No. 123123

In the Supreme Court of Illinois

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

BRIEF OF AMICUS CURIAE ILLINOIS POLICY INSTITUTE IN SUPPORT OF APPELLANT

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POINTS AND AUTHORITIES

INTRODUCTION

Amicus curiae Illinois Policy Institute ("IPI") submits this brief in support of Plaintiff-Appellant LMP Services, Inc., which challenges two provisions in the City of Chicago's ordinance regulating food trucks: one prohibiting food trucks from operating within 200 feet of the principal entrance of any business that prepares and serves food to the public (the "200 foot rule"); and one requiring food trucks to be equipped with a functioning GPS device (the "GPS requirement"). The 200 foot rule prohibits food trucks from operating in a substantial portion of the City of Chicago. And the GPS requirement requires food truck operators to retain months of GPS data and turn it over to Chicago or anyone who requests it. IPI submits this brief to highlight the real world, harmful consequences that anti-competitive regulations that favor some businesses over others, such as the 200 foot rule, have on entrepreneurs, new businesses, consumers, potential employees, and taxpayers. The City's 200 foot rule protects politically-connected businesses, which tend to be larger and richer, at the expense of food truck owners, which tend to be smaller start-ups. This Court, consistent with Illinois precedent, can and should overturn the 200 foot rule because it confers special benefits on certain private businesses without providing any benefit to the public's health, safety, or welfare.

INTEREST OF THE AMICUS CURIAE

IPI is an independent non-partisan non-profit organization that generates public policy solutions aimed at promoting personal freedom and prosperity in Illinois. As part of its promotion of these principles, IPI strongly opposes laws that favor certain politically connected businesses over other businesses. The result of such laws is that the success or failure of a business tends to be determined not by its ability to meet the

demands of customers, but by its ability to meet the demands of politicians, driving out those who are not politically privileged.

ARGUMENT

The Schnitzel King is dead and the City of Chicago killed it.

That's the food truck formerly operated by Greg Burke and Kristin Casper, former plaintiffs in this lawsuit. Burke started the Schnitzel King food truck in November 2011, after his former employer in the construction industry laid him off in response to the collapse of the commercial real estate market. C7-8. He got the idea after serving schnitzel sandwiches (hand-breaded and fried pork, chicken, or lamb cutlet between two slices of bread, topped with grilled onions and peppers) while tailgating before Chicago Bears football games, after fellow tailgaters who ate his sandwiches constantly told him how delicious they were. C8. Burke used his life savings to buy a vintage 1970s Jeep, which became the Schnitzel King food truck, C8, shown below.

Kristin Casper, then his fiancé, joined Burke, and became the business's director of media relations, after she too lost her job. C8. But because of the ordinance, specifically the 200 foot rule, it was too difficult for Burke and Casper to consistently find locations with the most demand during the most profitable hours of the day. Casey Cora, *Schnitzel King to Close*, DNAinfo Chicago (April 15, 2014), https://goo.gl/NwqeTn. As a result, in April 2014, Burke and Casper made the painful decision to close Schnitzel King. *Id*. Burke and Casper, long-time residents of Chicago, then left the City they love, when they found employment in North Dakota. Hilary Gowins, *City Rules Lure, Push Away Food Truck Flavors*, Huffington Post (July 19, 2014), https://goo.gl/oWrR2I.

Unfortunately, Burke and Casper are not the only victims of Chicago's food truck regulations that favor brick-and-mortar restaurants over mobile ones. Shawn Podgurski and his partner started a food truck in 2013. When a number of new trucks were licensed in August 2015, the 200 foot rule forced the operators to compete for limited space. Eventually, Mr. Podgurski, fed up with watching the food truck community turn on each other over truck spots, opened a bar, which has struggled to turn a profit. But at least Mr. Podgurski was able to live his dream in Chicago; other entrepreneurs were not so fortunate. BBQ enthusiasts Joseph and Lauren Woodel began operating their food truck in July 2012. They chose to operate in Chicago because they believed that the American Dream lived in Chicago. The couple sold a car, cashed their 401k, and invested their entire life savings into their food truck. As more food trucks became licensed, the Woodels found themselves in tough competition for legal spots to operate; Joseph began waking up at 3 a.m. to find a parking spot. The couple, based in Rogers Park, was forced to open a small shop in Bridgeport to prepare their food. At the end of 2015, they closed

their Chicago business and have since relocated to Germany, where the business environment is much friendlier.

