No. 123123

In the Supreme Court of Illinois

LMP SERVICES, INC.,

Plaintiff-Appellant,

v.

THE CITY OF CHICAGO,

Defendant-Appellee.

On Appeal from the Appellate Court of Illinois
First Judicial District, No. 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

REPLY BRIEF OF PLAINTIFF-APPELLANT LMP SERVICES, INC.

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POINTS AND AUTHORITIES

ARGUMENT

I. The 200-Foot Rule Violates the Illinois Constitution.

The City admits the 200-foot rule's purpose is to suppress competition. *See, e.g.*, Br. Def.-Appellee ("Resp.") 5, 22 (quoting press release in which Mayor states the rule was designed to "protect[] traditional restaurants," and defending rule by stating that "[i]t is . . . rational to regulate food trucks in a manner that addresses restaurant owners' concerns about 'unfair competition.'"). But laws that restrict competition to benefit preferred interest groups are illegitimate. Br. Pl.-Appellant LMP Servs., Inc. ("Br.") 12–18. In response, the City argues it may favor one business over another so long as its protectionism might incidentally benefit the public. Resp. 21–31. It states that, by contrast, all the Illinois cases striking down anti-competitive laws conferred only private benefits. Resp. 31–35. Alternatively, it argues that even if protectionism is illegitimate, the rule survives under its post-hoc rationalizations of pedestrian congestion and spreading retail food options. Resp. 35–43. These arguments are wrong.

A. This Court Should Reject Chicago's Argument That the City May Suppress Competition if It Might Incidentally Benefit the Public.

In its opening brief, LMP demonstrated how courts have rejected laws that enrich one group by burdening another. Br. 12–30. This bar on using

public power for private gain is uniform and appears in cases about zoning, occupational licenses, and restrictions like the 200-foot rule.

The City disagrees, stating that this Court and others regularly uphold blatantly discriminatory laws. Resp. 25–31. Joining forces with the Illinois Restaurant Association, the rule's private beneficiary, the City claims its discrimination is publicly minded because the public may benefit in some "trickle down" sense.[1] And both say this Court must accept that claim, no matter how fantastic it seems.

The City is wrong. As LMP explains in Section 1, courts reject the idea that economic byproducts may justify blatantly protectionist restrictions. And in Section 2, LMP demonstrates that, even if such byproducts could theoretically justify protectionism, the City's wild suppositions are not reasonably conceivable.

Illinoisans' rights rest on firmer stuff. Accordingly, this Court should strike down the 200-foot rule.

1. Numerous Decisions Reject the City's Protectionism Argument.

Illinois courts have repeatedly rejected the idea that governments may suppress one business to help another. As LMP's opening brief showed, this principle permeates all discussions concerning the police power. Br. 14–17.

Chicago Title & Trust v. Village of Lombard, 19 Ill. 2d 98 (1960), shows this Court's approach. After this Court rejected Lombard's pretextual

[1] *But see infra*, pages 8–9.

justifications for its 650-foot rule between filling stations, it recognized that the rule's purpose was to protect existing stations from competition. Rejecting that purpose, this Court held there was no "rational basis for the restriction" and struck it down. *Id*. at 107.

The City raises several attacks on *Chicago Title & Trust*, arguing, for instance, that the 1970 Constitution's introduction of home-rule authority means the case carries no constitutional weight, Resp. 32–33, and that it should be ignored because it involved private property, Resp. 34. LMP's opening brief addressed both points, explaining that the same constitutional standard applies to both municipal ordinances and state laws, Br. 18–20 (discussing *City of Carbondale v. Brewster*, 78 Ill. 2d 111, 115 (1979)), and that laws lacking a rational basis, even those concerning the right of way, are invalid, Br. 20–23 (discussing *City of Evanston v. City of Chicago*, 279 Ill. App. 3d 255 (1st Dist. 1996)). The City offers no response to these points.

Instead, the City argues protectionism is permissible if it thinks the beneficiary is "important" to Chicago's economy. Resp. 25–31. This power would diminish the "well-established constitutional principle that every citizen has the right to pursue a trade, occupation, business or profession." *Coldwell Banker Residential Real Estate Servs. of Ill., Inc. v. Clayton*, 105 Ill. 2d 389, 397 (1985). Moreover, *all* industries contribute to the local economy and have competitors they might want to suppress. Department stores, for instance, compete with smaller retailers. Full-service restaurants compete

with take-out stores. And movie theaters compete with online streaming services. Under Chicago's reasoning, it could label any of that competition "unfair," state its preferred industry is "important" to the economy, and hobble that industry's competitors.

