No. 123123

IN THE
SUPREME COURT OF ILLINOIS

LMP SERVICES, INC. *Plaintiff-Petitioner*,	)	On Appeal from Appellate Court of Illinois First District, No. 16-3390
	)	On Appeal from Circuit Court of Cook County, Case No. 12 CH 41235
	)	Trial Judge: Hon. Helen Demacopoulos
THE CITY OF CHICAGO *Defendant-Respondent*.	)	

MOTION OF ILLINOIS FOOD TRUCK OWNERS ASSOCIATION, NATIONAL FOOD TRUCK ASSOCIATION, AND CATO INSTITUTE FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER LMP SERVICES, INC.

MATTHEW A. CLEMENTE
(Bar #6255757)
SIDLEY AUSTIN LLP
1 South Dearborn St.
Chicago, IL 60603
mclemente@sidley.com
Telephone: (312) 853-7914
Fax: (202) 736-8711
*additional counsel listed on inside cover

GORDON D. TODD
DAVID A. MILLER
MACKENZI SIEBERT
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
gtodd@sidley.com
david.miller@sidley.com
msiebert@sidley.com
Telephone: (202) 736-8000
Fax: (202) 736-8711

August 20, 2018

The Illinois Food Truck Owners Association, the National Food Truck Association, and the Cato Institute (collectively, "Proposed *amici*"), respectfully move pursuant to Illinois Supreme Court Rule 345 for leave to file a brief as *amici curiae* in support of the Petition for Leave to Appeal of Plaintiff-Petitioner LMP Services, Inc. ("LMP Services").

Attached hereto are: (1) the proposed brief of *amici curiae*; and (2) a proposed order.

Interests of the Proposed *Amici*

The Illinois Food Truck Owners Association is a community of food truck operators, which supports the well-being of mobile food vendors, including promoting sensible regulation to allow food trucks to flourish in Chicago. Its members are directly affected by the challenged ordinances in this case.

The National Food Truck Association is an organization of regional food truck associations. Its purpose to leverage their members experience and knowledge to ensure that food trucks nationwide have sufficient resources and access to information. Among other things, it assists vendors and regional associations in working cooperatively with municipalities and governmental bureaucracies to review codes, ordinances, and procedures so they can better address the realities of the new food truck industry.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

The Proposed Brief of *Amici Curiae* Will Assist the Court

Proposed *amici* have a strong interest in the issues at stake in this matter, including freedom from unreasonable searches and seizures, the protection of economic liberty, and the ability of new businesses to compete with entrenched economic interests.

Proposed *amici* respectfully submit that the attached brief of *amici curiae* will assist the Court in considering LMP Services' Petition. Proposed *amici* National Food Trucks Association and Illinois Food Truck Owners Association support the food truck industry both nationally and in Illinois and therefore are uniquely situated to understand and explain the impact of the challenged ordinances on their members, the food truck industry at large, and other new businesses. Proposed *amicus* Cato Institute is a well-known advocate on behalf of liberty and is particularly well situated to explain the impact of the Appellate Court's decision on freedom from unreasonable searches and economic rights.

The attached brief is less than 50 pages and is not repetitive of LMP Services' arguments. It is intended to supplement, not restate, those arguments, and is being filed well in advance of any answer from Respondent, thus giving Respondent ample time to respond. For the reasons stated above, Proposed *amici* respectfully request that the Court consider the attached brief.

WHEREFORE, Proposed *amici* respectfully request that the Court grant them leave to file their brief as *amici curiae*.

August 20, 2018

Respectfully Submitted,

/s/ Matthew A. Clemente
MATTHEW A. CLEMENTE

(Bar #6255757)
SIDLEY AUSTIN LLP
1 South Dearborn St.
Chicago, IL 60603
mclemente@sidley.com
Telephone: (312) 853-7914
Fax: (202) 736-8711

GORDON D. TODD
DAVID A. MILLER
MACKENZI SIEBERT
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
gtodd@sidley.com
david.miller@sidley.com
msiebert@sidley.com
Telephone: (202) 736-8000
Fax: (202) 736-8711