Food trucks are not the only victims of City regulations that favor some businesses over others. Indeed, the City imposes numerous regulations that are intended to, and have the effect of, favoring certain existing businesses over others.

Sara Travis, a lifelong resident of Chicago, founded the Brew Hub, a mobile coffee-vending business that sells iced coffees and teas, in June 2013. But after a year of trying to obtain a permit from the City of Chicago, Travis left Chicago, moving her business to Austin, Texas, where it took her just one afternoon to obtain her permit. *Coffee Run: Chicago Forces Out Entrepreneurs*, Illinois Policy (July 8, 2014), https://goo.gl/f6iLUk. Felony Franks, a hot dog shop that employs ex-offenders to offer them a livelihood outside of crime, left Chicago after an alderman who didn't like the name of the restaurant, used his power to prevent the restaurant from obtaining a sign. Felony Franks successfully sued the City, but the delay in obtaining a sign was fatal to the success of its business in Chicago, forcing it to close and move to the suburbs. Diana Sroka Rickert, *Chicago Loses as Felony Franks Moves to the Suburbs*, Chi. Trib. (Dec. 8, 2014), https://goo.gl/I5IiR2.

Consider the City of Chicago's ordinance regulating ridesharing vehicles, which include services such as Uber and Lyft. One of the regulations in that ordinance bans commercial advertising in the interior and on the exterior of ridesharing vehicles – even as the City does not ban advertising in and on taxicabs or on personal vehicles. It is, of course, no secret that taxi medallion owners have lobbied heavily for restrictions on

rideshare companies such as Uber and Lyft. As a result, Vugo[1] – a company that provides software designed to be displayed on electronic tablets in rideshare vehicles that would generate ads and other media tailored to ridesharing passengers, while sharing the ad revenue with rideshare drivers – is prohibited from doing business in Chicago. This is particularly unfortunate because Vugo's founder, James Bellefeuille got the idea for Vugo while driving for Uber in Chicago and now his business cannot operate in the very city where it was conceived. Austin Berg, *Chicago Made Their Business Illegal, Now Vugo is Fighting Back*, Illinois Policy (Feb. 7, 2017), https://goo.gl/X8vLaR.

Or take Chicago's recent ordinance regulating homesharing through online platforms such as Airbnb. Again, it is no secret that hotels in Chicago have long sought restrictions on homesharing out of fear of losing customers to such services. But the claim that regulations were needed to "level the playing field" rings hollow when the ordinance the City actually adopted imposes stricter regulations on homesharing hosts and services than the City Code imposes of hotels. The ordinance regulating homesharing imposes a special four percent tax that doesn't apply to hotels, motels or bed-and-breakfasts. The City also imposes a noise ordinance requirement on homesharing units that is stricter than the one imposed on hotels – an impossible-to-understand and follow prohibition on noises "louder than the average conversational level." *See* Jacob Huebert & Christina Sandefur, *Chicago's Home-Sharing Ordinance is an Unwelcome Guest*, Chi. Trib. (Nov. 29, 2016), https://goo.gl/EvVjGN. The ordinance also originally required Airbnb hosts in Chicago to keep records of their guests' personal information authorized city officials to inspect those records at any time, for any reason, without a warrant, which was not

[1] Counsel for the amicus in this case also represents Vugo and rideshare drivers in a lawsuit challenging this discriminatory treatment of rideshare vehicles.

imposed on hotels. *See id.* The City repealed the warrantless search aspect of the ordinance, however, after a legal challenge.[2] Ally Marotti, *Despite City Tweaks, Court Extends Order Blocking Chicago Airbnb Rules*, Chi. Trib. (Feb. 24, 2017), https://goo.gl/Ci6FiU.

These stories show how government regulations that favor certain businesses over others benefit the politically connected businesses over non-connected businesses. These connected businesses tend to be existing ones, meaning that anti-competitive laws tend to protect established businesses by keeping newcomers out of the market.