In any event, Illinois courts have implicitly rejected this argument. In *Lazarus v. Village of Northbrook*, 31 Ill. 2d 146 (1964), for instance, the incumbent hospital surely made "important" contributions to Northbrook's economy. The same is true of the concrete company in *Suburban Ready-Mix Corp. v. Village of Wheeling*, 25 Ill. 2d 548, 550 (1962), the restaurants in *Cosmopolitan National Bank v. Village of Niles*, 118 Ill. App. 3d 87 (1st Dist. 1983), and the stations in *Chicago Title & Trust*. But, in each case, Illinois courts rejected the government's attempt to "legislate economic protection for existing businesses." *Exch. Nat'l Bank of Chi. v. Vill. of Skokie*, 86 Ill. App. 2d 12, 21 (1st Dist. 1967).

The City's cases do not suggest that it may burden LMP to protect restaurants. Instead, they demonstrate that Illinois courts uphold laws that further broad public interests. To be sure, in some cases there are incidental competitive effects, but courts upheld those laws *despite* those effects, not because of them.

Look at *Triple A Services v. Rice*, 131 Ill. 2d 217 (1989), the City's chief case, which prohibited food trucks in Chicago's Medical District, an area dedicated to "providing medical care for the sick and injured," *id*. at 232. By

contrast, the 200-foot rule prohibits trucks by reference *to their competitors' location*. Moreover, in *Triple A Services*, the City argued its restriction enhanced the District's appearance, reduced congestion, and prevented sanitation problems. *Id*. at 228. It didn't argue it could ban trucks to improve restaurants' bottom lines. In fact, the word "competition" never appears in this Court's opinion, which upheld the restriction on the above-mentioned non-protectionist grounds. *Id*. at 234. The restriction in *Dukes v. City of New Orleans*, another case the City relies on, survived for similar non-protectionist reasons. 427 U.S. 297, 303 (1976). Likewise, in *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296 (2008), Hinsdale sought to maximize overall sales-tax revenues, not bestow special protection on a preferred industry. Br. 25–27. Lastly, the City relies on *Yellow Cab Co. v. City of Chicago*, 396 Ill. 388 (1947), which it claims upheld a host of protectionist measures. Resp. 26–27. But that reading is wildly off the mark: Chicago had promised people who voluntarily turned in taxi licenses that they would be first in line later on. *Id*. at 400. When Chicago tried to renege, this Court made it keep its word. *Id*. at 401–02. These cases don't support Chicago's argument it may protect preferred industries from competition.

Even when Illinois cases *do* mention competition, none suggests that governments may act *for the purpose* of suppressing competition to benefit someone it deems "important." Instead, in each, courts upheld restrictions that furthered legitimate, non-protectionist purposes and had only *incidental*

competitive effects. In *Illinois Commerce Commission v. Chicago Railways Co.,* 362 Ill. 559, 562 (1936), for instance, this Court upheld an order authorizing new trolley service that would benefit customers but "deprive [an incumbent carrier] of a substantial part of its revenue." *Id.* at 566. Despite this incidental competitive effect, the Court held that "the convenience and need of the public is of primary importance." Likewise, in *Potter v. Hodge*, 112 Ill. App. 3d 81, 82 (3d Dist. 1983), incumbent businesses sued to block municipal bonds for a proposed business that "would be in direct competition with their existing retail businesses." The appellate court denied the challenge, noting that any "competitive impact on already existing businesses" was an "incidental side effect" of the law's pro-growth purposes. *Id.* at 87–88. *See also Cohn v. Smith*, 14 Ill. 2d 388 (1958) (upholding blocking of new community currency exchange, where exchanges had significant uncovered financial exposure that would harm customers and third parties in case of insolvency); *Gen. Motors Corp. v. State Motor Vehicle Review Bd.*, 224 Ill. 2d 1 (2007) (upholding law redressing bargaining-power disparity between auto manufacturers and franchisees); *Ill. Power Co. v. Ill. Commerce Comm'n*, 316 Ill. App. 3d 254, 261 (5th Dist. 2000) (upholding marketing rule that had purpose of creating "a competitive market for electric utility service").

By contrast, courts have rebuffed governments that interfered with one person's constitutional rights to aid someone they deemed more "important."

