegated to a non-home-rule unit *by the General Assembly*." 131 Ill. 2d at 231 (emphasis added). Nothing in Chicago Title & Trust suggests that the test for reasonableness under the statute at issue there included the same conceivable-basis test that this court applies routinely to due process challenges of economic regulations.

In addition, Chicago Title & Trust turned on equal protection principles that do not apply here. There, a zoning law prevented a new gas station from opening within 650 feet of another station, even though existing gas stations were permitted to continue operating at that distance. 19 Ill. 2d at 106-07. This court held that the zoning law lacked a rational basis because "it does not operate equally upon all persons of the same class within the municipality." Id. at 105-06. LMP does not dispute that the 200-foot rule applies equally to brick-and-mortar restaurants – if they operate a food truck, they must follow the same rules. Beyond that, the 200-foot rule treats two very different types of food services differently because they are not similarly situated. That was the basis for the circuit court's dismissal of LMP's equal

protection challenge, C4035, which LMP does not challenge.

Chicago Title & Trust is also distinguishable because, as the appellate court explained, 2017 IL App (1st) 163390, ¶ 42, the business owner there was attempting to operate a business on its own property, not on the public way. Unlike the right to use one's own property, there is no inherent right to use the streets or highways for business purposes. Chasteen, 19 Ill. 2d at 211; Good Humor v. Village of Mundelein, 33 Ill. 2d 252, 257 (1965). In fact, given the unique nature of and potential for clashes in the public way, this court has upheld bans on food trucks from Chicago's medical district, Triple A, 131 Ill. 2d at 228; street-vending in the Chicago Loop, City of Chicago v. Rhine, 363 Ill. 619, 625 (1936); and peddling on streets and public places in an entire village, Good Humor, 33 Ill. 2d at 259.

LMP also relies on a handful of cases in other jurisdictions that have rejected proximity restrictions. LMP Br. 23-34. None addresses the rationality of a distancing rule as a means of balancing the interests of two different types of businesses, and preserving a brick-and-mortar industry that adds considerable revenue, jobs, tourism, and culture to a municipality. And none can be squared with Dukes. Three were decided before Dukes. Duchein v. Lindsay, 345 N.Y.S.2d 53, 55-57 (N.Y. App. Div. 1973); Mister Softee v. Mayor of Hoboken, 186 A.2d 513, 519-20 (N.J. Super. Ct. 1962), overruled on other grounds by Brown v. City of Newark, 113 N.J. 565, 578 (1989); Moyant v. Borough of Paramus, 30 N.J. 528, 545 (1959). Two others did not bother to distinguish it. People v. Ala Carte Catering Co., 159 Cal.

Rptr. 479 (Cal. App. Dep't. Super Ct. 1979); Fanelli v. City of Trenton, 135 N.J. 582, 589 (1994). None of these cases, therefore, provides a reason to deviate from the host of Illinois cases we discuss in subsection 2, which fall neatly in line with the Supreme Court's approach in Dukes.

B. The 200-Foot Rule Is Rationally Related To The Legitimate Governmental Interest Of Alleviating Sidewalk Congestion.

The 200-foot rule is also rationally related to the City's interest in reducing sidewalk congestion. It is settled that managing congestion in the public way is a legitimate governmental objective. Triple A, 131 Ill. 2d at 234. Indeed, this court has recognized for decades that reducing such congestion is a legitimate basis for banning vending on the public way. Rhine, 363 Ill. at 625; Good Humor, 33 Ill. 2d at 259.

After all, the area right outside restaurants can become congested because people often walk to restaurants in groups and customer lines can form outside of restaurants, C3076, 3205, 3346, 3349, and food trucks also generate lines of people who order and wait for food, C3192-95, which can clog sidewalks, C4569, 4498, 4510. The observers in Ehrenfeucht's study documented this over and over. Food truck lines forced pedestrians to "slowly navigate," C4398, or "squeeze" between customers, C4569; "caused a bottleneck effect," C4569; and forced pedestrians to "stop, slow down, or sharply change course," C4612. Disruptions to pedestrian flow were described as "constant," C4508, sometimes blocking the entire sidewalk for up to an hour, C4510. The City has a legitimate an interest in keeping those

sorts of obstructions away from restaurant entrances.

LMP attempts to discredit the congestion justification as a "post hoc" argument. LMP Br. 9. That argument reflects a fundamental misunderstanding of the burden of proof in this case. Under rational-basis review, a "challenger must 'negative every conceivable basis' that might support a challenged law, and 'it is entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature.'" Monarch Beverage Co, Inc. v. Cook, 861 F.3d 678, 681 (7th Cir. 2017) (quoting FCC v. Beach Communications, Inc. 508 U.S. 307, 314-15 (1993)). The challenged legislation can be supported by any other "conceivable, and perhaps unarticulated, governmental interest." Cutinello, 161 Ill. 2d at 420.

LMP also argues that the evidence does not show that food trucks operating close to restaurants will compound congestion. LMP Br. 43-44. Initially, we note that this line of argument ignores that rational-basis review may be satisfied without studies, expert testimony, or other evidence. E.g., Moline School District No. 40 v. Quinn, 2016 IL 119704, ¶ 24; Lumpkin, 184 Ill. 2d at 123-24; Arangold Corp. v. Zehnder, 329 Ill. App. 3d 781, 798 (1st Dist. 2002), aff'd, 204 Ill. 2d 142 (2003). So long as a rational basis exists, "[a]ll of [plaintiff's] affidavits, statistics, and articles" are "irrelevant." Arangold, 329 Ill. App. 3d at 793.