PROOF OF SERVICE

The undersigned certifies under penalties as provided by law that on August 20, 2018, a copy of the foregoing **MOTION OF ILLINOIS FOOD TRUCK OWNERS ASSOCIATION, NATIONAL FOOD TRUCK ASSOCIATION, AND CATO INSTITUTE FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER LMP SERVICES, INC.** and its two attachments were filed and served upon the Clerk of the Illinois Supreme Court via the Court's electronic filing system and was served on counsel of record below via email:

Robert Frommer
Robert Gall
Erica J. Smith
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA. 22203
(703) 682-9320
rfrommer@ij.org; bgall@ij.org;
esmith@ij.org

James W. Joseph
Eimer Stahl, LLP
224 South Michigan Ave., Suite 1100
Chicago, IL. 60604
(312) 660-7612
jjoseph@eimerstahl.com

Counsel for the Plaintiff

Suzanne M. Loose
City of Chicago, Department of Law
Appeals Division
30 North LaSalle Street, Suite 800
Chicago, IL. 60602
Suzanne.loose@cityofchicago.org

Counsel for Defendant

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/ Matthew A. Clemente
Matthew A. Clemente
Sidley Austin LLP
Counsel for Proposed Amici Curie

Exhibit 1

Proposed Brief of Amici

No. 123123

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	)	Trial Judge: Hon. Helen Demacopoulos
THE CITY OF CHICAGO *Defendant-Respondent*.	)	

PROPOSED BRIEF OF *AMICI CURIAE* ILLINOIS FOOD TRUCK OWNERS ASSOCIATION, NATIONAL FOOD TRUCK ASSOCIATION, AND CATO INSTITUTE IN SUPPORT OF PETITIONER LMP SERVICES, INC.

MATTHEW A. CLEMENTE
(Bar #6255757)
SIDLEY AUSTIN LLP
1 South Dearborn St.
Chicago, IL 60603
Telephone: (312) 853-7914
Fax: (202) 736-8711
mclemente@sidley.com
*additional counsel listed on inside cover

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msiebert@sidley.com
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PRELIMINARY STATEMENT

The decision below sustained two challenged ordinances on bases that strike at the heart of liberty. *Amici curiae* ("*amici*") respectfully urge this Court to reverse the Appellate Court's decision on both points.

First, the GPS Requirement plainly effects a "search" under *United States v. Jones*, 565 U.S. 400 (2012). In holding otherwise, the Appellate Court erred by taking an unduly constrained view of what constitutes a physical trespass and an unduly large view of government authority to attach conditions to licensure. This Court should therefore reverse that decision.

The Appellate Court further erred by failing to recognize that the GPS Requirement is fundamentally different from the limited number of warrantless administrative search regimes that have been upheld and that the City can articulate no legitimate government interest in the continuous surveillance of food trucks. Because the lack of constitutional safeguards and the improper purposes underlying the regulatory scheme render it unreasonable, this Court should find the GPS Requirement unconstitutional under the Fourth Amendment of the U.S. Constitution, and Article I, Section 6 of the Illinois Constitution

Second, the 200-Foot Rule violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and the Equal Protection Clause of the Illinois Constitution because it fails both prongs of rational basis review. The Appellate Court's decision below endorsed pure economic favoritism as a "legitimate interest," contrary to this Court's clear precedent, and should be reversed on that point alone. But, even if this Court disagrees and finds economic protectionism to be a legitimate government interest,

then it must meaningfully consider that justifications advanced by the City in support of the 200-Foot Rule, and evaluate whether the justifications are rationally related to the City's interest in adopting the 200-Foot Rule. Empirical data does not support the City's justifications, and in fact, shows that allowing food trucks to freely operate within the City would increase the City's taxable revenue, and would have no effect on either sidewalk crowding or the accumulation of garbage. The rule thus fails both prongs of rational basis review, and this Court should reverse the Appellate Court's decision.

INTERESTS OF *AMICI CURIAE*

The Illinois Food Truck Owners Association is a community of food truck operators, which supports the well-being of mobile food vendors, including promoting sensible regulation to allow food trucks to flourish in Chicago. Its members are directly affected by the challenged ordinances in this case.