In *Good Humor Corp. v. City of New York*, for instance, New York City claimed it wasn't suppressing vending competition as an end in itself, but that it—like Chicago—wanted to "prevent unfair competition by itinerant peddlers with storekeepers who pay rent and various taxes." 290 N.Y. 312, 317 (1943). And it claimed—again, like Chicago—that such protectionism would benefit "the city and its inhabitants." *Id*. But the New York Court of Appeals rejected that argument, ruling the government may not "prohibit use of the street for a lawful business . . . for the sole purpose of protecting rent payers and taxpayers against competition from others who do not pay rent or taxes." *Id*.

Importantly, *Good Humor* shows the fallacy of Chicago's "general welfare" argument. Under Chicago's reasoning, the decision should have devastated New York City's restaurants. But food trucks and restaurants both thrive there, just as they do in Washington D.C., Los Angeles, and other jurisdictions without restrictions like the 200-foot rule. By contrast, since 2012, Chicago's food-truck population has dropped *by over 40%*. *See* Amicus Br., Illinois Policy Institute at 9.

The U.S. Supreme Court has also rejected the idea that governments may suppress competition to benefit preferred industries that might, in turn, benefit the public. In *Metropolitan Life Insurance Co. v. Ward,* 470 U.S. 869 (1985), Alabama argued its lower tax on domestic insurance companies vs. out-of-state competitors helped promote domestic industry, which would

benefit the public. But the Court rejected that argument, holding that "promotion of domestic business within a State, by discriminating against foreign corporations that wish to compete by doing business there, is not a legitimate state purpose." *Id*. at 880. This is no outlier: federal courts regularly invalidate laws that make protecting preferred interest groups from competition their goal.[2]

This Court, too, has rejected the idea that governments may deprive one person of her constitutional rights to financially benefit another private party, even if that action might create economic byproducts benefitting the broader public. In *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.*, 199 Ill. 2d 225 (2002) ("*SWIDA*"), the government wanted to transfer defendants' land to a racetrack. SWIDA claimed the taking was valid under the police power, *id*. at 235, because it would help the racetrack "grow and prosper and contribute to positive economic growth in the region," *id*. at 239. But this Court held that while "this expansion in revenue could potentially trickle down and bring corresponding revenue

[2] *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (law allowing only funeral directors to sell caskets lacked a rational basis as it served to protect directors from competition); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (same); *Merrifield* v. *Lockyer*, 547 F.3d 978 (9th Cir. 2008) (licensing scheme for pest controllers that exempted those dealing with certain pests lacked a rational basis and had the primary purpose of protectionism); *Bruner v. Zawacki*, 997 F. Supp. 2d 691 (E.D. Ky. 2014) (regulations on moving companies lacked a rational basis and were instead just protectionist); *Santos v. City of Houston*, 852 F. Supp. 601, 608 (S.D. Tex. 1994) (ban on jitneys lacked a rational basis and was "economic protectionism in its most glaring form").

increases to the region, revenue expansion alone does not justify an improper and unacceptable expansion of the eminent domain power." *Id*. at 241.

Although LMP's challenge arises under Article I, Section 2, instead of Article I, Section 15, *SWIDA*'s logic holds. One person should not be cast out of her trade because her competitor may generate incidental "economic by-products." *Id*. at 240. That is particularly true here, where the potential public benefits of Chicago's discrimination are not reasonably conceivable.

2. The Idea That the 200-Foot Rule Benefits the Public Is Not Reasonably Conceivable.

The 200-foot rule's harms are obvious. Food-truck operators like LMP suffer: As LMP's opening brief demonstrated, the rule eliminates thousands of vending locations throughout Chicago, including the Loop. Br. 31. This, as noted, has devastated the industry. The rule also harms food-truck customers, who face fewer options and higher prices.

Its private benefits are also obvious. By hobbling mobile competitors, restaurants capture consumers without other choices. It is little surprise the Illinois Restaurant Association, which lobbied for the rule, Amicus Br., Illinois Policy Institute at 8–9, now defends it so vociferously.

But the 200-foot rule has no *public* benefit. Under rational-basis review, a law "must have a definite and reasonable relationship to . . . the public health, safety and welfare." *Church v. State*, 164 Ill. 2d 153, 165 (1995); *see also St. Joseph Abbey*, 712 F.3d at 223 (noting that, under

rational-basis review, "a hypothetical rationale, even post hoc, cannot be fantasy"). Although the City and the Illinois Restaurant Association suggest that competition would lead to unemployment, empty commercial spaces, and decreased tax revenue, that suggestion is fantasy. It rests on no analysis, reports, or actual evidence. *Cf. Napleton*, 229 Ill. 2d at 321 (detailing months of study before enacting amendment).