In any event, the evidence in this case – including the testimony of LMP's own witnesses – supports the congestion-control justification. As we

explain above, the observers in Ehrenfeucht's study saw many disruptions to pedestrian flow. And Pekarik herself has noticed that the areas within 200 feet of restaurants have "higher foot traffic," C3041, because that is "where the action is at," C3034. In addition, some restaurants have less sidewalk space available for food truck lines because of sidewalk cafes. C3173. And food trucks and restaurants are usually busy at the same times – i.e., breakfast, lunch, and dinner – when most people seek food, and frequently walk in a group. C3346, 3349. Sidewalk congestion can affect an entire block, around a corner, or across an intersection. C3178-79. For all these reasons, it is rational for the City to keep food trucks and restaurant entrances separated by 200 feet, so that congestion caused by one will not compound the congestion caused by another.

LMP insists that the 200-foot rule is not rational because the City does not require the same distance between food trucks and other congestion sources, such as crosswalks, theaters, department stores, and office buildings. LMP Br. 35-36. In a similar vein, LMP argues the congestion rationale is undermined by "the fact that the City permits many other activities in front of restaurants that raise pedestrian congestion concerns," such as street performers, handbillers, and vending carts. LMP Br. 35-36. But the City was not required to adopt a regulation that would eradicate all potential congestion problems in the same way. The legislature "is not bound to pass one law meeting every exigency," Cutinello, 161 Ill. 2d at 422, and may instead "confine and apply its restriction to only those classes wherein it

deems the need to be the clearest," Serpico v. Village of Elmwood Park, 344 Ill. App. 3d 203, 217 (1st Dist. 2003). It may also proceed "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Dukes, 427 U.S. at 305.

In any event, it is rational not to require the exact same 200-foot distance from crosswalks, theaters, stores, or office buildings. Those places do not have sidewalk cafes taking up sidewalk space, or tend to attract crowds at the same times of the day as food trucks. Likewise, there is no reason to believe that street performers, handbillers, or vending carts generate the same type of sidewalk-blocking lines at restaurants' busiest times. Although LMP claims vending carts can "park" on the sidewalk in front of a restaurant's door, LMP Br. 37, there is no evidence that vending cart operators tend to do that for hours at a time in one location, as do food trucks, or that they generate comparable lines. The City Council could rationally conclude that the "limited size of their carts" enables vendors to "operate without occupying a significant part of the public way and can easily move to avoid traffic congestion." City Council Journal of Proceedings, Sept. 24, 2015, at 6985.

Moreover, these activities are already subject to other location restrictions, some of which are arguably far more restrictive than the 200-foot rule. Peddlers and prepared food vendors are excluded from dozens of areas of the City, including significant portions of the Loop. Municipal Code of Chicago, Ill. §§ 4-244-140, 4-8-037. Street performers are also subject to

location restrictions, including a prohibition on blocking access to any private property, not just restaurants. Id. § 4-244-164. And street performers can easily move along if a congestion problem arises. In short, the constraints on these sidewalk activities are tailored to the nature of the business.[10] Since food trucks draw crowds at the same times as restaurants, the 200-foot rule is particularly rational for them.

LMP also argues that the exceptions to the 200-foot rule for food truck stands and construction sites undercut the rationality of the rule. LMP Br. 36, 37. But these exceptions are rational. As we explain above, the ordinance was meant to balance the interest in expanding food truck operations with the interests of brick-and-mortar restaurants. Part of the balancing equation included providing some exceptions that would open more space for food trucks. It is rational to create such exceptions to mitigate some of the impact of the 200-foot rule.

In addition, the food-truck-stand exception is rational because it includes safeguards against congestion. In establishing the location of a food truck stand, the commissioner must determine that it is a "convenience to the public," Municipal Code of Chicago, Ill. § 7-33-117(c)(3), which ensures consideration of site-specific factors to minimize congestion, even if

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[10] For similar reasons, the accusation that mobile food vendors, along with Uber and Lyft drivers, and Airbnb operators, are "victims" of "regulations that favor some businesses over others," Brief of Amicus Curiae Illinois Policy Institute 4, is baseless. Comparing regulations of competitors that use two very different "business models" is like comparing "cats to dogs" – the same rules are not always appropriate for both. Illinois Transportation Trade Association v. City of Chicago, 839 F.3d 594, 597-98 (7th Cir. 2016).

restaurants are nearby. Conversely, the City can be responsive to location-specific congestion concerns as they arise in a way that it cannot when food trucks choose their parking spots each day. For example, on one occasion, the City was able to address congestion concerns by moving the location of a food truck stand. C1672.

As for construction sites, the City is entitled to make the policy judgment that, at these locations, congestion concerns are outweighed by other benefits. This exception opens up opportunities for food trucks at locations that have traditionally been served by food trucks. Moreover, allowing food trucks to serve construction workers aids construction schedules by providing convenient and quick food options for those workers. Even if a brick-and-mortar restaurant is close to such a site, it may not be open or offer the type of quick and affordable options the construction workers need. C1540.

Next, LMP relies on Ehrenfeucht's conclusion that "the distance between a truck and a restaurant did not affect the amount of pedestrian congestion." LMP Br. 44. Her opinion, though, is the sort of evidence that cannot be used to undermine a rational basis, as we explain above. Moreover, that study did not measure congestion at all, much less a food truck line's impact on it. Observers measured only whether a line extended into the sidewalk. They did not measure the number of pedestrians affected by the line or document the amount of time that lines affected pedestrian flow. C2009-10. Nor did the study include restaurants with sidewalk cafes,

C2023, which greatly reduce sidewalk space. And it involved relatively few food trucks located more than 200 feet from a restaurant – 64 trucks observed during 24 observation periods were within 200 feet of a restaurant, while only 13 trucks observed during ten observation periods exceeded that distance. C2021. All of the trucks were located in the Loop or just north of it. C2013. This lopsided, Loop-focused approach is no basis to draw broad conclusions, on a citywide basis, that the distance between food trucks and restaurant entrances makes no difference.