Because new businesses generally must be innovative to succeed – they will attract customers away from established businesses only if they offer customers a better or cheaper product, service, or experience – government restrictions that protect existing businesses from new competitors will tend to lead to complacency and less innovation. Food trucks provide an example: to the extent that they are allowed to operate, they offer new and innovative foods, often at lower prices than gourmet brick-and-mortar restaurants.

I. Chicago's ordinance attempts to protect brick-and-mortar restaurants from competition.

Chicago's ordinance, pushed by politically-connected restaurant owners, exists to protect those restaurants. The ordinance intentionally limits the amount of innovation that can take place by limiting the number of places food trucks can locate and thus limiting the number of food trucks that can profitably operate. The result is a less vibrant food truck scene in Chicago than in many other cities.

[2] Counsel for the amicus also represents plaintiffs in a legal challenge to the City's homesharing ordinance.

Potential entrepreneurs, owners of disfavored businesses, and people who would have benefited from the excluded businesses – potential employees and consumers – tend to look elsewhere when they cannot get what they want. Since other cities treat food trucks more fairly than Chicago does, it is not surprising that potential entrepreneurs and former food truck owners in Chicago would look outside of Chicago.

A. The ordinance exists to protect brick and mortar restaurants.

There is no dispute that the City of Chicago's ordinance regulating food trucks exists to protect brick-and-mortar restaurants from competition from food trucks. Alderman Tom Tunney told the Chicago Sun-Times in 2011 that "[o]ne of the major issues is spacing from brick-and-mortar restaurants . . . . We need to make sure we protect . . . restaurants and foster a trend that, I think, is gonna be here for a while." Joe Kaiser, *After Court Ruling, Chicago Food Trucks Must Fight on Against Protectionist City Rules*, Illinois Policy (Dec. 6, 2012), https://goo.gl/EgPNcp. Other alderman echoed the concerns about protecting restaurants from competition with food trucks. Alderman Walter Burnett, Jr. said that "we don't want to hurt the brick and mortar restaurants." A.68. And Brendan Reilly said that purpose of the ordinance was to make "sure that we are guarding those folks who've made substantial investments in the City of Chicago by buying restaurants." A.66–67. One of the bases on which the City defends the ordinance is that it "fosters restaurants," and the circuit court upheld the 200 foot rule on this basis. A8-12.

B. The restaurants that worried about competing with food trucks pushed for the provisions in the ordinance.

Before July 2012, Chicago was the only major U.S. city that did not allow food trucks to prepare any food on board the truck, including cutting or cooking ingredients; food

trucks could only sell food prepared and packaged in a commercial kitchen. Julia Thiel, *Why Chicago's Once-promising Food Truck Scene Stalled Out*, Chi. Reader (March 29, 2017), https://goo.gl/pLs6kq. As a result, the vast majority of food trucks that existed in Chicago prior to July 2012 were those that served food prepared in a brick-and-mortar kitchen to workers at construction sites – the type sometimes disparagingly referred to a "roach coaches." *Id*.

Around 2008, the modern day food truck movement began when gourmet food trucks started offering limited but creative dishes at reasonable prices, providing ethnic, fusion, or niche dishes that customers were not likely to find elsewhere. Bryant Urstadt, *Intentionally Temporary*, N.Y. Mag. (Sept. 13, 2009), https://goo.gl/eqYrV2. The ability to cook and prepare food on the trucks gave these innovative chefs the ability to offer high quality food where demand was greatest at relatively low prices. Since Chicago did not allow food to be prepared on a food truck, Chicago residents were missing out on this food truck revolution, and thus the pressure was mounting on the City Council to do something to open to the market to these innovative businesses, allowing Chicago citizens to experience the benefits that people in other cities across the country were enjoying. Associated Press, *Chicago City Council Approves Food Truck Ordinance*, Fox News (July 25, 2012), https://goo.gl/8EYnKr.