Moreover, to believe food trucks threaten Chicago's very fabric requires accepting a series of increasingly implausible assumptions. Without the rule, food trucks would compete more with restaurants. Although restaurants have advantages like seats, tables, heating and cooling, bigger menus, and alcohol sales, the City posits that (1) competition would be so severe and one-sided that restaurants would suffer economically, shedding jobs or closing altogether. Even more implausibly, the City suggests that after these closures (2) no new businesses would move into now-empty commercial spaces, not even successful vendors.[3] And this (3) destruction of restaurants would supposedly occur again and again, (4) leading to empty storefronts and a decreased tax base.

The City's imagined harms are neither "definite" nor rational. Indeed, of the ten largest U.S. cities, only Chicago has something like the 200-foot rule. If Chicago were right, other major cities' restaurant scenes would be

[3] *See* Food Truck Facts, DMV Food Truck Association, http://www.dmvfta.org/food-truck-facts (noting that "[i]n our area more than 20 [] food trucks have grown into brick-and-mortars").

faltering. They aren't. From 2012 through 2016 (the last year data were available), the number of restaurants in New York City and Washington, D.C.—two major cities without a restriction like Chicago's—grew by 12.1% and 18.7%, respectively.[4]

In the end, the idea the rule prevents economic collapse is not "reasonably conceivable." To affirm on such a thin reed would weaken Illinoisans' rights and signal to both the state and local governments that they too may engage in blatant protectionism for favored constituents.

B. The 200-Foot Rule Is Not a Reasonable Congestion Measure.

The 200-foot rule's purpose has always been protectionism. Yet, the City also defends it as a sidewalk congestion measure. Resp. 35–42. According to Chicago, the fact that restaurants open onto the sidewalk, and food trucks sometimes operate in public parking spaces, justifies any restriction, no matter how ill-fitting.

But evidence demonstrates the rule's irrationality as a congestion measure. First, the 200-foot rule stretches much farther than restrictions that address actual congestion concerns. Br. 35. For instance, the rule stretches ten times farther (and fines more than thirty times as much) than the rule against parking too close to an intersection. Br. 34–37. The rule exempts numerous congestion-creating activities, as well as food trucks

[4] U.S. Census Bureau; County Business Patterns, 2012-2016 Geography Area Series: County Business Patterns, Tables CB1200A11 to CB1600A11, http://factfinder.census.gov (generated Dec. 4, 2018).

operating at stands and construction sites, locations that raise equal or greater congestion concerns. Br. 36–40. Because the rule creates 400-foot wide no-vending zones, it blocks trucks from private property and other locations that don't raise congestion concerns. Br. 40–43. And Professor Renia Ehrenfeucht's exhaustive study concluded that the distance between a truck and restaurant made no difference in terms of congestion outcomes. Br. 43–45.

The City claims it may proceed "one step at a time" and need not "adopt a regulation that would eradicate all potential congestion problems in the same way." Resp. 37–38. But the evidence shows that food trucks aren't an actual congestion problem with respect to restaurants and that the rule will have *zero* effect on congestion. Different treatment cannot be *arbitrary* treatment. *Best v. Taylor Mach. Works*, 179 Ill. 2d 367, 398 (1997).

The City also tries to short-circuit this Court's review of LMP's evidence by noting that, once a rational basis exists, evidence is immaterial. Resp. 40. But that begs the question: This inquiry is to decide *if* the 200-foot rule has a rational basis. The only reasonably conceivable purpose for the rule, which bans food trucks based on their competitors' location, is to suppress competition. Moreover, although the City need not submit evidence under rational-basis review, LMP may undercut the rule's rationality using evidence, just as the plaintiffs did in *Chicago Title & Trust*. 19 Ill. 2d at 102, 105 (rejecting congestion rationale because evidence showed congestion was

no "different with respect to filling stations than . . . other businesses"); *see also United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938) (holding that "rational basis" inquiry to be determined based on facts); *St. Joseph Abbey*, 712 F.3d at 223 (stating that "plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality").