LMP also argues that the reasonableness of the 200-foot rule is undermined by its application when a food truck operates "on private property," LMP Br. 40, or "the next block over past an intersection" from a restaurant, id. at 43. Even if congestion were less likely in those circumstances, that would demonstrate, at most, an "imperfect fit between means and end," which is tolerated under rational basis review. Arangold, 329 Ill. App. 3d at 793. And, of course, facial invalidity cannot be established by "[t]he invalidity of the statute in one particular set of circumstances," In re M.T., 221 Ill. 2d 517, 536-37 (2006), or by "hypothesiz[ing]" about "factual situations . . . in which enforcement of [an] ordinance . . . would raise substantial constitutional questions," Mulligan v. Dunne, 61 Ill. 2d 544, 558 (1975).

In any event, it is reasonable to believe food trucks on private property can still cause sidewalk congestion. Hamilton testified that congestion from one source can affect activity across an intersection. C1644-45. And even

food trucks operating on private property have every incentive to operate close to sidewalks to attract passersby. C1668. Thus, in a dense City like Chicago, it is entirely reasonable to believe that the 200-foot rule helps avoid unwanted congestion, even when a food truck operates on private property.

C. The 200-Foot Rule Is Rationally Related To The Legitimate Governmental Interest Of Providing An Incentive For Food Trucks To Operate In Underserved Areas.

The 200-foot rule also serves the legitimate objective of encouraging food trucks to operate in areas that are underserved by retail food businesses. The 200-foot rule helps spread retail food options to underserved areas by making it illegal to park within 200 feet of restaurants. Thus, even in neighborhoods that generally have many restaurants, compliant food trucks will usually park on blocks with few or no restaurants. This is a benefit to the public, since food trucks can offer "convenience and variety" to office workers with limited time and options nearby, and can turn "underutilized areas" into "vibrant marketplaces." C3162.

The rule also gives food trucks an incentive to seek out areas of the City that are underserved by restaurants. Food trucks can "increase a community's quality of life by improving access to food" in "food deserts," and providing products in areas where other business will not locate. C2974. The 200-foot rule makes it more difficult to find spaces in areas with many restaurants, which is a "cost" that may prompt food truck operators to go elsewhere. C3953.

LMP urges this court to rely on Dr. Butler's count of food trucks in various neighborhoods based on Twitter posts, which it claims undercuts the City's rationale because few trucks have gone to Chicago's most underserved neighborhoods. LMP Br. 46-47. Under rational-basis review, however, the degree of actual success of the regulation does not matter. As the United States Supreme Court has explained, "[w]hether *in fact* the Act will promote" the desired result "is not the question," since rational basis review is satisfied where one could reasonably believe the statute "might" foster that purpose. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). See also Dukes, 427 U.S. at 304-05 (city could make reasonable judgment that street vendors "might" harm city's economy).

Moreover, Dr. Butler admits that one great advantage food trucks have over brick-and-mortar restaurants is that they can more easily venture into, and test out, new communities. C4085. He further admits that "food trucks actually sometimes have gone to [underserved] areas." C4099. He noted 327 stops in Hyde Park, C2527-28, which includes a university that does not "have a lot of food options," C3086-87. He also noted at least four food truck stops in Auburn Gresham, three in Beverly, four in Englewood, three in Humboldt Park, five in Morgan Park, and eight in South Shore. C2527-28. LMP's own submissions, therefore, suggest that the 200-foot rule may have already encouraged some food trucks to venture outside the Loop to underserved areas. For that reason and others, the requirement is rational and should be upheld.

II. THE GPS REQUIREMENT IS NOT AN UNCONSTITUTIONAL SEARCH.

The ordinance requires food trucks to "be equipped with a permanently installed functioning [GPS] device which sends real-time data to any service that has a publicly-accessible application programming interface (API)." Municipal Code of Chicago, Ill. § 7-38-115(l); A2. Under Board of Health rules, the GPS device need only transmit location data "while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary . . . ." A6 (Rule 8(A)(4)). The location data need only be transmitted "to a GPS service provider," and "not . . . to the City." A6 (Rule 8(A)(2)). The City will request GPS data only with consent or judicial authorization, or in connection with investigations of health and safety complaints or in an emergency. A6-A7 (Rule 8(B)).

LMP's argument that the GPS requirement is an unreasonable search is meritless. LMP's challenge is, once again, a facial challenge, and so LMP must show that "no set of circumstances exists under which [the enactment] would be valid." One 1998 GMC, 2011 IL 110236, ¶ 20. LMP comes nowhere close to this showing. In the event of a serious food-borne illness reported by numerous patrons of the same food truck, the City would plainly be entitled because of the health emergency to search that truck's GPS records to attempt to find the truck. Even limiting consideration to that circumstance shows that a search could be constitutionally undertaken, which means that LMP's facial challenge must fail.

LMP's argument to the contrary is based on a fundamental misrepresentation of the GPS provision as requiring real-time location information to be made available to the City and public at all times. That sort of constant access is not required. Instead, the GPS requirement serves a basic regulatory function by requiring food trucks to create and keep records of the locations of this business operations. This record-keeping requirement does not amount to a search, much less an unreasonable search.

