IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GREG BURKE, KRISTIN CASPER, AND LMP SERVICES, INC.,	)	12CH41235
Plaintiffs,	)	No. _____
v.	)	
THE CITY OF CHICAGO, ILLINOIS,	)	
Defendant.	)	

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COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiffs Greg Burke, Kristin Casper, and LMP Services, Inc., bring this complaint pursuant to 735 ILCS 5/2-701 for declaratory and injunctive relief against the Defendant City of Chicago, Illinois and states as follows:

Preliminary Statement

This civil rights lawsuit seeks to vindicate the fundamental right of Plaintiffs, who own and operate mobile-vending vehicles, to earn an honest living free from unreasonable and anticompetitive government restrictions. Mobile vending has long been an entry point to entrepreneurship in cities across America, whereby those with a strong work ethic but little capital can strike out on their own. Through that hard work, mobile vendors around the country create jobs, offer consumers tasty food at reasonable prices, and energize urban spaces.

Although food trucks have grown increasingly popular around the country, they remain rare in Chicago largely due to burdensome and anti-competitive laws that the City has put in place. On July 25, 2012, the Chicago City Council passed an ordinance that overhauled mobile vending within the city. That ordinance maintained a rule that bans Plaintiffs and other food trucks from operating within 200 feet of any fixed business where food and drink is prepared and served for the public. This restriction does not address any public health or safety concern;

instead, it exists simply to protect brick-and-mortar businesses from competition. Accordingly, the 200-foot proximity rule unconstitutionally interferes with Plaintiffs' right to pursue a lawful occupation as protected by the Due Process Clause of Article I, Section 2 of the Illinois Constitution.

To help enforce the 200-foot proximity rule, the City is also requiring that Plaintiffs and other food-truck entrepreneurs permanently install Global Positioning System (GPS) devices on their trucks so that City officials and the general public may track a truck's whereabouts whenever and wherever it is operating. Ensuring that food trucks do not operate within 200 feet of a brick-and-mortar competitor, however, is not a legitimate government interest and cannot be the basis for this highly unusual and highly intrusive measure. This requirement therefore violates Plaintiffs' right to be free of unreasonable searches and seizures, as protected by the Searches, Seizures, Privacy and Interceptions Clause of Article I, Section 6 of the Illinois Constitution.

JURISDICTION AND VENUE

1. At all times pertinent to this action, the acts complained of have occurred in or are occurring in Chicago, Cook County, Illinois.

2. This action arises under Article I, Section 2, of the Illinois Constitution (Due Process Clause); Article I, Section 6, of the Illinois Constitution (Search, Seizure, Privacy, and Interceptions Clause); and 735 ILCS 5/2-701 (Declaratory Judgment).

3. This Court has jurisdiction over the subject matter pursuant to Article VI, § 9 of the Illinois Constitution. Venue is proper in this Court pursuant to 735 ILCS 5/2-103 because Defendant is a municipal corporation with its principal office in Cook County.

PARTIES

4. Plaintiff Greg Burke is a citizen of Illinois and a resident of Chicago.

5. Mr. Burke is the owner of Schnitzel King, a licensed mobile food vending vehicle that operates on both public and private property in the City of Chicago.

6. Plaintiff Kristin Casper is a citizen of Illinois and a resident of Chicago.

7. Ms. Casper is the Director of Media Relations for Schnitzel King.

8. Plaintiff LMP Services, Inc. is an Illinois-based corporation with its principal place of business in Elmhurst, Illinois.

9. LMP Services, Inc. operates a licensed mobile food vending vehicle named Cupcakes for Courage, which operates on both public and private property within the City of Chicago and elsewhere.

10. LMP Services, Inc. is wholly owned by Laura Pekarik, a citizen of Illinois and a resident of Lombard, Illinois.

11. Defendant City of Chicago is a municipality organized under the laws of the State of Illinois.

FACTS

The Food-Truck Industry in the United States

12. Mobile food vending vehicles (more commonly known as "food trucks") are commercial vehicles that let entrepreneurs travel from place to place in order to sell and serve food to private groups or the public at large.

13. Food trucks take many different forms. Some food trucks, including Plaintiff LMP Services, Inc.'s cupcake truck, only serve food that is prepared and prepackaged in a licensed commercial kitchen. Other food trucks are self-sufficient mobile kitchens that let those working on board prepare and serve fresh food directly from the truck.

14. Historically, the typical clientele for food-truck fare were construction workers. Food trucks that served construction sites typically served coffee, tacos, and sandwiches.

15. The late 2000's saw the rise of the modern "gourmet" food truck. These trucks differ in several ways from their predecessors. Rather than sandwiches and coffee, these newer trucks serve a wide variety of ethnic and high-end fare, including Korean fusion, freshly baked pizzas, and traditional New England lobster rolls.

16. Gourmet food trucks also differ in how they connect with their customers. Using both their websites and social media sites such as Twitter and Facebook, modern trucks can communicate directly with their customers to let them know where the trucks will be serving food.

17. Lastly, modern gourmet food trucks serve a different clientele than traditional trucks. Rather than sit on a construction job site, most modern food trucks serve the general public. This can occur both on the public right of way (for example, by having the truck park in a legal parking space) and on private property (for example, by having the truck park on a private lot with the owner's permission).

18. Food trucks provide a number of benefits for their customers, their employees, and their communities. Being mobile gives food trucks a broader customer base, which allows the trucks to offer more "niche" products than a brick-and-mortar store may offer. And the lower overhead involved with opening a food truck can lead to lower prices for the customer.

19. Food trucks create jobs, not just for those people who work on the truck itself, but for those who build the trucks, equip them, and maintain them.

20. Food trucks also help make streets safer and revitalize moribund areas. Food trucks increase foot traffic by drawing people out of their homes and offices, which in turn reduces the chances of criminal activity. Food truck "rallies" are popular social events that can

attract hundreds, if not thousands, of visitors. Locally, a food-truck rally held in April 2012 on the University of Chicago campus drew over 300 attendees.

21. Food trucks serve as complements to restaurants, with the two working together on joint ventures. Many food-truck entrepreneurs later open restaurants, and vice versa.

Chicago's Small Food-Truck Industry

22. Chicago, when compared to other cities of similar size, has historically had few food trucks. Despite having a population of 2.7 million, Chicago had only 127 food trucks as of July 2012. By way of comparison, Travis County, Texas, which includes Austin, has a population of 1 million and 1,200 mobile food vendors.

23. One reason there historically have been few food trucks in Chicago is the city's laws. Until recently, Chicago was the only major city in the United States to prohibit cooking on board food trucks. Under the old law, food trucks had to serve only prepackaged items and could not take any final step to "finish" an item, such as by putting ketchup on a hot dog.

24. The law in Chicago also limited food trucks' hours of operation. Under the old law, food trucks could only operate for twelve hours a day, between 10:00 am and 10:00 pm.

25. Since 1991, Chicago's food-truck law has prohibited food trucks from operating within a 200-foot distance of any fixed business that sold food for immediate or later consumption.

26. Contemporaneous news reports from 1991 about the introduction of the 200-foot rule reported that its purpose was to protect restaurants from competition from mobile vendors.

Plaintiffs' Food-Truck Businesses

Schnitzel King

27. Greg Burke is the owner and operator of the Schnitzel King food truck.

28. Greg earned a degree in mechanical engineering and worked in the construction trade. He found himself without a job, however, when his company was forced to lay him and all his fellow employees off in response to the collapse of the commercial real-estate market. Greg searched for another job but was unable to find one.