The National Food Truck Association is an organization of regional food truck associations. Its purpose to leverage their members experience and knowledge to ensure that food trucks nationwide have sufficient resources and access to information. Among other things, it assists vendors and regional associations in working cooperatively with municipalities and governmental bureaucracies to review codes, ordinances, and procedures so they can better address the realities of the new food truck industry.

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ARGUMENT

I. THE GPS REQUIREMENT EFFECTUATES AN UNCONSTITUTIONAL WARRANTLESS SEARCH

The Fourth Amendment protects not privacy generically, but the right to be free from unreasonable searches and seizures. Specifically, its two clauses establish "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures" and separately that "no Warrants shall issue, but upon probable cause." Read literally then the Fourth Amendment does not require a warrant for all searches nor probable cause for a search to be "reasonable." However, the U.S. Supreme Court has established "the basic rule" in all cases assessing the constitutional reasonableness of warrantless searches that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (internal quotations omitted).

The City argues, and the Appellate Court held, that the GPS Requirement[1] is not a constitutional "search." The City further argues that it would be reasonable in any event under the exception to the warrant requirement for administrative searches of closely regulated industries. This is wrong on both fronts. The GPS Requirement unambiguously

[1] Chi. Ill., Mun. Code § 7-38-115(l) (1990) requires that each licensed food truck "be equipped with a permanently installed functioning" GPS device that "sends real-time data to any service that has a publicly accessible application program interface (API)." Additionally, a Chicago Board of Health rule imposes further requirements on the GPS functionality and GPS service providers. *See* Chi. Bd. of Health, Rules & Regs. for Mobile Food Vehicles, R. 8 (eff. Aug. 7, 2014). As used herein, "GPS Requirement" refers to the totality of these requirements.

mandates searches subject to constitutional scrutiny—it is of no import that the tracking devices are physically installed by private parties as a condition of licensure. Moreover, while not requiring a warrant, the GPS Requirement fails to restrict searches to constitutional circumstances, does not properly limit official discretion, and is not justified by constitutionally permissible purposes. *Amici* therefore urge this Court to overturn the Appellate Court's erroneous holding that Article I, Section 6 of the Illinois Constitution, has no application to the GPS Requirement and find that the GPS Requirement is an unreasonable, and therefore unconstitutional search.

A. The GPS Requirement Plainly Effects a Search Under the *Jones* Framework

In *United States v. Jones*, 565 U.S. 400, 404 (2012), the U.S. Supreme Court held that the government conducts a "search" for purposes of the Fourth Amendment when it installs a GPS tracking device on a vehicle for the purpose of tracking its movements.[2] In this case, the City of Chicago has enacted an ordinance that achieves precisely the same result by requiring food truck owners to do what *Jones* held the government cannot do without a warrant. The Appellate Court's ruling that this ordinance does not effect a search is contrary to the logic of *Jones* and would produce constitutionally intolerable results. This Court should overturn the Appellate Court's erroneous holding that Article I, Section 6 of the Illinois Constitution, has no application to the GPS Requirement.

Under *Jones*, a search occurs where the government (i) physically intrudes on (ii) a constitutionally protected area (iii) for the purpose of gathering information. *See, e.g.*,

[2] This ruling is equally applicable to Ill. Const. art 1, § 6. *People v. Thomas*, 198 Ill. 2d 103, 109 (Ill. 2001).

id. at 406 n.3, 407. According to the Appellate Court, the GPS Requirement does not constitute a physical intrusion because it does not permit or require the City to "physically enter[]" food trucks. The Appellate Court also suggested that the GPS Requirement is exempt from *Jones* because it is a condition of licensure. This reasoning is deeply flawed.

First, the Appellate Court's narrow view of what constitutes a physical intrusion contradicts a well-established principle of Fourth Amendment jurisprudence: the government cannot avoid constitutional scrutiny by requiring a private citizen to do what the government itself cannot do without conducting a search. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 614−15 (1989). In *Skinner*, the U.S. Supreme Court held that federal regulation requiring private railroad companies to collect blood and urine samples from employees involved in certain accidents was a "search" within the meaning of the Fourth Amendment. Although the government itself did not conduct this physical intrusion upon the persons of railroad employees, any railroad that complied with the regulation did so "by compulsion of sovereign authority." *Id.* at 614. Even a less-compulsory regulation that authorized but did not require blood and urine tests of certain employees effected a search because any tests conducted would not be "primarily the result of private initiative." *Id.* at 615; *cf. Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) (defining "the test" for state action in the Fourth Amendment context to be "whether . . . in light of all the circumstances of the case" a private party "must be regarded as having acted as an 'instrument' or agent of the state").