And LMP's evidence shows the rule's irrationality as a congestion measure. The City claims restaurants are unique congestion sources, but they are not. Br. 35. The City testified that lines outside restaurants are rare, and Professor Ehrenfeucht found no instances where people entering or leaving restaurants caused congestion. C.2043. The City notes that food trucks and restaurants get busy at the same time, Resp. 38, but that's why Professor Ehrenfeucht analyzed both at lunchtime, to capture any cross-business effects. There were none.[5] The City says some restaurants have sidewalk cafes, Resp. 38, but it requires them to maintain sufficient clearance precisely to obviate congestion concerns.[6] And although the City suggests people walk in groups to restaurants, its expert conceded that "[p]eople can walk in groups to a lot of different places. I mean anything, really," including office buildings, museums, parks, churches, schools, and stores. C.1734–35.

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[5] The City also complains that Professor Ehrenfeucht's study focused on the Loop, where pedestrian density is greatest, but that is consistent with the study's desire to highlight any congestion effects.

[6] Sidewalk Café Rules, City of Chicago, https://www.cityofchicago.org/content/dam/city/depts/dol/rulesandregs/SidewalkCafeRules.pdf (last visited Dec. 1, 2018).

The City fails to explain why other potential sources of congestion, like street performers and food carts, may operate within 200 feet of a restaurant. The City says no evidence suggests street performers create congestion, Resp. 38, but Chicago's representative testified they could, A.177, and its expert witnessed such congestion firsthand. C.1723. It claims food carts are no concern because they can easily move, Resp. 38, but that isn't true; carts are non-motorized mobile kitchens weighing hundreds of pounds unloaded. The City also notes that rules require performers and carts to move if they create congestion. Resp. 39. But those same rules also apply to food trucks, suggesting the 200-foot rule was designed for other purposes.

The City also fails to explain the rule's construction and food-truck stand exemptions. Its argument regarding the former boils down to saying that construction workers *like* food trucks. Resp. 40. Well, lots of people like food trucks, but that says nothing about how the exemption serves the City's purported congestion interest. It likewise claims that food-truck stands aren't congestion concerns because they can be readily monitored. Resp. 39–40. But LMP's opening brief showed Chicago does not regulate the stands and is unaware if anyone monitors them. Br. 39. In any event, Professor Ehrenfeucht's study showed no congestion differences between the stands and other locations. Br. 39–40.

Lastly, the City claims the rule's application to private property is rational because food trucks may park on the property line. Resp. 41–42.

But it never heard of a situation where food trucks operating on private property caused sidewalk congestion. A.202. And its expert observed three trucks operating in a private lot, and noted they had no effect on the sidewalk whatsoever. C.1721.

In the end, evidence shows that the 200-foot rule makes no sense as a congestion measure. Similar evidence shows it doesn't rationally further the City's spreading-retail-food-options goal either.

C. The 200-Foot Rule Is Not a Reasonable Means of Spreading Retail Food Options.

The City also claims its 200-foot rule encourages food trucks to operate in "underserved communities" where demand for prepared food outstrips supply. Resp. 42–43. But as LMP showed, Br. 45–47, this makes no sense. The rule applies citywide, including the underserved areas Chicago purportedly wants to help. Br. 45. The City took no other steps to encourage trucks to visit underserved locales, such as reducing licensing fees or offering longer operating hours. *Id*. Moreover, Dr. Henry Butler, an economist, testified that because underserved locales lack sufficient levels of disposable income and population density, economics predicts that the rule would not cause trucks to operate there. Br. 46. And Dr. Butler's empirical study showed that trucks, in fact, don't go to underserved areas. Br. 46–47.

The City claims none of this evidence matters, and that a law can be rational even if a plaintiff proves it doesn't serve its ostensible purpose.

Resp. 43. But in the case it cites, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the plaintiff *conceded* that the law had a rational basis, since its bottles caused the environmental problems the state was targeting. *Id*. at 466. That is not the case here.

Turning to the evidence, the City cites out-of-context snippets of testimony to suggest the rule actually does work. The City quotes Dr. Butler saying that "food trucks actually sometimes have gone to [underserved] areas," C. 4099, but it omits his next statement, which said "that the trucks hardly go [to underserved areas] at all," and that "it's almost like these [trucks wind up in these areas because they] get lost." *Id*.; *see also* Br. 47 (34 recorded stops in underserved areas out of over 11,000). The City also suggests that Hyde Park, where trucks congregate on the University of Chicago campus, is underserved. The City cites a food-truck owner who says Hyde Park doesn't "have a lot of food options," Resp. 43, but it ignores its own representative's testimony that "Hyde Park . . . is one [neighborhood] where there's now an increasing number of retail food options." C.2088. It also ignores its "Citywide Retail Market Analysis," which showed the University area is actually *overserved* by over $4.2 million. C.2529.