29. Greg, along with most people in Chicago, is a Bears fan. For years, he tailgated at Chicago Bears games, and there he would fry schnitzel (a hand-breaded and fried pork, chicken, or lamb cutlet), put it between two slices of bread, and top it with grilled onions and peppers.

30. Greg served his schnitzel sandwiches to his fellow tailgaters, who told him both that they loved the sandwiches and that Greg should sell them for a living.

31. With no job options, Greg went into business for himself. He pulled together his life savings, bought a vintage 1970s Jeep that he turned into the Schnitzel King food truck, and rented out space in a commercial kitchen.

32. Kristin Casper is Greg Burke's fiancé and the Director of Media Relations for Schnitzel King. After helping get the food truck opened, Kristin planned on helping manage the social media and public relations for Schnitzel King while working her own full-time job. But then Kristin herself was laid off and she joined Greg to work on the food truck full time.

33. Because Chicago prohibited cooking on board a food truck, Greg prepared and cooked Schnitzel King's sandwiches in a commercial kitchen. He then kept the sandwiches in a warmer on the food truck until selling them to consumers.

34. The Schnitzel King food truck operates both on public property and on private property with the owners' permission.

35. As described below, the 200-foot proximity restriction contained in Section 7-38-115(f) of the Municipal Code of Chicago ("City Code") has caused, and continues to cause, injuries to Plaintiffs Casper and Burke.

Cupcakes for Courage

36. Laura Pekarik is the sole shareholder of LMP Services, Inc., a corporation registered in Illinois. LMP Services, Inc., in turn, owns the Cupcakes for Courage food truck.

37. Laura's pathway to being a food-truck entrepreneur had its start in tragedy. When Laura's sister Kathryn was diagnosed with Non-Hodgkin's lymphoma, Laura and her mother both quit their jobs to take care of her. In order to keep Kathryn's mind off of her cancer treatments, Laura and her sister baked, developing many cupcake recipes and perfecting each cupcake's base and icing.

38. Kathryn's cancer thankfully went into remission. Laura originally thought about returning to her previous job, but instead decided that she wanted to go into business for herself.

39. Like many new entrepreneurs, Laura didn't have the money to open a storefront location, so she instead chose to sell cupcakes out of a food truck.

40. Laura, through LMP Services, Inc., opened the Cupcakes for Courage food truck in June 2011. Laura donates ten percent of Cupcakes for Courage's proceeds to the Leukemia & Lymphoma Society and a local non-profit organization called Ride Janie Ride that helps cancer patients with their financial needs.

41. Cupcakes for Courage has been successful enough that, Laura, through LMP Services, Inc., had the resources to open Courageous Bakery, a bakery and coffee shop located in Elmhurst, Illinois, in September 2012. The bakery serves as the home and commercial kitchen for the food truck, which continues to operate throughout all of Chicago.

42. The Cupcakes for Courage food truck operates both on public property and on private property with the owners' permission.

43. As described below, the 200-foot proximity restriction contained in Section 7-38-115(f) of the City Code has caused, and continue to cause, injuries to Plaintiff LMP Services, Inc. and Laura Pekarik.

Chicago's New Food-Truck Ordinance

44. On June 27, 2012, Mayor Rahm Emanuel, along with seven aldermen, introduced Ordinance O2012-4489 ("Ordinance"), entitled "Amendment of Titles 2, 4, 7, 9, 10 and 17 of Municipal Code regarding mobile food vehicles."

45. Section I of the Ordinance (which is codified at Section 4-8-010 of the City Code) created a new category of mobile food vehicle called a "mobile food preparer," defined as "any person who, by traveling from place to place upon the public ways, prepares and serves food from a mobile food truck."

46. Part C of Article II of the Ordinance (which is codified at Section 7-38-134(a) of the City Code) stated that "[a]ny food sold or served by a mobile food preparer shall be prepared or wrapped in the mobile food vehicle or in a duly licensed food establishment."

47. The Ordinance also gave "mobile food dispensers," i.e., those food trucks that "serve[] previously prepared food or drink that is enclosed or wrapped for sale in individual portions," more flexibility. Part B of Article II (which is codified at Section 7-38-130(a)(1) of the City Code) states that food served by mobile food dispensers "may undergo a final preparation step immediately prior to service to a consumer, provided such final preparation steps conform with the rules and regulations of the board of health."

48. The Ordinance's original language repealed the limitation on food trucks' hours of operation so that food trucks could serve their customers whenever they wished. A substitute version of the Ordinance that was introduced on July 19, 2012 amended Section 7-38-115(d) of the City Code to prohibit food trucks from operating between the hours of 2:00 a.m. to 5:00 a.m.

49. The Ordinance also maintained a proximity restriction that since 1991 has restricted how close food trucks may operate to fixed businesses that sell food. Section 7-38-115(f) of the City Code states that "[n]o 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." The Ordinance modified Section 7-38-115(f) to clarify that the 200-foot proximity restriction was not in effect between the hours of midnight and 2:00 a.m.

50. Section 7-38-115(f) of the City Code describes a "restaurant" as "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."

51. The Ordinance added Section 7-38-115(k) to the City Code, which permits food trucks to operate on private property with the owners' written permission. Food trucks operating on private property must abide by the 200-foot proximity restriction except as to any "restaurant" that is on the property from which the truck has permission to vend.

52. The Ordinance modified Section 7-38-115(h) of the City Code, which exempts food trucks that "are being used to provide food and drink to persons engaged in construction in the City of Chicago" from the 200-foot proximity restriction, by noting that those food trucks serving construction crews must be standing or parked in legal parking spots.

53. The Ordinance also dramatically increased the fines imposed on a food truck for violating the 200-foot proximity restriction laid out in Section 7-38-115(f).

54. Previously, Section 7-38-575 of the City Code levied fines of $250.00 to $500.00 upon mobile-food vehicles that violated the 200-foot proximity restriction.

55. The Ordinance quadrupled the fines applicable to trucks that violate Section 7-38-115(f) of the City Code. The Ordinance added Section 7-38-128(d) to the City Code, which now says that "[a]ny person who violates sections 7-38-115 and 7-38-117 of this chapter shall be fined not less than $1,000.00 and not more than $2,000.00 for each offense. Each day that the violation occurs shall be considered a separate and distinct offense."

56. The Ordinance also created Section 7-38-117 in the City Code, which requires the City to establish "mobile food vehicle stands"—designated spaces on the public way where mobile food vehicles may operate without being subject to the 200-foot proximity restriction. No food trucks may operate on a block where a food-truck stand has been established unless they are located at the stand. The Ordinance requires the city to establish at least five (5) mobile food vehicle stands "in each community area . . . that has 300 or more retail food establishments."

57. The same part of the Ordinance that retained the City's 200-foot proximity restriction also added language requiring food trucks to purchase and permanently install a GPS tracking device to aid the City in enforcing that restriction. Section 7-38-115(l) of the City Code now states that "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)."

58. The GPS tracking device will permit both City officials and the general public to monitor the whereabouts of a food truck. The GPS tracking device will also let City officials maintain a record of a food truck's movements that can be later used to prove that the truck violated the City Code's 200-foot proximity restriction.

59. GPS tracking devices are not 100 percent accurate. The common commercial standard of GPS tracking gives the device's exact location plus/minus 9.8 to 16.4 feet 95% of the time, while the other 5% of the time GPS tracking may mistake the exact location of the device

by 32.8 feet or more. The accuracy of GPS tracking devices degrades in downtown urban areas where tall buildings make it more difficult for a device to "lock" onto GPS satellites.