Here, as in *Skinner*, the government compels a private party to carry out what would indisputably be a "search" if performed by the government. But for the government's GPS Requirement, there would be no GPS device installation nor subsequent tracking of food

trucks locations and retention of data. Because the government cannot avoid constitutional limitations on searches by conscripting food truck owners—or, indeed, vehicle owners generally—as agents to conduct searches of their own vehicles, the Appellate Court's holding that no search occurred should be reversed.

Second, the Appellate Court also mistakenly held that no search occurred because the right to operate a food truck is a revocable license and that a food truck vendor consents to abide by the GPS requirement as a condition of obtaining that license. *See LMP Servs. Inc. v. City of Chicago*, 2017 IL 163390, ¶¶ 54−57 ("Op.") (citing *Grigoleit v. Bd. of Trs*., 233 Ill. App. Ct. 3d 606 (Ill. App. Ct. 1992)). As an initial matter, this conflates the question of whether the GPS Requirement effects a "search" with the question of whether that search was reasonable.[3] *See, e.g.*, *Florida v. Jimeno*, 500 U.S. 248, 250−51 (1991) (holding that whether consent to search was given goes to whether search was reasonable).

Moreover, *Grigoleit* stands only for the proposition that no "unconsented search" occurs when the government conditions a special privilege to dispose of industrial wastewater on real property owned by the public on the license-holder agreeing to inspection. *Grigoleit*, at 611. If the Appellate Court is correct that *Grigoleit* allows the government to condition the issuance of any license on the license-holder agreeing to a search, it would permit the Illinois government to condition even the issuance of drivers licenses on drivers' consenting to random police searches of their vehicles, or on the

[3] Whether or not it is *reasonable* as an administrative search of a closely regulated entity or otherwise for the GPS Requirement to mandate such an invasion of personal property as a condition to operate a food truck is an entirely separate and distinct inquiry the Appellate Court did not reach. *Cf. City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015) (holding unconstitutional a statute requiring hotels to comply with administrative searches of their records without affording them the opportunity for preclearance review before a neutral decision-maker).

installation of GPS trackers in all vehicles, thus negating longstanding jurisprudence applying constitutional protections against unreasonable searches to motor vehicles. *See generally Gant,* 556 U.S. 332 (applying Fourth Amendment to search of vehicle).

B. The GPS Requirement is Not Constitutional Under the Administrative Search of Closely Regulated Industries Exception to the Warrant Requirement Due to Its Excessive Scope and Failure to Cabin Official Discretion

1. The Closely Regulated Industries Exception is Narrowly Tailored and Applicable to a Limited Set of Circumstances.

Although warrantless searches generally require probable cause, *see, e.g., Carroll v. United States.*, 267 U.S. 132, 155−56 (1925), certain warrantless search regimes may be constitutionally reasonable where special needs render the traditional warrant and probable cause requirements impracticable and the primary purpose of the scheme is distinguishable from general interests in crime control. *Patel*, 135 S. Ct. at 2452. The administrative search doctrine is one such "special needs" exception to the warrant requirement where the necessity of individualized probable cause determinations gives way to an industry or area-wide approach in order to address health and safety concerns. *See, e.g.*, *See v. City of Seattle*, 387 U.S. 541, 546 (1967) (noting legality of certain business licensing and inspection programs under Fourth Amendment to be assessed on a case-by-case basis); *Camara v. Mun. Court*, 387 U.S. 523, 534−39 (1967) (holding that probable cause for administrative building code inspections need "not necessarily depend upon specific knowledge of the condition of the particular dwelling" to satisfy the Fourth Amendment provided "reasonable legislative or administrative standards" are met).