A. The Ordinance Requires The GPS Device For Record-Keeping Purposes, Not For Constant Access By The City Or Public.

The GPS requirement is a basic record-keeping requirement. All licensed businesses in Chicago are required to provide the City with the location of their business operations. Municipal Code of Chicago, Ill. § 4-4-050(a)(i). And licensed businesses are not free to change locations without first notifying the City and applying for a new license. Id. § 4-4-170. It is particularly important that the City have this information for food services, where dangers to the public health and safety may require prompt action, such as an emergency closure or abatement. Since food trucks are mobile, the City enacted a different version of this very basic requirement. A GPS device gives food trucks the ability to provide their location, but without the inconvenience of having to apply for a new license or report the address of every stop before opening for business there.[11] That way, the City can

[11] Other cities generally require disclosure of food truck locations in one form or another. Some require the owner to provide the location in advance. E.g.,

determine where a food truck is operating, or has operated, in order to perform its regulatory functions.

The GPS requirement is, therefore, nothing more than a new take on a basic requirement. Like other records, these records must be kept so that they are available to a lawfully authorized investigatory agency when they are relevant to a matter under investigation. See Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1946). Record-keeping requirements are analyzed distinct from the circumstances concerning a search of those records. E.g., City of Los Angeles v. Patel, 135 S. Ct. 2443, 2447 (2015) (despite invalidating "on demand" access to records, noting that "nothing in our opinion calls into question" requirement that hotel operators "maintain guest registries containing certain information"); Second City Music, Inc. v. City of Chicago, 333 F.3d 846, 848 (7th Cir. 2003) (upholding record-keeping requirements and access to store and records, but noting that implementation of provisions on other facts could be unconstitutional). Indeed, it is settled that, by requiring "the mere maintenance of the records," the government "neither searches nor seizes" those records. California

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Los Angeles County Code of Ordinances § 8.04.403 (food truck must submit route sheet listing addresses, as well as arrival and departure times); Houston City Code § 20-22(c)(3) (food truck must submit list of locations and give two-days' notice before relocating); San Francisco Public Works Code §§ 184.83(c), 184.84(i) (applicant must give specific location information and submit another application for new locations). Others prescribe designated areas for food trucks. E.g., St. Louis Code of Ordinances § 8.108A.020 (street vending prohibited except in "Vending Districts."); Atlanta Code of Ordinances § 30-1400 (assigning "designated food truck areas"). Others, like Chicago, require a GPS device. E.g., Boston Municipal Code § 17-10.8(9); City of Hoboken Municipal Code § 147-9(H).

Bankers Association v. Shultz, 416 U.S. 21, 53-54 (1974). Here, the ordinance is likewise limited to record-keeping. Since such a record-keeping requirement is not, in and of itself, a search, LMP's claim should be rejected.

LMP's argument that the GPS requirement is an unconstitutional "search" hinges on a misrepresentation of the ordinance as requiring constant access to location information to be given to the City and the public. LMP claims that the reference in the GPS requirement to "publicly-accessible [API]" means a "software 'door' that is open to anyone upon request." LMP Br. 47. LMP then variously describes the ordinance as a requirement: "authorizing long-term monitoring," id. at 57, or "surveillance," id. at 58; to "make . . . data available to *anyone*," id. at 60; to use a GPS provider that will "not restrict access to the truck's data," id. at 62; to make "location data available to whomever wishes it," id.; and to allow the public to "track [a food truck] in real time," or "look up everywhere it has operated over the past six months," id. at 63. None of these statements accurately describes the GPS requirement. Indeed, LMP's reliance on that interpretation of the ordinance means that this court can reject LMP's constitutional challenge simply as a matter of ordinance construction. "It is settled that courts should avoid constitutional questions when a case can be decided on other grounds." Innovative Modular Solutions v. Hazel Crest School District, 2012 IL 112052, ¶ 38. Here, where the ordinance says nothing at all about the circumstances under which a City official, or the public, must be provided access to the GPS records, this court need not address the constitutionality of a different

ordinance, like the one that LMP describes.[12]

In addition to the language of the ordinance, which does not support LMP, the Board of Health interprets the "publicly accessible API" requirement to mean that the GPS provider must "*be able to provide* . . . [a]n [API] that is available to the general public." A7 (Rule 8(C)) (emphasis added). Then, "[i]f the City establishes a website for displaying the real-time location of mobile food vehicles, for purposes of marketing and promotional efforts, the licensee *may choose to provide the appropriate access information to the API* of its GPS to enable the posting of the vehicle's location on such website." A7 (Rule 8(D)) (emphasis added). The licensee, however, "*is not required* to provide such information or otherwise allow the City to display the vehicle's location." A8 (Rule 8(D)) (emphasis added). In other words, although a GPS provider must have "the capability to allow a third party to access data," it is up to the licensee whether to use that resource for marketing.[13] C1567.

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[12] In some municipalities, open access by the city and public is required, see, e.g., City of Hoboken § 147-9 (food trucks "shall make these data openly available to the public and the City of Hoboken for tracking and enforcement purposes"); see also City of Boston Food Truck Permit Application, available at https://www.cityofboston.gov/images_documents/Food%20Truck%20Permit%20Application2-12_tcm3-43061.pdf (requiring consent of applicant to use of GPS for monitoring and providing accurate location data to customers). There is no similar language in the Chicago ordinance.

[13] LMP cites a City press release, LMP Br. 62, announcing that GPS data would be used to make "food truck locations . . . available online to the public." C1524. That statement alludes to the City's plan to provide a website to assist the food trucks that wish to participate with marketing. The website has not come to fruition.