60. Despite this potential for inaccuracy, Section 7-38-115(l) of the City Code states that "[f]or 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."

Chicago Enacts Its New Food-Truck Ordinance

61. On July 19, 2012, the Chicago City Council Committee on License and Consumer Protection held a hearing to discuss the Ordinance.

62. Food-truck operators, including Kristin Casper and Laura Pekarik, testified in opposition to provisions of the Ordinance, including its retention of the 200-foot proximity restriction in the City Code.

63. Members of the Illinois Food Truck Association and Plaintiffs asked that the existing 200-foot proximity restriction located at Section 7-38-115(f) of the City Code be eliminated, arguing that it both unconstitutionally restricted competition and made it virtually impossible for food trucks to succeed.

64. Alderman John Arena of the 45th Ward noted at the committee hearing that under the ordinance, a serious health violation results only in a fine of $250, while a violation of the 200-foot proximity restriction results in a fine that is at least four times as large.

65. After testimony, the members of the Committee on License and Consumer Protection passed the Ordinance out of committee by voice vote, which Alderman John Arena opposed.

66. Six days later, on July 25, 2012, the full Chicago City Council approved the Ordinance by a vote of 45-1.

67. The sole "Nay" vote came from Alderman John Arena, who said, "I think restraint of trade is what this ordinance serves up," and "A brick-and-mortar restaurant lobby got ahold of [the ordinance], and it was stuffed with protectionism and baked in the oven of paranoia."

Chicago Establishes Food-Truck Stands

68. On October 3, 2012, Mayor Rahm Emanuel introduced Ordinance O2012-6638, which was entitled "Designation of mobile food vehicle stands at various addresses." With six community areas in Chicago that have 300 or more restaurants, Section 7-38-117 of the City Code requires that the City establish 30 food-truck stands. Despite that, Ordinance O2012-6638 designated only 23 locations throughout the six community areas.

69. On October 23, 2012, the Committee on License and Consumer Protection passed a substitute ordinance, SO2012-6638, out of committee. This substitute ordinance removed two designated locations, including one at 2934 N. Broadway in the Lakeview community area. A Chicago Tribune article that ran the day after SO2012-6638 passed out of committee indicated that City officials removed the Broadway location in order to block mobile vendors from competing with area restaurants. The full City Council passed the substitute ordinance on October 31, 2012.

70. The substitute ordinance designated only four locations in the Loop community area despite it being the busiest lunchtime area in Chicago. Furthermore, one of the locations is adjacent to Buckingham Fountain, which is a considerable distance from the office buildings where most food-truck customers work, and none of the locations is south of Jackson Boulevard. In Plaintiffs' view, the food-truck stands do little to alleviate the problems caused by the 200-foot proximity restriction.

INJURIES TO PLAINTIFFS

71. The proximity restriction in Section 7-38-115(f) of the City Code prohibits Plaintiffs and other mobile vendors from operating within 200 feet of a fixed location where food and drink is prepared and served for the public, including coffee shops and grocery and convenience stores.

72. Due to the ubiquity of brick-and-mortar businesses that serve food, the proximity restriction located at Section 7-38-115(f) of the City Code prohibits Plaintiffs from vending in large swaths of Chicago, including virtually the entire downtown Chicago area known as "the Loop."

73. Laura Pekarik, owner of Plaintiff LMP Services, Inc., would like to operate the Cupcakes for Courage food truck on public property near the corner of North Franklin Street and West Randolph Street. But she may not legally do so because the principal entrances of several ground-level brick-and-mortar restaurants, including Jimmy Figs (located at 160 North Franklin Street) and Potbelly Sandwich Works (located at 225 West Randolph Street), are located within 200 feet of where she would operate. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Ms. Pekarik would be able to legally operate at this location and would do so.

74. Laura Pekarik would also like to have Cupcakes for Courage operate at the corner of West Madison Street and South Wells Street in the Loop. She cannot legally do so, however, because the principal customer entrances to several brick-and-mortar restaurants, including Jamba Juice (located at 190 West Madison Street) and Dunkin' Donuts (located at 201 West Madison Street) are within 200 feet of where Cupcakes for Courage would vend. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Ms. Pekarik would be able to legally operate at this location and would do so.

75. Plaintiffs Casper and Burke would like to operate the Schnitzel King food truck on public property at various parking spaces at the corner of West Monroe Street and North Dearborn Street. But they may not legally operate at the majority of parking spaces there because the principal customer entrances of several ground-level brick-and-mortar restaurants, including Caribou Coffee (located at 55 West Monroe Street) and The Grillroom Chophouse & Wine Bar (located at 33 West Monroe Street), are located within 200 feet of where they would operate the food truck. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Plaintiffs Casper and Burke would be able to legally operate at those now-prohibited parking spaces and would do so.

76. Plaintiffs Casper and Burke would also like to operate at locations that are outside the Loop but which they are barred from due to the proximity restriction found in Section 7-38-115(f) of the City Code. They, for instance, would like to vend at the intersection of West Addison Street and North Sheffield Avenue near Wrigley Field, but may not legally do so because the principal customer entrances of several ground-level brick-and-mortar restaurants, including Sports Corner Bar & Grill (located at 956 West Addison Street) and Subway (located at 951 West Addison Street), are located within 200 feet of where they would operate the food truck. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Plaintiffs Casper and Burke would be able to legally operate at this location and would do so.

77. Plaintiffs Casper and Burke would like to operate on public property at the corner of West Jackson Boulevard and South Jefferson Street on the Near West Side. They may not legally do so, however, because the principal customer entrance for Lou Mitchell's (located at 565 West Jackson Boulevard) is within 200 feet of where they would operate. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Plaintiffs Casper and Burke would be able to legally operate at this location and would do so.

78. The vending stands that Section 7-38-117 of the City Code calls upon the City to establish do not fix or ameliorate the problems caused by the 200-foot restriction. Plaintiffs Burke, Casper, and LMP Services, Inc. view the stands as inadequate due both to their limited number and to their undesirable placement in the Loop and elsewhere.

79. The proximity restriction contained in Section 7-38-115(f) also applies to mobile food vehicles that operate on private property with the property owner's permission.

80. Laura Pekarik, through Plaintiff LMP Services, Inc., would like to operate from the parking lot of Maria's Packaged Goods & Community Bar, located at 960 West 31st Street, and has gotten permission from Maria's to vend there in the past, but cannot legally do so because the principal entrances of two restaurants, the Bridgeport Coffeehouse (located at 3101 South Morgan Street) and Carlito's Way Pizzeria (located at 964 West 31st Street), are both within 200 feet of where Cupcakes for Courage would be operating. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Ms. Pekarik would be able to legally operate at this location and would do so.

81. Plaintiffs Casper and Burke have reached agreements with private property owners to operate on their property and would do so but for the 200-foot proximity restriction. Plaintiffs Casper and Burke have received consent from Heritage Bicycles, a retailer located at 2951 North Lincoln Avenue, to operate on its private lot. They cannot do so, however, because the principal entrances of two restaurants, Rice Bistro (located at 2964 North Lincoln Avenue) and the Golden Apple diner (located at 2971 North Lincoln Avenue), are both within 200 feet of where Schnitzel King would be operating. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Plaintiffs Casper and Burke would be able to legally operate at this location and would do so.