But politically connected owners of brick-and-mortar restaurants worried about competing with these new food trucks. The Illinois Restaurant Association – which had the ear of Alderman Tom Tunney, a member and former chairman of the Association and owner of Ann Sather restaurants – made recommendations to the City Council designed to stifle the competition that food trucks would provide to existing brick-and-mortar

restaurants, Monica Eng, *Does Restaurant Association Document Reveal the Future for Chicago Food Trucks?*, Chi, Trib. (April 20, 2012), https://goo.gl/noJkMQ, and that some of these recommendations made it into the ordinance. Although the ordinance adopted in July 2012 allowed the preparation of food on board of a truck, it maintained the existing 200 foot rule (with an exception for food trucks at construction sites), created the GPS requirement, and imposed a limit of two hours for food trucks to stay in any one location in an attempt to protect brick-and-mortar restaurants.

C. The ordinance had its intended effect, making it difficult for food trucks to compete with the politically-connected brick-and-mortar businesses.

Initially, removing the prohibition on the preparation of food in the truck resulted in an uptick of food truck permits issued by the City, as entrepreneurs looked to take advantage of the growing gourmet food truck movement.

But the realities imposed by the 200 foot rule, GPS requirement, and other requirements in the ordinance eventually had the intended effect: Numerous food truck operators went out of business when they found that it was very difficult to be profitable if they could not secure one of the few available spaces for food trucks where demand was highest during the lunch hour. The original Complaint filed in this case notes that at the time, July 2012, Chicago had 127 food trucks, C7, but by 2017 it was estimated that there are only about 70 food trucks in Chicago. Julia Thiel, *Why Chicago's Once-promising Food Truck Scene Stalled Out*, Chi. Reader (March 29, 2017), https://goo.gl/pLs6kq.

Indeed, according to a report by the U.S. Chamber of Commerce released earlier this year, "Chicago's food truck scene appears to be stalling out due to onerous regulations." Michael Hendrix & Lawrence Bowdish, *Food Truck Nation*,

https://www.foodtrucknation.us/wp-content/themes/food-truck-nation/Food-Truck-Nation-Full-Report.pdf. Further, the report finds that "[t]he experience of operating a food truck in Chicago is perhaps one of the most difficult in the country." *Id.*

The report calculates that the cost of complying with the City of Chicago's regulations to be $32,461, the highest in the country next to Boston. Id. And the results of these regulations are clear: Chicago has significantly fewer food trucks relative to its population than other major U.S. cities. New York City has about 500 food trucks. *New York City Food By the Numbers: Food Trucks*, New York City Food Policy Center at Hunter College (Oct. 16, 2014), https://goo.gl/vzzvB3. Los Angeles County has about 2,600 permits for food trucks. Thiel, *supra*. Washington, D.C., which has a population of 680,000, compared to 2.7 million in Chicago, has 100 food trucks. *Id*. Minneapolis, which has about one-sixth the population of Chicago (and has even harsher winters), has 80 to 90 trucks. *Id*. Austin, Texas has issued 1,250 mobile vending permits. *Id*. And despite having only a quarter of the population of Chicago, Portland has a larger number of active food trucks. Hendrix & Bowdish, *supra.*

As Chicago defends this anti-competitive ordinance designed to protect existing brick-and-mortar restaurants at the expense of food truck owners and entrepreneurs, other cities are repealing their restrictive food truck regulations. For example, San Antonio recently repealed its 30 year-old ordinance prohibiting food trucks within 300 feet of a brick-and-mortar restaurant, after City Attorney Martha Sepeda concluded that the law was "not defensible." Kenric Ward, *San Antonio Food Trucks Win at City Hall*, Watchdog.org (Nov. 20, 2015), http:// goo.gl/zTmU5S. Meanwhile, in 2016, Evanston, Illinois, immediately to the north of Chicago, repealed a provision of the city's food-truck

ordinance that banned food trucks based outside of Evanston from operating in the city, after facing a lawsuit challenging that provision. Bob Seidenberg, *Evanston Opens Door to Outside Food Trucks*, Chi. Trib. (June 16, 2016), https://goo.gl/tcx7H9; *see also* Melissa McCart, *Change Made to Laws Governing Food Truck Licenses, Parking in Pittsburgh*, Pittsburgh Post-Gazette (December 22, 2015), https://goo.gl/JqgJWt (describing Pittsburgh ordinance allowing food trucks to park in metered spaces for as long as four hours); Katherine Driessen, *Food Trucks Now Allowed in Downtown Houston*, Houston Chron. (Sept. 26, 2014), https://goo.gl/PSt4Hp (describing Houston ordinance lifting a restriction on food trucks in the downtown business district).