LMP completely ignores the Board's API rule, even though it was prominently featured in the City's summary judgment and appellate briefs. Brief of Defendant-Appellee (Ill. App. Ct. No. 16-3390) 54-58; C2610, 3726, 3838, 4288. That silence is telling; LMP still has not found a way to explain the rule away. The Board's rules are key to resolving any ambiguity about the meaning of "publicly accessible API." That is because deference is owed to interpretations rendered by the agency charged with administering an ordinance. DTCT, Inc. v. City of Chicago, 407 Ill. App. 3d 945, 952 (1st Dist. 2011); West Belmont, L.L.C. v. City of Chicago, 349 Ill. App. 3d 46, 49 (1st Dist. 2004). "A reviewing court will defer to the administrative entity's practical construction of the ordinance unless it is clearly erroneous, arbitrary, or unreasonable." Memory Gardens Cemetery, Inc. v. Village of Arlington Heights, 250 Ill. App. 3d 553, 560 (1st Dist. 1993). Here, the Board's interpretation in the rules leaves no doubt that the term "publicly accessible API" does not require that the GPS data is constantly accessible to the City or public.

Finally, LMP's argument that the GPS requirement means constant real-time access is undermined by the Board of Health rules that limit the circumstances under which City officials will seek access to GPS data. Those regulations authorize appropriate officials to seek those records under limited circumstances: (1) after the City has first obtained a warrant, court order, or consent; (2) when needed to investigate a complaint of unsanitary or unsafe

conditions, or a food-related threat to public health; (3) to establish compliance with food truck regulations; or (4) in an emergency. A6-A7. These rules clearly contemplate that the City will have a specific regulatory purpose, and perhaps even court or licensee approval, before requesting GPS data. LMP does not even argue that the City's access to GPS records under any of those circumstances would be unconstitutional.

B. A Food Truck's Location Is Not Private.

The GPS requirement is also not a search because the location of food truck operations is not private. A search occurs when the government infringes on an individual's "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 (1967); accord, e.g., People v. Carodine, 374 Ill. App. 3d 16, 22 (1st Dist. 2007).[14] This exists only when the individual has a "subjective expectation of privacy," and an objective expectation of privacy that "society [is] willing to recognize . . . as reasonable." California v. Ciraolo, 476 U.S. 207, 211 (1986). LMP has neither.

LMP has no subjective expectation of privacy. The only data that a GPS provider must maintain is the location of a food truck while it is engaged in "vending food," "open for business," or being serviced at a commissary. A6 (Rule 8(A)(4)). LMP does not keep these locations private. On the contrary,

[14] LMP rightly does not invoke the Illinois Constitution's separate protection against unreasonable "invasions of privacy or interceptions of communications by eavesdropping devices or other means." Ill. Const. Art. I, § 6. That clause applies only where the government intrudes "into the individual's bodily zone of privacy" or seeks access to private documents, such as "medical or financial records." People v. Caballes, 221 Ill. 2d 282, 330 (2006). The location of a business is not such a private matter.

LMP voluntarily and broadly publicizes its location on social media, on its website, by emails, and over the telephone. C3027-28, 3037-38. In United States v. Miller, 425 U.S. 435 (1976), the Court explained that a bank customer had no reasonable expectation of privacy in bank records where the customer was engaging in commercial transactions in which his information would be exposed to others in the ordinary course of business, id. at 442. Here, the expectation of privacy is even less than the bank transaction in Miller, since food trucks like LMP broadcast the location of their business operations to everyone in sight, and also on websites and social media.

By the same token, the location of LMP's food trucks is not the sort of information that society recognizes as private. There is no objectively reasonable expectation of privacy in a vehicle's location when operating in public because a person driving in public "voluntarily convey[s] to anyone who want[s] to look . . . the fact of whatever stops he made." United States v. Knotts, 460 U.S. 276, 281-82 (1983). Indeed, as Pekarik admits, the location of her truck is "not a secret to anyone." C3019.

For just this reason, numerous federal courts have rejected Fourth Amendment challenges to similar requirements that taxicabs install GPS units that transmit their locations. As each of these courts explains, taxicabs have no reasonable expectation of privacy when operating in public. See, e.g., Azam v. D.C. Taxicab Commission, 46 F. Supp. 3d 38, 50-51 (D.D.C. 2014) ("a GPS tracking device that records the start and end of each trip does not infringe on any reasonable expectation of privacy"); El-Nahal v. Yassky, 993

F. Supp. 2d 460, 465 (S.D.N.Y. 2014) (plaintiffs "cannot show a reasonable expectation of privacy in any of the information collected under the [GPS] system"), aff'd, 835 F.3d 248, 253 (2d Cir. 2016); accord Buliga v. N.Y.C. Taxi & Limousine Commission, 2007 WL 4547738, at *2 (S.D.N.Y. 2007), aff'd, 324 Fed. Appx. 82 (2d Cir. 2009); Carniol v. N.Y.C. Taxi & Limousine Commission, 2 N.Y.S.3d 337, 337-38 (N.Y. App. Div. 2015). Like taxicabs, food trucks openly do business in public, so the GPS requirement is not a "search."

LMP argues that it has a privacy interest in the location of its truck when its employees "work alone on the truck" or "have previously been harassed and threatened by members of the public." LMP Br. 47. LMP did not raise this argument in the appellate court. Arguments not raised in the appellate court are forfeited. 1010 Lake Shore Association v. Deutsche Bank National Trust Co., 2015 IL 118372, ¶ 14. Beyond that forfeiture, the argument flunks. As we explain above, the ordinance does not require GPS data to be shared with the public, much less shared in a way that will tip off someone looking to harass or threaten an employee. On the contrary, Board rules provide that, if the City were to establish a website displaying "real-time location," "[t]he licensee *is not required to provide such information* or otherwise allow the City to display the vehicle's location." A8 (emphasis added).