82. Plaintiffs Casper and Burke also reached an agreement with Fischman's Liquors, located at 4780 North Milwaukee Avenue, to operate on its private lot. They may not legally do so, however, because the principal entrance of Krakus Homemade Sausage, a Polish deli located at 4772 North Milwaukee Avenue, is within 200 feet of where they would operate. But for the 200-foot proximity restriction located in Section 7-38-115(f) of the City Code, Plaintiffs Casper and Burke would be able to legally operate at this location and would do so.

83. Plaintiffs earn their livings from vending. They seek to do nothing more than offer food for sale from their trucks without being hampered by Defendant's 200-foot proximity restriction around restaurants, grocers, and convenience stores.

84. Because Plaintiffs cannot legally operate within 200 feet of brick-and-mortar businesses that serve food, they are limited to vending where that restriction does not apply. Given how many fixed businesses sell food for immediate or later consumption, permissible areas to vend from are difficult to identify. In addition, many of the areas where vending may legally occur are not profitable places to operate a mobile-vending business.

85. Plaintiffs' businesses have suffered due to the proximity restriction contained in Section 7-38-115(f) of the City Code.

86. But for Defendant's enforcement of Section 7-38-115(f), Plaintiffs could and would legally vend within 200 feet of existing restaurants.

87. Plaintiffs Casper and Burke's business is the Schnitzel King food truck. The proximity restriction contained in Section 7-38-115(f) makes it difficult for Plaintiffs Casper and Burke to reach potential customers. Plaintiffs Casper and Burke would like to operate The Schnitzel King at the locations identified in Paragraphs 75-77 and 81-82 of this Complaint. But for the proximity restriction contained in Section 7-38-115(f), Plaintiffs Casper and Burke would operate The Schnitzel King food truck at those locations.

88. Laura Pekarik, through Plaintiff LMP Services, Inc., owns both the Cupcakes for Courage food truck and the Courageous Bakery in Elmhurst, Illinois. The proximity restriction contained in Section 7-38-115(f) makes it difficult for Plaintiff LMP Services, Inc., to reach potential customers. Laura Pekarik, through Plaintiff LMP Services, Inc., would like to operate Cupcakes for Courage at the locations identified in Paragraphs 73-74 and 80 of this Complaint. But for the proximity restriction contained in Section 7-38-115(f), Laura Pekarik, through LMP Services, Inc., would operate the Cupcakes for Courage food truck at those locations.

89. The same section of the City Code ordinance that establishes the 200-foot proximity restriction also requires Plaintiffs to permanently install and operate a GPS tracking device as a means to enforce that restriction.

90. Section 7-38-115(l) of the City Code mandates that the GPS tracking devices stream the whereabouts of their food trucks to both City officials and the general public.

91. The GPS tracking devices allow the City to collect and store indefinitely the movements of each of Plaintiffs' food trucks.

92. Nothing in the Ordinance places any restrictions on when City officials may access or analyze the location data that the GPS tracking devices transmit.

93. Nothing in the Ordinance places any restrictions on how City officials may use the location data that the GPS tracking devices transmit.

94. Nothing in the Ordinance places any restrictions on who will have access to the location data that the GPS tracking devices transmit.

95. Defendant's required GPS tracking device will broadcast the whereabouts of Plaintiff LMP Services, Inc.'s Cupcakes for Courage food truck to the world even when the truck is outside Chicago's city limits.

96. Defendant's required GPS tracking device will broadcast the whereabouts of Plaintiffs Casper and Burke's Schnitzel King food truck to the world when they operate the truck for orders outside Chicago's city limits.

97. Plaintiffs do not wish to pay hundreds of dollars to install a GPS tracking device along with a monthly activation and monitoring fee.

98. Through the arbitrary acts of the Defendant as alleged above, Plaintiffs are injured irreparably by the deprivation of their due process rights to earn an honest living free from arbitrary and irrational government interference as protected by the Illinois Constitution.

99. Through the arbitrary acts of the Defendant as alleged above, Plaintiffs are injured irreparably by the deprivation of their right to be free from unwarranted searches, seizures, inspections and invasions of privacy as protected by the Illinois Constitution.

COUNT I
(Violation of Article I, Section 2 of the Illinois Constitution Due Process)

100. Plaintiffs incorporate Paragraphs 1 through 99 by reference as though fully alleged in this Paragraph 100.

101. Article I, Section 2 of the Illinois Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."

102. The Due Process Clause of the Illinois Constitution protects the right of Illinoisans to pursue legitimate occupations, subject only to regulations that are rationally related to a legitimate government purpose.

103. The proximity restriction contained in Section 7-38-115(f) of the City Code violates Plaintiffs' right to due process of law under the Illinois Constitution both on its face and as-applied to the extent that Chicago law prohibits Plaintiffs from selling food within 200 feet of

any restaurant, grocer, convenience store, or other fixed business that sells food for immediate or later consumption.

104. The sole purpose of the proximity restriction contained in Section 7-38-115(f) of the City Code is to protect fixed businesses from competition by mobile vendors, including Plaintiffs.

105. Protecting non-mobile businesses at the expense of mobile vendors is not a valid exercise of Defendant's police power to protect public health and safety.

106. Unless Defendant City of Chicago is enjoined from committing the above-described constitutional violations of Article I, Section 2, Plaintiffs will continue to suffer great and irreparable harm.

WHEREFORE, Plaintiffs request the following relief:

A. Entry of a declaratory judgment in favor of Plaintiffs and against Defendant providing that Section 7-38-115(f) of the City Code is unconstitutional both on its face and as applied to Plaintiffs, and that, as a consequence, it is void and without effect;

B. Entry of a permanent injunction in favor of Plaintiffs and against Defendant prohibiting Defendant or its officers or agents from enforcing Sections 7-38-115(f) of the City Code;

C. An award of nominal damages in favor of Plaintiffs and against Defendant in the amount of one dollar;

D. An award of Plaintiffs' costs and expenses of this action, together with reasonable attorneys' fees; and

E. Such other and further relief as this Court deems just and proper.

COUNT II
(Violation of Article I, Section 6 of the Illinois Constitution Searches, Seizures, Privacy and Interceptions)

107. Plaintiffs incorporate Paragraphs 1 through 99 by reference as though fully alleged in this Paragraph 107.

108. Article I, Section 6 of the Illinois Constitution provides that "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."

109. Article I, Section 6 of the Illinois Constitution protects Illinoisans from unreasonable searches, seizures, and other technological invasions of their right to privacy.

110. The United States Supreme Court in *United States v. Jones*, 132 S. Ct. 945, 952 (2012), held that monitoring one's movements through the placement of a Global Positioning System tracking device is a "search" for purposes of the Fourth Amendment to the U.S. Constitution.

111. Illinois courts construe the search and seizure provisions in Article I, Section 6 of the Illinois Constitution in a matter consistent with the Fourth Amendment to the U.S. Constitution.

112. Section 7-38-115(l) of the City Code requires Plaintiffs and all other food-truck operators to install and use a GPS tracking device at their own expense.

113. Forcing Plaintiffs to install a GPS tracking device in order to engage in a common occupation constitutes a search under Article I, Section 6 of the Illinois Constitution.

114. The GPS tracking device requirement in Section 7-38-115(l) of the City Code does not serve a legitimate, let alone substantial, government interest, is not necessary to further any legitimate government interest, and does not provide a constitutionally adequate substitute for a warrant.

115. The GPS tracking device requirement in Section 7-38-115(l) exists to enforce the 200-foot proximity restriction in that same section.

116. Nothing in the Ordinance places any restrictions on when City officials may access or analyze the location data that the GPS tracking devices transmit.