It is not rational to think the 200-foot rule helps spread retail food options. Instead, it only helps suppress competition. Because this is illegitimate, this Court should reverse.

II. The City's GPS Requirement Violates Article I, Section 6.

Chicago requires food trucks to install GPS tracking devices. Every five minutes, those devices send location data to a private company that maintains "a publicly-accessible application programming interface (API)." As LMP's opening brief demonstrated, this is a search under *United States v. Jones*, 565 U.S. 400 (2012), because it both physically invades LMP's property and enables long-term monitoring that violates LMP's reasonable expectation of privacy. Br. 49–58.

The City attempts to dodge this constitutional inquiry. It claims, without any on-point precedent, that GPS tracking is just a "record-keeping" requirement. Resp. 45–48. It says food trucks aren't really private property and that LMP has no reasonable expectation of privacy. Resp. 50-53. And it misrepresents language from its ordinance and regulations to state that it doesn't require LMP's data to be accessible by *anyone*.

As LMP demonstrates below, these points are wrong. In Part A, LMP explains why Chicago's GPS requirement effects a search. And in Part B, LMP shows that Chicago has failed to prove that its warrantless GPS scheme is reasonable.

A. The GPS Requirement Effects a Search.

Chicago's GPS scheme effects a search under Article I, Section 6 both because it requires the installation of tracking devices on private vehicles and because those devices monitor vehicles' whereabouts for months on end. This

is a trespass to LMP's property, *see* Amicus Br., Restore the Fourth at 5–9, and an impingement on LMP's reasonable expectation of privacy.

The City, however, claims its GPS scheme is merely a record-keeping requirement, that no search has occurred until it reviews LMP's data, and that food trucks aren't really private vehicles. Those arguments are utterly unsupported by case law.

1. GPS Tracking Is No Mere "Record Keeping Requirement."

The City characterizes its GPS scheme as a newfangled way of asking vendors to keep records. It isn't. Notably, the City cites no case concerning GPS tracking; in fact, most predate GPS altogether. And none says the government may force private companies to install tracking devices while avoiding constitutional scrutiny. *Jones*, 565 U.S. at 406 n.3 (stating "a search has undoubtedly occurred" when "the Government obtains information by physically intruding on a constitutionally protected area").

Keeping records asks only that businesses hold onto information. Should the government wish to learn that information by reviewing those records, it must satisfy Fourth Amendment scrutiny. *See City of Los Angeles v. Patel*, 135 S. Ct 2443 (2015) (holding that hoteliers need not turn over guestbooks without a warrant). Most cities follow this approach by asking food trucks to log where they operate and provide that log to officials upon

request. This approach, which does actually involve record keeping, generally raises no constitutional concerns.

But that is not Chicago's approach. Instead, the City exercises dominion over LMP's private property from the outset. It orders LMP to install a tracking device that beams information Chicago may access without a warrant. *Cf. Carpenter v. United States*, 138 S. Ct. 2206, 2221 (2018) (requiring warrant before government may acquire location information from third-party provider). Chicago cites no case—and LMP cannot locate one—characterizing GPS tracking as a record-keeping requirement.

Indeed, Chicago's cases suggest the opposite. In *Oklahoma Press Publishing Co. v. Walling*, for instance, the Supreme Court rejected a Fourth Amendment challenge to a subpoena seeking business records. It held that "the records in these cases present no question of actual search and seizure" since "[n]o officer or other person has sought to enter petitioners' premises against their will, to search them." 327 U.S. 186, 195 (1946). But here, Chicago took dominion over LMP's property to acquire information.

Or look at *Second City Music Inc. v. City of Chicago*, 333 F.3d 846 (7th Cir. 2003), which the City mischaracterizes as concerning record-keeping requirements. Instead, it asked if Chicago could enter Second City's store absent a warrant. The Seventh Circuit, applying the *New York v. Burger* framework that governs this appeal, 482 U.S. 691 (1987), upheld the search because second-hand stores were closely regulated, the government

demonstrated a need for warrantless entry, and regulations closely limited those searches' scope. *Second City*, 333 F.3d at 848. *Second City* shows that when the government intrudes on private property absent a warrant, it must prove its actions are reasonable.[7] Chicago has not met that burden.