The result of Chicago's anti-competitive ordinance, and particularly the 200 foot rule, has predictably been to stymie the growth of food trucks in Chicago – and give Chicago residents fewer choices than they otherwise would enjoy – while other major cities and their citizens have benefited from growing food truck scenes.

II. Illinois courts are empowered to provide meaningful review of laws that favor some businesses over others.

The Illinois Constitution allows Illinois courts to do something about these unfair laws favoring some businesses at the expense of others. Indeed, Illinois courts have a long history and tradition of reviewing laws that favor politically influential companies.

The Illinois Supreme Court has historically been willing to strike down laws establishing legal monopolies under the guise of protecting public health and safety. In *Chicago v. Rumpff*, for example, the Court struck down an 1867 Chicago ordinance that prohibited the slaughter of cattle except at a single, privately owned abattoir, that the City defended by claiming it protected public health. The Court found that government could protect people against nuisances or other public dangers, but may not "confer pecuniary

benefits, or to grant monopolies to any portion of community," or "sell, or even grant, special immunities to any portion of the inhabitants for their individual benefit or gain." 45 Ill. 90, 95-96 (1867). Nearly a century later, the Court relied on *Rumpff* to block a village's attempt to allow only a single concrete plant to operate by forbidding new concrete companies, holding it unconstitutional "to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period." *Suburban Ready-Mix Corp. v. Vill. of Wheeling*, 25 Ill. 2d 548, 551 (1962).

The Illinois Supreme Court has historically recognized the important role that courts' protection of constitutional rights plays in ensuring economic opportunity for those who lack political influence to obtain special government privileges:

> The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. . . . A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit . . . .

Frorer v. People, 141 Ill. 171, 183 (1892) (*quoting State v. Goodwill*, 10 S.E. 285, 286-87 (W.Va. 1889)).

In reviewing restrictions on economic liberty, the Illinois Supreme Court has not treated the rational basis test as requiring automatic approval of anything the government claims serves its interests. To the contrary, it has consistently held that laws that are not reasonably designed to serve the public's health, safety, or welfare are unconstitutional. In particular, the Illinois Supreme Court has rigorously applied the rational basis in cases affecting the right to use one's property to earn a living. *See, e.g., Church v. State*, 164 Ill. 2d 153, 169-72 (1995) (striking statute for licensing alarm contractors not "calculated

to enhance the expertise of prospective licensees"); *People v. Johnson*, 68 Ill. 2d 441 (1977) (striking licensing law protecting established plumbers from competition without providing any benefit to the public, following a line of cases doing the same); *Chi. Title & Trust Co. v. Vill. of Lombard*, 19 Ill. 2d 98, 105-06 (1960) (striking down an ordinance that prohibited a gas station from existing within 650 feet of another gas station); *Gholson v. Engle*, 9 Ill. 2d 454, 459-60 (1956) (striking law requiring a funeral director to also be a licensed embalmer because evidence showed no justification for tying one occupation to the other); *Figura v. Cummins*, 4 Ill. 2d 44, 49 (1954) (striking down a statute prohibiting people from processing metal springs in their homes as unreasonably overbroad because the alleged justification for the law – that the foot press used by some home workers would, if unguarded, be dangerous to small children – was not used in 75 percent of homes and could have been entirely eliminated by a regulation requiring foot presses used in the processing of metal products by home workers to be provided with guards).

Thus, the history and values reflected in Illinois Supreme Court precedent give this Court the tools needed to apply meaningful review to the City of Chicago's food truck ordinance – and to strike it down because it serves no purpose except economic protectionism.

CONCLUSION

For the reasons set forth above and in Plaintiff-Appellant's brief, the circuit court's decision should be reversed.

Dated: August 20, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or 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, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 13 pages.