117. Nothing in the Ordinance limits City officials' ability to access the location data that the GPS tracking devices transmit to only certain purposes.

118. Nothing in the Ordinance places any restrictions on how City officials may use the location data that the GPS tracking devices transmit.

119. Nothing in the Ordinance places any restrictions on the people who will have access to the location data that the GPS tracking devices transmit.

WHEREFORE, Plaintiffs request the following relief:

A. A declaratory judgment in favor of Plaintiffs and against Defendant providing that Section 7-38-115(l) of the City Code is unconstitutional both on its face and as applied to Plaintiffs, and that, as a consequence, it is void and without effect;

B. A permanent injunction in favor of Plaintiffs and against Defendant prohibiting Defendant or its officers or agents from enforcing Section 7-38-115(l) of the City Code;

C. An award of nominal damages in favor of Plaintiffs and against Defendant in the amount of one dollar;

D. An award of Plaintiffs' costs and expenses of this action, together with reasonable attorneys' fees; and

E. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

GREG BURKE, KRISTIN CASPER,
and LMP SERVICES, INC.

By: _____
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Attorneys for Plaintiffs

Dated: November 14, 2012

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GREG BURKE, KRISTIN CASPER and LMP SERVICES, INC.,	)	
Plaintiff,	)	
v.	)	No. 12 CH 41235
THE CITY OF CHICAGO, a Municipal Corporation,	)	Judge Peter Flynn
Defendant.	)	

DEFENDANT'S SECTION 2-615 MOTION TO DISMISS THE COMPLAINT

Defendant City of Chicago ("City"), by and through its counsel, Stephen R. Patton, Corporation Counsel of the City of Chicago, hereby moves pursuant to 735 ILCS 5/2-615 to dismiss Plaintiff's Complaint for Declaratory Judgment and Injunctive Relief. In support of this Motion, Defendant states as follows:

1. "[A] section 2-615 motion to dismiss challenges only the legal sufficiency of a complaint and alleges only defects on the face of the complaint." *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill.2d 419, 423 (1999). The critical inquiry is whether "the allegations of the complaint, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." *Id.* at 424. "A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief." *Id.* However, "legal conclusions and factual conclusions which are unsupported by allegations of specific facts will be disregarded in ruling on a motion to dismiss." *LaSalle National Bank v. City Suites, Inc.*,

325 Ill.App.3d 780, 790 (1st Dist. 2001).

2. Plaintiffs own or operate licensed mobile food vending vehicles ("food trucks") in Chicago. Compl. ¶¶ 4-10, 12. Food trucks travel from place to place and sell food to the public or to private groups. *Id.* ¶ 12. Plaintiffs' food trucks operate on both the public way and on private property with the owners' permission. *Id.* ¶¶ 17, 34, 42. Plaintiffs' Complaint contains two counts and challenges two provisions of the Municipal Code of Chicago ("MCC") governing food trucks.

3. Count I challenges MCC 7-38-115(f), which states that "[n]o 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." "Restaurant" is defined as "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." *Id.* Count I asserts that MCC 7-38-115(f) violates the due process clause in Article I, section 2 of the Illinois constitution.

4. Count I should be dismissed, for two reasons. First, Plaintiffs' operation of food trucks in Chicago is not a property interest that is protected by the due process clause. Second, even if it is, MCC 7-38-115(f) is a valid public welfare regulation under the City's police power and passes rational basis review.

5. Count II challenges MCC 7-38-115(l), which states that each food truck "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)." Count II alleges that this requirement amounts to a search under Article I, section 6 of the Illinois constitution, and that the search is unlawful because it lacks a warrant.

6. Count II should be dismissed, for two reasons. First, the location of food trucks is not private information, and its transmission therefore does not amount to a "search." Second, even if a "search" occurs, no warrant is required in this instance because food trucks are a closely-regulated enterprise, and because Plaintiffs consent to the device as a condition of doing business.

7. Concurrently with this motion, Defendant is filing a Memorandum in Support that more-fully discusses these grounds for dismissal.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

STEVEN R. PATTON
CORPORATION COUNSEL
CITY OF CHICAGO

January 30, 2013

BY: _____
One of Its Attorneys

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GREG BURKE, KRISTIN CASPER and LMP SERVICES, INC., Plaintiff,	)	
v.	)	No. 12 CH 41235
THE CITY OF CHICAGO, a Municipal Corporation, Defendant.	)	Judge Peter Flynn

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

There are few, if any, realms of regulation over which cities have traditionally held more sway than the sale of food and the use of vehicles in public. Yet Plaintiffs claim that when the City modestly regulates food trucks – an industry at the center of not one but both of these domains – it violates the constitution. Their claims fail. Plaintiffs challenge, as a deprivation of property in violation of due process, a requirement that food trucks operate at least 200 feet from a restaurant entrance. But Plaintiffs do not have a protected property right to use public streets for private profit and, even if they do, the 200 feet requirement satisfies due process because it is a rational effort by the City to protect public safety and welfare. Plaintiffs also challenge, as an illegal warrantless search, a requirement that food trucks install a global positioning system device that can transmit their location. This is no "search" under the constitution, as a food truck's location is not private information. Indeed, trucks themselves actively broadcast their location to the public. And even if there is a search, a warrant is not required here because food trucks are a closely-regulated enterprise, and because Plaintiffs consent to the device as a condition of doing business.

ARGUMENT

I. Requiring Food Trucks To Operate 200 Feet From A Restaurant Entrance Does Not Violate Substantive Due Process.

Section 7-38-115(f) of the Municipal Code of Chicago ("MCC") states that "[n]o 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." Compl. ¶ 49.[1] Count I

[1] "Restaurant" is defined as "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

asserts that this "200 Feet Rule" violates the due process clause (Art. I, § 2) of the Illinois constitution. This is a substantive, rather that procedural, due process claim: Plaintiffs do not quarrel with the City's licensing procedures, but instead contend that the 200 Feet Rule is not a valid exercise of the City's police power to protect public health and welfare. *See* Compl. ¶¶ 104-105; *People v. R.G.*, 131 Ill.2d 328, 342 (1989) (discussing difference between substantive and procedural due process). This claim fails, for two reasons. First, operating food trucks at all, much less within 200 feet of a restaurant, is not a property interest protected by the due process clause. Second, even if it is, the 200 Feet Rule is a valid exercise of the City's police power.

A. Substantive due process does not protect operating food trucks.

In any due process analysis, "one must first ascertain that a protected interest has been interfered with by the state." *Big Sky Excavating, Inc. v. Illinois Bell Tel. Co.*, 217 Ill.2d 221, 241 (2005). *See also Groenings v. City of St. Charles*, 215 Ill.App.3d 295, 307 (2nd Dist. 1991) (plaintiff "must first establish" liberty or property interest). A property interest is protected only if a plaintiff has a "legitimate claim of entitlement" to it. *Petersen v. Chicago Plan Commission*, 302 Ill.App.3d 461, 467 (1st Dist. 1998) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). *See also Big Sky*, 217 Ill.2d at 242. A "legitimate claim of entitlement" may "arise from statute, regulation, municipal ordinance, or express or implied contract." *Akmakjian v. Department of Prof. Reg.*, 287 Ill.App.3d 894, 896 (1st Dist. 1997). An "abstract need or desire" or a "unilateral expectation" is not enough. *Petersen*, 302 Ill.App.3d at 467.

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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." MCC 7-38-115(f).