2. A Search Occurs When the Government Exercises Dominion over Private Property Like LMP's Food Truck.

The City also argues, based on several district-court decisions involving taxicabs, that LMP's truck is not an "effect" for Fourth Amendment purposes. Resp. 51–52. Those decisions claimed taxis are not really private property because they invite passengers inside. They are wrong, as explained below, but in any event their reasoning doesn't apply to food trucks, which serve customers who remain outside. No customers enter a truck's interior space, unlike a taxicab or restaurant. *Cf. United States v. Rahman*, 805 F.3d 822, 831 (7th Cir. 2015) (holding that a "restaurant is a constitutionally protected area" (citing *Michigan v. Tyler*, 436 U.S. 499, 508 (1978)).

Even were that not so, Judge Pooler's concurring opinion in *El-Nahal v. Yassky,* 835 F.3d 248 (2d Cir. 2016), shows that LMP is entitled to constitutional protection. Judge Pooler partially affirmed the district court's

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[7] The City also claims its GPS scheme is only a search when it reviews a licensee's information. But as the Supreme Court held, a search occurs when the government occupies private property to *obtain* information. *Jones*, 565 U.S. at 47. When it *reviews* that information doesn't matter. *See Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam) (rejecting similar point).

judgment, but criticized its Fourth Amendment analysis, including the holding that "taxis are not truly private property." *Id.* at 258 (Pooler, J., concurring in part and dissenting in part). As Judge Pooler noted, a vehicle is an effect for Fourth Amendment purposes, and effects are "not limited . . . to personal property of a noncommercial nature. It included the goods of a merchant [or] tradesman." *Id.* at 259 (internal quotations and citation omitted). And although taxicabs invite passengers into their vehicles—just as restaurants invite customers into their dining rooms—that does not strip them of constitutional protection. As the Supreme Court has held, "there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees." *Lo–Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979). For that reason, Judge Pooler concluded that, even for a taxicab, the "implied license . . . does not encompass an invitation to install surveillance technology in their vehicles." *El-Nahal*, 835 F.3d at 260.

3. LMP Has a Reasonable Expectation of Privacy.

LMP's opening brief also showed that Chicago's GPS scheme, which creates months of location data, violates LMP's reasonable expectation of privacy. The City ignores those points or cites inapposite, outdated case law.

The City, for instance, claims LMP has no expectation of privacy because Laura Pekarik, its owner, sometimes tweets the truck's location. As

LMP noted, Laura sometimes wants to keep that information private, such as when employees face harassment, but cannot under the ordinance.[8]

It also claims LMP's expectation of privacy is not reasonable, Resp. 51, but its principal case, *United States v. Knotts*, 460 U.S. 276 (1983), is a pre-*Jones* case that involved short-term monitoring of a beeper. By contrast, Chicago's GPS scheme requires at least *six months* of information. Five Justices in *Jones* agreed that long-term monitoring "impinges on expectations of privacy" and constitutes a search. 565 U.S. at 430 (Alito, J., concurring in the judgment); *see also id.* at 415 (Sotomayor, J., concurring) (agreeing with Justice Alito's statement). Even if Chicago's scheme didn't require LMP's data to be shared with the public—which it does, *see infra*—long-term monitoring demands constitutional scrutiny.

B. Chicago's GPS Requirement Fails Constitutional Muster.

Because Chicago's GPS requirement is a warrantless search, the City must prove "by a preponderance of the evidence that it falls within one of the exceptions to the warrant requirement." *People v. Blair*, 321 Ill. App. 3d 373, 376–77 (3d Dist. 2001) (citing *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)). The City justifies its actions as administrative searches of closely regulated businesses. Resp. 55–57. Under that exception, the City must

[8] The City claims LMP has forfeited this argument. Resp. 52. It is wrong. LMP has consistently argued that Chicago's GPS requirement is a search, and impinging one's reasonable expectation of privacy is one way a search can occur. Both the trial and appellate courts evaluated whether LMP had a reasonable expectation of privacy. This Court should not eschew conducting a similar evaluation.

prove: 1) that the regulatory scheme serves a substantial interest; 2) that warrantless inspections are necessary to further that interest; and 3) that the law governing inspections limit inspecting officers' discretion and have a properly defined scope. *Burger*, 482 U.S. at 702–03. It fails to meet that burden.

First, LMP's opening brief demonstrated that Chicago's GPS scheme fails *Burger* because it requires service providers to share location data with whoever asks for it. Br. 61–63. The City's contrary claim rests on self-serving testimony and a misreading of its ordinance and regulations.