The closely regulated industry exception, itself a limited subset of administrative search doctrine, permits regular warrantless searches of pervasively regulated industries

whose characteristics inherently pose credible threats to health and safety. *See, e.g.*, *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76 (1970) (holding the "framework of a warrant procedure" inapplicable to assessing constitutionality of warrantless search regime of liquor businesses); *Donovan v. Dewey*, 452 U.S. 594, 602 (1981) (noting "mining industry is among the most hazardous in the country" in upholding warrantless search regime). When upheld, these cases involve relatively non-invasive, discrete government intrusions authorized by statute or regulation to ensure compliance with specific health and safety-related administrative requirements, such as recordkeeping rules or licensing restrictions. *Colonnade Catering*, 397 U.S. at 77 (emphasizing regulatory regime did not allow forcible entry to conduct inspections); *see also United States v. Biswell*, 406 U.S. 311, 317 (1972) (holding warrantless firearms inspection statute valid "where . . . the possibilities of abuse and the threat to privacy are not of impressive dimensions"); *Dewey*, 452 U.S. at 604-05 (noting "specific mechanism for accommodating any special privacy concerns" and prohibition on forcible entries in upholding warrantless search scheme).

The closely regulated industry exception thus provides that in a narrow set of circumstances, warrantless searches conducted on an industry-wide basis to further state interests in health and safety may be reasonable pursuant to a valid statute. Critically, this does not provide carte blanche for regulatory regimes to eschew the Fourth Amendment's central tenet to ensure such searches not be conducted in a discriminatory or otherwise arbitrary manner. *See, e.g.*, *id.* at 604 (finding the scheme "establishes a predictable and guided federal regulatory presence" and does not leave "*the frequency and purpose* of inspections to the unchecked discretion of" officials) (emphasis added); *Marshall v.*

Barlow's, Inc., 436 U.S. 307, 323−24 (finding Fourth Amendment violation where "[t]he authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers").[4]

In other words, such statutes are valid exceptions to the warrant requirement *only* where structural safeguards ensure that closely regulated industries will not be subjected to arbitrary, generalized invasions. This necessitates more than an abstract balancing of the governmental interests in health and safety against the industry privacy interests at stake. Rather, a warrantless search of a closely regulated industry will be deemed reasonable only if three criteria are met: (i) a substantial government interest informs the regulatory scheme; (ii) the warrantless search is necessary to further the scheme; and (iii) the scheme, in terms of the certainty and regularity of its application, provides a constitutionally adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 702−03 (1987).

2. The GPS Requirement Is Not Necessary to Further the Regulatory Scheme

The GPS Requirement is extensive. It mandates that food truck operators provide a constant stream of real-time location data to a GPS service provider every five minutes a food truck is open for businesses or being serviced at a commissary. The GPS service provider must ensure such data is publicly accessible and also maintain and provide the prior six months of historic location data when requested. The GPS Requirement contains

[4] The U.S. Supreme Court applies similar scrutiny to other administrative search regimes that do not require individualized showings of probable cause. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973) (objecting to "unfettered discretion"); *See*, 387 U.S. at 545 (noting lack of "unreviewed discretion of the enforcement officer"); *United States v. Ortiz*, 422 U.S. 891, 896 (1975) (Border Patrol authority "to search vehicles at random" that merely "arouse their suspicion" violates Fourth Amendment).

no procedural safeguards or protections aimed at protecting foods trucks' privacy interests. As such, the GPS Requirement is woefully inadequate to address constitutional safeguards under the second and third prongs of the *Burger* framework.

The City argues that the GPS Requirement is necessary to protect public health and safety because prepared food can carry foodborne illness, propane tanks present fire hazards, and food trucks by definition operate on public roads. Therefore, the City purportedly enacted the GPS Requirement to locate food trucks to ensure health and safety regulations are followed–specifically when a location needs to be acquired quickly to address emergencies or other time-sensitive issues when alternative methods such as following social media or contacting food truck operators directly have failed. The City argues a warrant requirement would frustrate the benefits of being able to conduct frequent and unannounced inspections. It should be noted LMP has established that the City has *never* used GPS data to conduct a health inspection.