Plaintiffs have no legitimate claim of entitlement in this case because they have "'no property right in the use of any of the streets of Chicago for the location and maintenance of [their food truck] business.'" *Good Humor Corp. v. Village of Mundelein*, 33 Ill.2d 252, 259 (1965) (quoting *City of Chicago v. Rhine*, 363 Ill. 619, 625 (1936)). *See also City of Decatur v. Chasteen*, 19 Ill.2d 204, 211 (1960) (Supreme Court "ha[s] repeatedly held that no one has any inherent right to use the streets or highways for business purposes"). In *Good Humor Corp.*, the Court upheld an ordinance that banned any selling of food on the public way. Even though the plaintiff had been selling ice cream on the street for 15 years and claimed that its business was "dependent" on being able to do so, the plaintiff's "assumed property right" in using Mundelein streets to operate a ice cream truck was "nonexistent." 33 Ill.2d at 254, 255, 259. And in *Triple A Services, Inc. v. Rice*, 131 Ill.2d 217 (1989), the Court upheld a Chicago ordinance banning food trucks from an entire area of the City (the Illinois Medical Center District west of the Loop). Citing *Good Humor Corp.* and *City of Decatur*, the Court remarked that while the plaintiffs could use Chicago streets because Chicago had granted them a license, they "ha[d] no due process right against the city's subsequent regulation of those streets in the valid exercise of the city's police power." *Id.* at 237.

There is no property right to operate food trucks because the City has the power to completely "prohibit" use of its streets "for private gain." *Triple A Services*, 131 Ill.2d at 229. "Where one seeks a special or extraordinary use of the streets or public highways for his private gain, as by the operation of a . . . truck . . . the state may regulate such use of the vehicle thereon or may even prohibit such use." *City of Decatur*, 19 Ill.2d at 211. *See also Rhine*, 363 Ill. at 622 (Chicago has the power to "suppress" sales on its streets). The "power to regulate and prohibit in

such cases" is "beyond question." *City of Decatur*, 19 Ill.2d at 211. Any allowance given to food trucks to use Chicago streets for profit is "solely a permissive one." *Rhine*, 363 Ill. at 624.

Accordingly, because Plaintiffs lack a legitimate claim of entitlement to operate a business on City streets, their due process claim fails at the outset. *See also Diaz v. City of Scranton Dep't of Licensing, Inspection, and Permits*, 2012 U.S. Dist LEXIS 116952, at *11-12 (M.D. Pa. 2012) (dismissing food cart's due process challenge to requirement that street vendors be at least 100 feet from entrance of neighboring business for lack of protected property interest).

B. The 200 Feet Rule is a rational exercise of the City's police power.

Even if Plaintiffs had a protected property interest in operating food trucks, their due process claim would still fail because the 200 Feet Rule is a valid regulation. The Rule, like all statutes, "carr[ies] a strong presumption of constitutionality." *Segers v. Industrial Comm'n*, 191 Ill.2d 421, 432 (2000). Plaintiffs "bear[] the burden of rebutting this presumption," and they must "clearly establish[] a constitutional violation." *Id.* at 432-33. This burden is "onerous." *Serpico v. Village of Elmwood Park*, 344 Ill.App.3d 203, 215 (1st Dist. 2003) (citation omitted).

As a regulation of the "socio-economic sphere," the 200 Feet Rule is reviewed under the rational basis test. *Triple A Services*, 131 Ill.2d at 226. Plaintiffs concede this. *See* Compl. ¶ 102. The test is a "low hurdle," *Reed v. Farmers Ins. Group*, 188 Ill.2d 168, 176 (1999), and is the "lowest level of scrutiny." *Serpico*, 344 Ill.App.3d at 214. Under the test, a regulation survives so long as it is "rationally related to a legitimate governmental purpose." *Triple A Services*, 131 Ill.2d at 226. The statute "need not be the best means" of accomplishing the City's objectives, and whether the statute "is wise" is a matter "left to the legislature, not the courts." *People ex rel. Lumpkin v. Cassidy*, 184 Ill.2d 117, 124 (1998). *See also Triple A Services*, 131

Ill.2d at 234 (court is not to sit as a "superlegislature" and judge "the wisdom or desirability" of the City's regulation of the "local economic sphere"). Further, the judgments made by the City "are not subject to courtroom fact finding" and "may be based on rational speculation unsupported by evidence or empirical data." *Lumpkin*, 184 Ill.2d at 124. Legislation is problematic only if its is "palpably arbitrary." *Haynes v. City of Chicago*, 265 Ill.App.3d 396, 399 (1st Dist. 1994).

Selling food from a truck traveling about the City can harm the public welfare in many ways, and the 200 Feet Rule is a rational effort to address them.[2] For one, food trucks attract lines of customers. *See* Compl. ¶ 18 (food trucks have a "broader customer base" than restaurants); *id.* ¶ 20 (food trucks "increase foot traffic"); *id.* (food truck "rallies" can attract "hundreds, if not thousands" of visitors). It stands to reason that these crowds can obstruct sidewalks and walkways, and if too close to the entrance of a restaurant, impede access to the restaurant by the restaurant's own customers. This problem can be compounded when customers of the restaurants themselves spill into these areas, as when they are waiting in line or for a table. The 200 Feet Rule thus furthers public safety by creating a buffer between food trucks and restaurants that helps keep the pedestrian areas around both free of obstructions.

Further, by definition, food truck customers cannot eat their food inside the vendor's establishment. Food trucks therefore present a unique risk that their customers' litter or trash

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[2] Many other cities recognize the benefits of spacing public-way food vendors from restaurants and have passed laws similar to the 200 Feet Rule. *See* Denver Zoning Code § 11.11.14.1(F) (200 feet); New Orleans Code of Ordinances § 110-190(b) (600 feet); Pittsburgh Code of Ordinances § 719.05A(b) (500 feet); Portland Code and City Charter § 17.26.050(I) (100 feet); San Antonio Code of Ordinances § 13-63(10) (300 feet). These laws are attached hereto as Exhibit A.

will not be thrown away properly, but will end up (intentionally or inadvertently) on the ground. The 200 Feet Rule helps ensure that this trash will not collect outside the entrances of restaurants and compromise their aesthetic curb appeal or be misattributed to the restaurants.

Additionally, the Rule advances the City's objective in seeing retail food options become more widely available in under-served areas of the City. Many Chicago communities lack a bevy of restaurants; some are even commonly referred to as "food deserts." The Rule helps alleviate this problem by providing an incentive for food trucks to operate in these neighborhoods. *See* Compl. ¶ 20 (food trucks "help make streets safer and revitalize moribund areas").

Against this backdrop, *Triple A Services* disposes of Plaintiffs' claim. That case involved a location regulation more restrictive than the 200 Feet Rule – it completely banned food trucks in an entire area of the City. Nonetheless, the Supreme Court upheld the regulation. In doing so, it held that "prevent[ing] pedestrian and vehicular congestion," "ameliorat[ing] or prevent[ing] sanitation problems" from food litter around existing enterprises, and "enhanc[ing] the professional appearance and ambience" of the area – in short, "promot[ing] optimum safe conditions and a professional atmosphere" – "are all legitimate governmental objectives" that rationally justified the ban. 131 Ill.2d at 228, 233, 234. "The fit between the means and the end to be achieved" did not need to "be perfect," and rational distinctions could be made "with substantially less than mathematical exactitude." *Id.* at 228-29. *See also id.* at 232.