LMP's amici – but not LMP – rely on the recent decision in Carpenter v. United States, 138 S. Ct. 2206 (2018). LMP's own reliance on this case is

forfeited. "This court has repeatedly rejected attempts by *amic[i]* to raise issues not raised by the parties to the appeal." Karas v. Strevell, 227 Ill. 2d 440, 450 (2008); Burger v. Luther General Hospital, 198 Ill. 2d 21, 62 (2001). In any event, as even LMP appears to recognize, Carpenter does not help LMP. There, the Court concluded that, notwithstanding a customer's consent to allow wireless carriers access to location information, a law that gave the government authority to subpoena those cell phone records without a warrant for purposes of a criminal investigation "invaded Carpenter's reasonable expectation of privacy in the whole of his physical movements." 138 S. Ct. at 2219. The Court cautioned that its decision should be read narrowly, and limited to that type of broad request. Id. at 2220-22. Here, no one has attempted to obtain information about the whole of a private individual's physical movements. Again, the GPS requirement requires only the keeping of records of food truck locations during business operations – information that has already been made public.

C. The GPS Requirement Is Not A Trespass On LMP's Property.

LMP also asserts that the GPS requirement involves the same sort of physical trespass on property that rendered use of a GPS device a "search" in United States v. Jones, 565 U.S. 400 (2012). That is incorrect. In Jones, the Court held that "the attachment of a [GPS] tracking device to an individual's vehicle, *and subsequent use of that device to monitor* the vehicle's movements on public streets, constitutes a search or seizure within the meaning of the

Fourth Amendment." Id. at 402 (emphasis added). So, for a search to result from the GPS requirement here, the City would have to do more than require food trucks to maintain a GPS device; the City would need to obtain and use LMP's location data. Outside of this litigation, the City has never done so.

Nor has there been a "physical intrusion," Jones, 565 U.S. at 406, by government agents onto LMP's private property. LMP – not any government agent – placed the GPS device on its food truck. LMP argues that, under Grady v. North Carolina, 135 S. Ct. 1368 (2015) (per curiam), it is the "lack of consent – not who physically installs the device – that controls," LMP Br. 50. LMP's reliance on Grady is misplaced. There, the government compelled a recidivist sex offender to wear a monitoring device by physically intruding "on [the] subject's body," 135 S. Ct. at 1371, which is clearly a "constitutionally protected area," id. at 1370, like a person's private vehicle, house, or curtilage of the house, id. at 1370-71. The GPS requirement here does not similarly involve a physical trespass onto such private space when food trucks are open to the public, especially when they are operating on public property.

Moreover, since food trucks are given the privilege of operating on *public* property, the City can insist on at least knowing where, on its property, the business is operating. In Grigoleit, Inc. v. Board of Trustees of Sanitary District of Decatur, 233 Ill. App. 3d 606 (4th Dist. 1992), for example, Grigoleit had been given a similar "revocable privilege" to discharge waste water into "the sanitary district's *own water pipes*" on condition of

giving the district access to the discharge location on Grigoleit's property, LMP Services, 2017 IL App (1st) 163390, ¶ 54 (discussing Grigoleit). As in Grigoleit, food trucks use government property for private commercial purposes, and the government can condition that use on the licensee's ability to provide basic information about that use.

D. The GPS Requirement Is Reasonable.

To the extent the GPS requirement is a "search," it is reasonable. Any "expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." New York v. Burger, 482 U.S. 691, 700 (1987). Privacy expectations are "particularly attenuated" for "'closely regulated' industries," because those "industries have such a history of government oversight that no reasonable expectation of privacy" could exist. Id.

LMP admits that, as a part of the food service industry, food trucks participate in a "closely regulated industry." LMP Br. 59 n.12. In addition, food trucks operate on the public way, the use of which is heavily regulated. See Chasteen, 19 Ill. 2d at 210-12; Witvoet v. Quinlan, 41 Ill. App. 3d 724, 729 (1st Dist. 1976). Because closely regulated businesses – especially those on the public way – have a reduced expectation of privacy, the warrant and probable-cause requirements are reduced. As with other cases in which the government has a "special need," a "warrantless inspection of commercial premises may well be reasonable," Burger, 482 U.S. at 702, if three criteria are met: (1) the government must have a "substantial" interest that informs

the regulatory scheme; (2) the warrantless inspections must be "necessary to further [the] regulatory scheme"; and (3) the regulations must be clear about the commercial premises to be searched and the search must have a "properly defined scope" that "limit[s] the discretion of the inspecting officers." Id. at 702-03. Each criteria is satisfied here.

LMP makes no argument on the first criteria, see LMP Br. 59 (disputing only the second and third), and plainly, the City has a substantial interest in being able to locate food trucks for inspections and enforcement. The GPS data can be used to determine whether food trucks are making required commissary visits; to help resolve a dispute over whether a truck operator complied with the ordinance's location regulations; and to determine a food truck's location history in the investigation of a foodborne illness. C2289.

As for the second Burger requirement, LMP argues that GPS tracking is not "necessary" because, so far, the City has "never used GPS tracking to facilitate a health inspection." LMP Br. 60. This argument reflects a serious misunderstanding of the necessity requirement. A warrantless search is considered "necessary to further [the] regulatory scheme" if obtaining a warrant could "frustrate[e] the purpose" of the regulatory scheme. Burger, 482 U.S. at 702-03. A warrant requirement could "frustrate[e] the purpos[e] . . . to deter safety and health violations" that is aided by the possibility of frequent inspections. Id. at 703. In addition, it is sometimes necessary to find food trucks quickly to address immediate health or safety hazards, such

as the outbreak of a foodborne illness or a reported safety violation.