As *Patel* makes clear, the necessary prong of the *Burger* framework is more demanding than merely showing that a warrant requirement would frustrate the efficacy of the regulatory scheme. The Court there in fact expressly rejected Los Angeles' argument that procedural safeguards would erode the ability to conduct surprise inspections and that this alone rendered the warrantless search scheme necessary. *Patel*, 135 S. Ct. at 2456 (analyzing necessary prong in terms of whether providing opportunity for precompliance review to regulated party would provide opportunity to falsify records and thereby fatally undermine the scheme); *see also Barlow's*, 436 U.S. at 320. As related to enforcing health and safety regulations, it is unclear how affording food truck operators some form of procedural safeguard before obtaining GPS location data in the normal course would hinder

the regulatory regime beyond any perceived "advantages" of surprise inspections. To the extent truly exigent circumstances were to arise, these would by definition render those warrantless searches reasonable.

More fundamentally, even if the City's stated reasons for the necessity of the GPS Requirement are similar to those advanced in cases involving other regulatory regimes, the scope of the invasion into food truck operators' business and property is wholly unprecedented and inconsistent with the justification for allowing warrantless searches under limited circumstances in closely regulated industries. In every case where the U.S. Supreme Court has upheld a warrantless search regime under the closely regulated industry exception the regulatory regime at issue provided for discrete, on-site inspections of business premises.[5] The exception allows these minimally invasive, post-hoc inspections conducted pursuant to procedural safeguards as "necessary" precisely because the warrant requirement's need for individualized suspicion prevented the government from effectively addressing health and safety concerns. *Dewey*, 452 U.S. at 603.

The GPS Requirement does not merely allow the City to inspect food trucks without first obtaining a warrant predicated on probable cause. Rather, it establishes a scheme of constant, real-time surveillance monitoring that requires public dissemination of business records (location data) devoid of any procedural safeguards. The closely regulated industry exception to the Fourth Amendment is not that broad. The pervasive surveillance authorized by the GPS Requirement is materially different in *kind* and degree from the limited, periodic inspections authorized by constitutional regulatory regimes. The City's

[5] To date there are four such cases. *See Colonnade Catering*, 397 U.S. 72 (liquor sales); *Biswell*, 406 U.S. 311 (firearms dealing); *Dewey*, 452 U.S. 594 (mining); *Burger*, 482 U.S. 691 (automobile junkyards).

legitimate need to inspect business properties on occasion does not justify a scheme of continuous surveillance.

3. The GPS Requirement Lacks a Properly Defined Scope and Fails to Limit Official Discretion.

The search regime's certainty and regularity of application must provide a constitutionally adequate warrant replacement. This third prong of the *Burger* framework requires the warrantless search scheme to perform the two basic functions of a warrant: (i) advise the business owner that the search is made pursuant to law with a properly defined scope; and (ii) limit official discretion. *Burger*, 482 U.S. at 703. Because the GPS Requirement limits neither its scope nor official discretion in any meaningful manner it fails to do either.

Under the GPS Requirement food trucks must provide real-time GPS location data to GPS service providers as a matter of course. GPS providers must also maintain six months of detailed historical location data. The City may obtain this data from these providers at whatever frequency it deems necessary. There is no requirement that the City provide its justification for obtaining such data. There is no mechanism for GPS operators to be informed why the City sought such data, much less to mount an objection. In fact, there is no requirement that the City ever even inform a food truck operator it has sought such data at all, including the historical information. This is a far cry from the requirement that the regime be "sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Id.* (citing *Dewey*, 452 U.S. at 600).

The search regime must also be limited in time, place, and scope to constitutionally substitute for the warrant requirement. *Id*. (citing *Biswell,* 406 U.S. at 315). Here the

fundamentally different nature of the GPS Requirement compared to prior inspection regimes becomes readily apparent. First, the constant GPS monitoring means that there is quite simply no constraint on the time and place dimensions and thus no limits as to which food truck is searched and under what circumstances these searches occur. *See Patel*, 135 S. Ct. at 2456 (holding warrantless inspection regime that provided for unlimited inspections without procedural requirements violative of third *Burger* prong for "impos[ing] no comparable standard" to previously upheld inspection schemes).