Triple A Services accords with other decisions affording substantial deference to local regulation of street vending and sustaining restrictions similar to the 200 Feet Rule. *Vaden v. Village of Maywood*, 809 F.2d 361 (7th Cir. 1987) upheld a requirement that mobile food dispensers operating in residential areas move at least one block every 10 minutes. Just as the

200 Feet Rule helps reduce congestion around restaurants, the 10-minute requirement was a "rational means" of "preventing children from creating a disturbance by congregating in front of one residence." *Id.* at 365. And in upholding District of Columbia restrictions on where street vendors could operate, *Service Employees Int'l Union, Local 82 v. District of Columbia*, 608 F.Supp. 1434 (D.D.C. 1985), concluded that "[l]ocational restrictions will undoubtedly lead to less congestion on the city's sidewalks." *Id.* at 1442.

Plaintiffs advance only one ground for finding the 200 Feet Rule invalid – that its "sole" purpose is allegedly "to protect fixed businesses from competition by mobile vendors." Compl. ¶¶ 104-05. Putting to the side that Plaintiffs fail to support this allegation with specific facts, the allegation – even if true – is irrelevant, for two reasons. First, that alleged purpose is not improper. A major rationale for the ban on food trucks in the Medical Center District in *Triple A Services* was to "facilitate the growth and development of a major medical center in Chicago." 131 Ill.2d at 228. Not only was it legitimate for the City to pursue this goal, but, in doing so, it could "validly" seek to "preserve and enhance" the "facilities already in operation" in the District by banning food trucks there. *Id.* Similarly, in upholding a New Orleans prohibition on food carts in the French Quarter, the U.S. Supreme Court was not troubled by the lower court's conclusion that the law created "a protected monopoly." *City of New Orleans v. Dukes*, 427 U.S. 297, 300 (1976). The Court found that the city could make the "reasoned judgment" that street vendors "might" have "a deleterious effect on the economy of the city" and "interfere with the charm and beauty of a historic area and disturb tourists." *Id.* at 304-05. Accordingly, it was valid for the city to aim to "preserve the appearance and custom valued by the Quarter's residents and attractive to tourists" by banning food carts. *Id.* at 304. *See also Coniston Corp. v. Village of*

Hoffman Estates, 844 F.2d 461, 467 (7th Cir. 1988) (a "desire to protect existing owners of office buildings from new competition" or "the fact that town officials are motivated by parochial views of local interests which work against plaintiffs' plan . . . does not state a claim of substantive due process").

Second, and more important, even if so-called economic protectionism cannot support the Rule, under rational basis review, the Rule can be sustained based on other reasons, "even if the reasoning advanced did not motivate the legislative action." *Lumpkin*, 184 Ill.2d at 124. "If there is any conceivable basis for finding a rational relationship, the law will be upheld." *Id.* *See also McLean v. Department of Rev. of the State of Illinois*, 184 Ill.2d 341, 355 (1998) ("As a rule . . . if any set of facts can reasonably be conceived to justify the [statute], it must be upheld."); *Triple A Services*, 131 Ill.2d at 227 (statute falls only if "there is no permissible interpretation which justifies its adoption"). As set forth above, the Rule can rationally be viewed as promoting the City's legitimate interests in reducing pedestrian congestion and litter around restaurants, and in bringing new food options to underserved areas. It therefore satisfies due process.

II. The GPS Requirement Does Not Constitute An Illegal Warrantless Search.

MCC section 7-38-115(l) states that each food truck "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)." Compl. ¶ 57. Count II alleges that this GPS Requirement amounts to a search under Article I, section 6 of the Illinois constitution, and that the search is unlawful because it lacks a warrant. Compl. ¶¶ 113-14. This claim fails. The GPS Requirement does not cause a search, and, even if it does, it is still lawful because no warrant is required in this instance.

A. The transmission of a food truck's location is not a "search."

A "search" implicating the constitution occurs when government infringes "a subjective expectation of privacy" that "society [is] willing to recognize . . . as reasonable." *California v. Ciraolo*, 476 U.S. 207, 213 (1986). *See also People v. Carodine*, 374 Ill.App.3d 16, 22 (1st Dist. 2007).[3] This test derives from *Katz v. United States*, 389 U.S. 347 (1967). *See Smith v. Maryland*, 442 U.S. 735, 740 (1979).

The GPS Requirement does not invade even a subjective expectation of privacy, much less an expectation that society regards as reasonable. The GPS device does not transmit any information about what is in the truck or what the operator is saying or doing. It simply conveys the truck's location. *See* Compl. ¶ 58 (GPS device allows tracking of trucks' "whereabouts"); *id.* ¶¶ 116 (device transmits "location data"); MCC 7-38-115(l) (device provides information about "places and times" at which food trucks are located).

Plaintiffs have no subjective expectation of privacy in this information. They do not allege that their trucks' location is private, and, in fact, they themselves voluntarily broadcast it to customers. Indeed, their very business survival depends on people knowing where the trucks are and where they are going. *See* Compl. ¶ 83 ("Plaintiffs earn their livings from vending."); ¶ 16 ("Using both their websites and social media sites such as Twitter and Facebook, modern trucks can communicate directly with their customers to let them know where the trucks will be serving food."); ¶ 20 ("Food truck 'rallies' are popular social events that can attract hundreds, if not

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[3] Article I, section 6's protection against unreasonable searches is measured using the same standards employed under the Fourth Amendment to the United States constitution. *See People v. Caballes*, 221 Ill.2d 282, 314-17 (2006); *People v. Harris*, 2011 IL App (1st) 103382, ¶ 10.

thousands, of visitors."). *See also Katz*, 389 U.S. at 351-52 ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.")

Morever, even if Plaintiffs subjectively felt their location information to be private, that information is not private under the reasonable expectations of society. "A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *United States v. Knotts*, 460 U.S. 276, 281 (1983). This is because "[a] car has little capacity for escaping public scrutiny," and a person driving in public "voluntarily convey[s] to anyone who want[s] to look the fact that he [is] travelling over particular roads in a particular direction" and the "fact of whatever stops he made." *Id.* at 281-82. *See also Lakeland Enterprises of Rhinelander, Inc. v. Chao*, 402 F.3d 739, 745 (7th Cir. 2005) ("no reasonable expectation of privacy in an open trench dug on a public roadway"). This is true also for privately-owned spaces like parking lots, since they are freely-accessible by the public and open to public view. *See Ciraolo*, 476 U.S. at 213-214 (no search where plants in private backyard could be seen by "[a]ny member of the public flying in [public] airspace who glanced down"); *Carodine*, 374 Ill.App.3d at 24 (no search where officer enters common area of private building that is accessible by the public).

Based on these principles, *Knotts* held that tracking a private vehicle's location via an electronic beeper attached to the vehicle is not a "search," 460 U.S. at 285, and the same conclusion follows here. *See also Alexandre v. New York City Taxi and Limousine Comm'n*, 2007 U.S. Dist. LEXIS, at *32 (S.D.N.Y. 2007) (GPS requirement for taxis likely does not invade a "legitimate expectation of privacy" and hence does not constitute a "search"). Indeed, the scope of information transmitted here is even narrower than in *Knotts*. The device in *Knotts*

transmitted the target's location when he was using the car for private purposes. *See* 460 U.S. at 278. But regulations implementing the GPS Requirement make clear that the GPS device need be turned on only when the truck is "in operation" as a mobile food vehicle. *Mobile Food Vehicles, Rules and Regulations*, Chicago Board of Health ("MFV Regulations"), Rule 8.A.4 (attached hereto as Exhibit B). Trucks are not required to broadcast their location if being used for personal reasons.