LMP insists that the City can use "other, less-intrusive means of locating a food truck, such as . . . social-media or calling operators." LMP Br. 60. But those sources are not reliable. As one food truck operator acknowledged, he does not answer his phone when he is serving customers. C3089. And Pekarik acknowledged that drivers sometimes delay reporting truck locations on social media. C3019. Even though the City has been able to find food trucks through social media, it has been difficult. On one occasion it took the City several days to find and inspect a food truck using that method. C2283-85. Such delay is unacceptable when serious and immediate health and safety problems arise.

On the third factor, LMP's argument that the GPS requirement is excessive in scope should also be rejected. This argument again hinges on LMP's urged reading of the ordinance to require that "location data be made available to whomever wishes it." LMP Br. 62. As we explain in Part II.A. above, the ordinance simply does not require that. For this reason, as well, LMP's unreasonable search claim fails.

CONCLUSION

The judgment of the appellate court should be affirmed.

Respectfully submitted,

EDWARD N. SISKEL
Corporation Counsel
of the City of Chicago

By: /s/ Suzanne M. Loose
SUZANNE M. LOOSE
Senior Counsel
30 North LaSalle Street
Suite 800
Chicago, Illinois 60602
(312) 744-8519
suzanne.loose@cityofchicago.org
appeals@cityofchicago.org

APPENDIX

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Municipal Code of Chicago, Ill. § 7-38-115, in relevant part:

(f) No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m.

Restaurant, for purposes of this section, means any public place at a fixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for the public for consumption on or off the premises pursuant to the required licenses. Such establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops.

* * *

(h) Mobile food vehicles that are being used to provide food and drink to persons engaged in construction in the City of Chicago and which are not equipped with noise-making devices are exempt from the provisions of (f) above, provided such vehicles are standing or parked in a legal parking spot.

* * *

(k) (1) No operation of a mobile food vehicle is allowed on any private property unless all of the following requirements are met:

(i) The mobile food vendor has obtained the express written consent of the owner or lessee of such property and such written consent is kept in the mobile food vehicle at all times when the vehicle is on the property;

(ii) The mobile food vendor is in compliance with all applicable requirements of the Chicago Zoning Ordinance; and

(iii) The mobile food vendor is in compliance with subsection (b)(i) and, except for the private property that allows the operation of the mobile food vehicle, subsection (f) of this section.

* * *

(l) Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device.

Id. § 7-38-117, in relevant part:

Mobile food vehicle stands program.

(a) A mobile food vehicle stands program ("program") is hereby created as provided in this section.

(b) The following definitions shall apply for purposes of this section:

(1) "Commissioner" means the City's Commissioner of Transportation.

(2) "Block" means both sides of the part of a street that lies between two intersecting streets, as the term "street" is defined in section 9-4-010 of this Code.

(3) "Stand" means a mobile food vehicle stand established by the Commissioner pursuant to this section.

(c) The Commissioner is authorized, subject to the approval of the City Council, to establish stands where mobile food vehicles may be operated at all times or during certain specified periods, if, after consulting with the alderman of the ward in which a proposed stand will be located and the Department of Police, the Commissioner determines that establishing such a stand: (1) will not create undue safety hazards in the use of the street by vehicular or pedestrian traffic; (2) will not impede the safe and efficient flow of traffic upon the street on which the mobile food vehicle stand is proposed; and (3) will provide benefit and convenience to the public. After engaging in the above consultations and posting appropriate signs, the Commissioner may amend the time of operation of mobile food vehicles at a mobile food stand. A minimum of 5 such stands shall be established in each community area, as such areas are designated in section 1-14-010 of this Code, that has 300 or more retail food establishments.

(d) The Commissioner shall designate mobile food vehicle stands by appropriate signs or curb markings or both. It shall be unlawful to stand or

park a vehicle, other than mobile food vehicles, in violation of signs posted, in any mobile food vehicle stands that the Commissioner has designated by appropriate signs or markings; provided, however, that this provision shall not apply to a vehicle engaged in the expeditious loading or unloading of passengers when such standing does not interfere with a mobile food vehicle waiting to enter or about to enter into such a stand.

(e) Notwithstanding any other provision of this Code, in a block where a mobile food stand is established pursuant to this section, no person shall operate a mobile food vehicle from any other place on the public way in such block face except from the designated mobile food stand

(f) Operators of mobile food vehicles that operate from a mobile food stand shall be subject to the provisions of this section and all applicable requirements of this chapter, including section 7-38-115(b)(i) except for the requirement in section 7-38-115(f).

(g) The Commissioner and the Commissioner of Business Affairs and Consumer Protection shall have power to adopt rules as may be necessary or useful for the proper administration and enforcement of this program, including rules pertaining to the operation of mobile food vehicles from a designated mobile food stand.

(h) The Commissioner and the Commissioner of Business Affairs and Consumer Protection shall evaluate the effectiveness of the program and may recommend changes as may be adopted by ordinance.