The ordinance's plain language requires service providers to maintain "a publicly-accessible application programming interface (API)." MCC 7–38–115(l); *see also* A.167 (regulations requiring providers to maintain "[a]n application programming interface (API) that is available to the general public"). *See Gapers, Inc. v. Dep't of Revenue*, 13 Ill. App. 3d 199, 202 (1st Dist. 1973) (holding that where ordinance is unambiguous, agency cannot alter that definition by regulation). No ambiguity exists here, where dictionaries define "accessible" as "capable of being used or seen,"[9] or "possible to approach, enter, or use."[10] Accordingly, the plain meaning of a "publicly-accessible API" is an API the public can access.

[9] "Accessible," Merriam-Webster, https://www.merriam-webster.com/dictionary/accessible (last visited Dec. 7, 2018).
[10] "Accessible," Cambridge Dictionary, https://dictionary.cambridge.org/us/dictionary/english/accessible (last visited Dec. 7, 2018).

The regulations also mention that if Chicago builds a website "for displaying the real-time location of MFVs . . . the licensee may choose to provide the appropriate access information to the API of its GPS." A.167. So, this regulation means food trucks can choose whether to share their information on a City-run website.

But Chicago misleadingly uses that language to imply that trucks have similar freedom to choose whether to share their information with *others*. Resp. 48. They do not. That reading violates the ordinance's plain meaning. It also contradicts a service provider's straightforward reading: he testified that because the ordinance requires his API to be "publicly accessible," "[he] could [not] deny access to that API to people requesting it." A.403. Moreover, if the API requirement existed solely for a City website, it would say "an application programming interface accessible by *the City*," not "a publicly-accessible application programming interface."

The City has also failed to prove its warrantless searches are necessary. Since Chicago has never used GPS tracking for health inspections, *see* Resp. 14, it would be hard-pressed to prove that warrantless access is necessary. But it doesn't really try, asserting only that sometimes it may need to act quickly. But courts can act quickly too, *Missouri v. McNeely*, 569 U.S. 141, 155 (2013) (invalidating warrantless search scheme in part

because technology allows officials to "secure warrants more quickly"), and Chicago fails to provide any evidence in support.[11]

Lastly, the City notes it can use GPS data to identify violations of the 200-foot rule. Resp. 4. But this reveals a separate constitutional infirmity, since it has no substantial (or even legitimate, *see supra*) interest in tracking people to ferret out prohibited competition. This seems to be the GPS scheme's principal purpose, since the ordinance 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 [by the GPS data.]" A.44. That language would be unnecessary if GPS data were only to help find trucks for inspection. As a result, Chicago's GPS scheme fails constitutional muster.

CONCLUSION

For the foregoing reasons, LMP Services, Inc., respectfully requests that this Court reverse and hold that Chicago's 200-foot rule and GPS tracking requirement violate the Illinois Constitution.

[11] The City contends its scheme is more reliable than methods like social media. Resp. 57. But the City testified that "just as somebody could fail to tweet their location" they could "fail to turn on their GPS unit." It further admitted that "[i]f the person doesn't turn on . . . the GPS unit, then it is going to make it impossible for us to find them unless we use social media." A.258.

Dated: December 7, 2018

Respectfully submitted,

LMP SERVICES, INC.
Plaintiff-Appellant

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms with the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in 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 5,994 words.

/s/ Robert P. Frommer

CERTIFICATE OF SERVICE

The undersigned certifies under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that on December 7, 2018, a copy of the foregoing **Reply Brief of Plaintiff-Appellant LMP Services, Inc.** was filed and served upon the Clerk of the Illinois Supreme Court via the efileIL system through an approved electronic filing service provider and was served on counsel of record below in the manner indicated:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Robert P. Frommer

No. 123123

In the Supreme Court of Illinois

LMP SERVICES, INC., Plaintiff-Appellant, v. THE CITY OF CHICAGO, Defendant-Appellee.	On Appeal from the Illinois Appellate Court, First Judicial District, Case No. 1-16-3390 There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 12 CH 41235 Hon. Helen A. Demacopoulos, *Judge Presiding*

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PLEASE TAKE NOTICE that on **December 7, 2018**, the undersigned attorney caused to be filed with the Clerk of the Supreme Court of Illinois, at 160 North LaSalle Street, Chicago, Illinois, via the efileIL system through an approved electronic filing service provider, the **Reply Brief of Plaintiff-Appellant LMP Services, Inc.,** a copy of which is attached and hereby served upon you.

Dated: December 7, 2018

Respectfully submitted,
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