Plaintiffs cite *United States v. Jones*, 132 S.Ct. 945 (2012) as holding that GPS monitoring of one's location constitutes a "search." Compl. ¶ 110. But *Jones* is inapposite. *Jones* established that a "search" can result not only from invading a reasonable expectation of privacy, but also from committing a common-law trespass. *See* 135 S.Ct. at 952 ("the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test) (emphasis in original). And the Court found a search occurred in that case because the government had trespassed: It attached a GPS device to a private jeep without the criminal target's knowledge. *See id.* at 948. This was a "search," not because the GPS invaded the target's privacy or collected private information, but because the government "physically occupied private property" – *i.e.*, trespassed – through the act of placing the GPS on the jeep. *Id.* at 949-50.

Here there is no trespass. The City does not physically occupy Plaintiffs' property. It is the food truck that is responsible for installing the device. *See* MCC 7-38-115(l) (each truck "shall be equipped" with GPS). Further, a trespass does not occur when the owner consents to the intrusion. *See* Restatement (Second) of Torts §§ 252, 329. By choosing to operate in the food truck industry, Plaintiffs consent to a GPS as a condition of doing business. Plaintiffs are

"free to reject the advantages afforded" by food truck licenses, "together with the corresponding requirements." *Grigoleit, Inc. v. Board of Trustees of the Sanitary Dist. of Decatur*, 233 Ill.App.3d 606, 613-14 (4th Dist. 1992). But they "may not accept the privileges afforded by the license while simultaneously raising the fourth amendment as a bar to enforcement of the very conditions upon which extension of the license is predicated." *Id.* at 613.

Since there is no trespass, this case is to be analyzed (as *Jones* makes clear) under the *Katz* reasonable expectation of privacy test. *See Jones*, 132 S.Ct at 953 (cases "involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis") (emphasis in original). *Jones* did not purport to address whether a GPS device is a search under that test. *See id.* at 954 ("the present case does not require us to answer" whether GPS device, "without an accompanying trespass, is an unconstitutional invasion of privacy"). The foregoing analysis shows that it is not.

B. Even if the GPS Requirement is a search, no warrant is required here.

The touchstone of a valid search is "reasonableness," and a search lacking a warrant is valid if it is reasonable under the circumstances. *Illinois v. McArthur*, 531 U.S. 326, 330 (2001). Factors taken into account include "special law enforcement needs, diminished expectations of privacy, [and] minimal intrusions." *Id.* No warrant is required under the circumstances of this case, for two reasons.

First, "consent has long been an exception to the need for a search warrant." *People v. Absher*, 242 Ill.2d 77, 83 (2011). As discussed above, Plaintiffs consent to the GPS Requirement in choosing to operate food trucks. *See also Daley v. Berzanskis*, 47 Ill.2d 395, 399 (1971) ("there is no constitutional objection to requiring consent to a warrantless search as a prerequisite

to the issuance of a liquor license"); *Marcowitz v. Department of Pub. Health*, 106 Ill.App.3d 422, 427 (1st Dist. 1982) ("The businessman in a regulated industry in effect consents to the restrictions placed upon him.").

Second, food trucks fall within the "closely regulated business" exception to the warrant requirement. *See New York v. Burger*, 482 U.S. 691 (1987). This exception recognizes that an operator in a highly-regulated industry "has a reduced expectation of privacy." *Id.* at 702. This is because some businesses "have such a history of government oversight," and because one electing to enter a regulated industry "does so with the knowledge that his business records [and stock] will be subjected to effective inspection." *Id.* at 700-01. *See also People v. Electronic Plating Co.*, 291 Ill.App.3d 328, 333 (1st Dist. 1997). As a result, the warrant requirements has "lessened application" to these industries. *Burger*, 482 U.S. at 702.

Food trucks are a closely-regulated enterprise. They are part of the food industry, which "is a quintessential example of an industry that is closely regulated." *Players, Inc. v. City of New York*, 371 F. Supp.2d 522, 537 (S.D.N.Y. 2005). Chicago's regulation of that industry "is pervasive." *Contreras v. City of Chicago*, 920 F. Supp. 1370, 1389 (N.D. Ill. 1996), *aff'd in rel. part*, 119 F.3d 1286 (7th Cir. 1997).[4] And, separate from their status as restaurants, food trucks are also automobiles, objects which themselves "are subjected to pervasive and continuing governmental regulation and controls." *California v. Carney*, 471 U.S. 386, 392 (1985).

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[4] Chicago requires food truck operators to obtain a license and follow regulations governing, among other things, the kinds of people who can work in the truck; how the truck is constructed; the kinds of utensils, refrigeration, heating, sanitation, and cooking equipment it can use; the kinds of food that can be sold; the manner in which the food can be prepared, stored, and sold; how refuse shall be disposed of; how propane or natural gas tanks in the truck can be stored and used; where the truck can park; and the times of day it can operate. *See* MCC Chapter 4-8; 7-38-075 – 140; MFV Regulations.

Accordingly, a warrantless "search" of Plaintiffs' trucks is valid if three criteria are met: (1) a substantial government interest informs the regulatory scheme under which the search is made; (2) the search is necessary to further the regulatory scheme; and (3) the regulatory scheme satisfies the two basic functions of a warrant – it advises the owner that the search is being made pursuant to law and has a properly defined scope, and it limits the discretion of the inspecting officers. *See Burger*, 482 U.S. at 702-03. The GPS Requirement satisfies each of these.

1. Chicago's regulation of the food industry is motivated by "[t]he safety of the food provided in Chicago," which "is an obvious 'substantial government interest.'" *Contreras*, 119 F.3d at 1290. *See also Contreras*, 920 F. Supp. at 1389. And, as to food trucks in particular, Chicago also has a substantial interest in reducing congestion, litter, and aesthetic harm on and near City streets. *See supra*, at pp. 5-7.

2. The GPS Requirement is necessary to further these interests. The food industry can significantly impact public health, and the City has a fundamental interest in knowing where mobile food vendors are, just like the City knows the locations of "brick and mortar" restaurants. Should a food truck sell food that causes illness, the location data transmitted by the GPS will help the City identify where the truck is or has been. That information would then allow the City to locate and inspect the offending truck as soon as possible, and, by publicizing the truck's location history, try to alert customers who ate from the truck at the relevant times and places. Further, should someone complain that a truck was operating in an illegal area, the data will help the City, as well as the truck, resolve the dispute. A GPS device is the only feasible way to serve these interests and identify the locations of hundreds of ever-moving food trucks. *See Carney*, 471 U.S. at 391 ("The mobility of automobiles . . . creates circumstances of such exigency that,

as a practical necessity, rigorous enforcement of the warrant requirement is impossible.").

3. The GPS Requirement is an adequate substitute for a warrant. The transmissions are made pursuant to law (*i.e.* ordinance and regulation) that precisely defines the scope of the transmissions: The device must "function at all times when the mobile food vehicle is in operation" and broadcast the location "no less frequent than once every five (5) minutes." MFV Regulations Rule 8.A.3-8.A.4. The GPS Requirement thus provides the "certainty and regularity" of application such that Plaintiffs "cannot help but be aware" that their trucks' location will be transmitted. *Burger*, 482 U.S. at 703. And rather than merely limit discretion, the Requirement eliminates it completely. The Requirement calls for nothing more than the automated transmission of GPS coordinates by a piece of equipment. There is no human intervention or subjectivity involved.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court dismiss Plaintiffs' Complaint in its entirety.

Respectfully submitted,

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