(i) The Commissioner of Transportation is authorized to establish a mobile food vehicle stand within the side of the block where each of the following addresses is located:

(1) 3627 North Southport Avenue;

(2) 3420 North Lincoln Avenue;

(3) 3241 North Lincoln Avenue;

(4) 817 West Belmont Avenue;

(5) 1005 West Wrightwood Avenue;

(6) 1030 West Fullerton Avenue;

(7) 2342 North Stockton Drive;

(8) 1262 North Milwaukee Avenue;

(9) 1218 North Milwaukee Avenue;

(10) 2135 West Division Street;

(11) 1155 North Oakley Boulevard:

(12) 1615 West Chicago Avenue;

(13) 149 North Ashland Avenue:

(14) 831 North Wells Street;

(15) 930 North LaSalle Drive;

(16) 355 West Chicago Avenue;

(17) 450 North Cityfront Plaza Drive;

(18) 729 – 829 North Larrabee Street;

(19) 30 East Lake Street;

(20) 140 South Clark Street, provided that the mobile food vehicle stand at this location shall not be more than 40 feet in length;

(21) 437 South Columbus Drive;

(22) 902 West Adams Street;

(23) 436 West Taylor Street;

(24) 1400 West Adams Street;

(25) 1851 West Jackson Boulevard;

(26) 150 West Van Buren Street;

(27) 65 East Harrison Street;

(28) 2500 North Cannon Drive;

(29) 3628 North Broadway;

(30) 1760 North Sheffield Avenue;

(31) 200 South LaSalle Street;

(32) 151 North Franklin Street;

(33) 185 North Upper Columbus Drive;

(34) 105 East Monroe Street, provided that the mobile food vehicle stand at this location shall not be more than 40 feet in length;

(35) 300 South Wabash Avenue, provided that the mobile food vehicle stand at this location shall not be more than 40 feet in length;

(36) 2220 West Campbell Park Drive;

(37) 145 South Franklin Street, provided that the mobile food vehicle stand at this location shall not be more than 40 feet in length;

(38) 1002 South Paulina Street;

(39) 1030 South Hamilton Avenue; and

(40) 3601 West Bryn Mawr Avenue, provided that the mobile food vehicle stand at this location shall not be more than 40 feet in length.

Chicago Board of Health Rules & Regulations for Mobile Food Vehicles, Rule 8:

Global Positioning System (GPS) requirements

A. All mobile food vehicles must be equipped with an operational Global Positioning System (GPS) device. The device must meet the requirements set forth in Section 7-38-115 of the Municipal Code of the City of Chicago, as well as the following:

1. The device must be permanently installed in, or on, the vehicle.

2. The device must be an “active”, not “passive” device that sends real-time location data to a GPS service provider; the device is not required to send location data directly to the City.

3. The device must be accurate no less than 95% of the time.

4. The device must function while the vehicle is vending food or otherwise open for business to the public, and when the vehicle is being serviced at a commissary as required by Section 7-38-138 of the Municipal Code of the City of Chicago or these regulations. The device must function during these times regardless of whether the engine is on or off.

5. When the GPS device is required to function, the device will transmit GPS coordinates to the GPS service provider no less frequently than once every five (5) minutes.

B. City personnel will not request location information from a GPS service provider pertaining to a mobile food vehicle unless:

1. The information is sought to investigate a complaint of unsanitary or unsafe conditions, practices, or food or other products at the vehicle;

2. The information is sought to investigate a food-related threat to public health;

3. The information is sought in connection with establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promulgated thereunder;

4. The information is sought for purposes of emergency preparation or response;

5. The City has obtained a warrant or other court authorization to obtain the information; or

6. The City has received permission from the licensee to obtain the information.

C. The GPS service provider must maintain at least six (6) months of historical location information and be able to provide the following:

1. When requested pursuant to Rule 8.B., reports of each transmitted position including arrival dates, times, addresses, and duration of each stop, in a downloadable format (i.e. PDF, CVS or Excel). If the request is to provide the current location of a vehicle, the GPS service provider must respond immediately with the most recent location information for the vehicle.

2. Reports that provide anonymous, aggregate information regarding mobile food vehicle operations within the City, and do not identify specific mobile food vehicles.

3. An application programming interface (API) that is available to the general public.

D. If the City establishes a website for displaying the real-time location of mobile food vehicles, for purposes of marketing and promotional efforts, the licensee may choose to provide the appropriate access information to the API of its GPS to enable the posting of the vehicle's location on such website. The licensee is not required to provide such information or otherwise allow the City to display the vehicle's location.

E. The following will serve as evidence that the GPS requirements have been met:

1. Proof of GPS installation.

2. Proof from a GPS tracking device service provider the operator is in compliance with the requirements as stated in this Rule.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). Pursuant to the word count feature of the Microsoft Word word-processing software used to prepare this brief, the length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 14,816 words.

/s/ Suzanne M. Loose
SUZANNE M. LOOSE, Attorney

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies under penalty of law as provided in 735 ILCS 5/1-109 that the statements set forth in this instrument are true and correct and that the foregoing brief was electronically filed with the Illinois Supreme Court using the court's electronic filing system, and was served on the plaintiff-appellant and amici by the electronic filing system and by emailing a PDF copy to the persons named below at the email addresses indicated, on November 13, 2018.

/s/ Suzanne M. Loose
SUZANNE M. LOOSE, Attorney

Persons served:

Counsel for Plaintiff-Appellant:

Robert Frommer, rfrommer@ij.org
Robert Gall, bgall@ij.org
Erica J. Smith, esmith@ij.org
James W. Joseph, jjoseph@eimerstahl.com

Counsel for amici:

Mahesha P. Subbaraman, mps@subblaw.com
Matthew Clemente, mclemente@sidley.com
Timothy R. Snowball, TSnowball@pacificlegal.org
Jeffrey M. Schwab, jschwab@libertyjusticecenter.org

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Carolyn Taft Grosboll
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