Even more problematic is the absolutely unprecedented scope of the GPS Requirement, which requires the GPS data to be made available to anyone with software capable of interfacing with the publicly available API the GPS service *must* have. In effect, the GPS Requirement mandates food truck operators make their location data available to the entire world. It is difficult to conceive of a warrantless search regime that does less to "place appropriate restraints on" official discretion and protect against "the possibilities of abuse and the threat to privacy" than a literal mandate to constantly reveal one's precise location to the world as a condition of doing business. *Burger*, 482 U.S. at 711; *Biswell*, 406 U.S. at 317. Compounding matters is that the City may obtain six months of historical location data to generally ensure compliance with a broad litany of City Code provisions applicable to any food establishment subject to no procedural restraint.

Notably, Chicago's food industry regulations fall within the closely regulated industry exception precisely because they were limited in scope and cabined the discretion of inspectors. *See City of Chicago v. Pudlo*, 123 Ill. App. 3d 337, 348 (Ill. App. Ct. 1983) (upholding warrantless search regime of closely regulated industry and noting "[t]his is not to say that the food industry is subject to the unfettered discretion of the City inspectors.

The Code is specific in limiting the inspections to reasonable times, to the inspection only of the books and records of the business, and to the inspection only of areas where food preparation or storage are conducted."); *see also Burger*, 482 U.S. at 711−12 ("the permissible scope of these searches is narrowly defined: the inspectors may examine the records, as well as 'any vehicles or parts of vehicles which are subject to the record keeping requirements of this section and which are on the premises.'") (citing *Dewey*, 452 U.S. at 605.).

The City's food industry regulations thus stand in stark contrast to the grossly unfettered discretion and sweeping scope of the GPS Requirement. That is no small flaw. Exceptions to the warrant requirement must be carefully cabined because while they allow for *alternative procedures* in lieu of a constitutional default rule, they are not exceptions to the core Fourth Amendment protection against arbitrary intrusions of property. *See generally Barlow's*, 436 U.S. at 320−24. The closely regulated industry exception is not intended to function as an all-encompassing license for the government to execute searches and seizures devoid of meaningful constitutional oversight.

C. The Purposes Underlying the GPS Requirement Do Not Address Health and Safety and Thus Cannot Survive Constitutional Scrutiny

The above application of the *Burger* framework reveals an exceptionally poor fit between the closely regulated industry exception and the GPS Requirement. This is because the GPS Requirement in truth is entirely unmoored to protecting health and safety, a necessary precondition to the exception's applicability. *See, e.g.*, *Dewey*, 452 U.S. at 600 (substantial federal interest in improving health and safety conditions in mines); *Biswell*, 406 U.S. at 315 (regulating firearms critical to preventing violent crime); *Burger*, 482 U.S.

at 708 (discouraging motor vehicle theft directly associated with inspecting the automobile junkyard industry).

The City asserts that the GPS Requirement is primarily designed to enforce health and safety regulations. But the City has never used GPS tracking data for this purpose, and the terms of the GPS Requirement itself belie that it was the City's intended purpose. The GPS data must be made publicly available and there is no enforcement mechanism as there is with other health and safety regulations. And although the GPS Requirement provides that the City will not request location data from a GPS provider except under certain circumstances, the six enumerated reasons are broad enough to cover essentially any conceivable circumstance. The exceptions expressly include "establishing compliance with Chapter 7-38 of the Municipal Code of Chicago or the regulations promulgated thereunder." Chi. Bd. of Health, Rules & Regs. for Mobile Food Vehicles, R. 8(b) (eff. Aug. 7, 2014). Chapter 7-38 of the Municipal Code contains an extensive, comprehensive regime of operating requirements applicable to various food establishments.

It is well established that any "special needs" exception to the warrant requirement, such as administrative searches of closely regulated industries, must first exhibit a "primary purpose" that is "[d]istinguishable from the general interest in crime control." *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000). In other words, warrantless search regimes may not be employed as an end-around the Fourth Amendment's protection against arbitrary searches and seizures. Given the City's admitted non-use of the GPS Requirement to facilitate health inspections and its express applicability to non-health and safety requirements, the inescapable conclusion is that the GPS Requirement is primarily concerned with general law enforcement.

The City has cited, for example, resolving disputes over compliance with the 200-Foot Rule[6] as another reason for requiring access to GPS location data. The Appellate Court upheld the 200-Foot Rule on an explicitly protectionist rationale: "We reject LMP's assertion that the City may not protect brick-and-mortar restaurants and uphold the 200-Foot Rule as a rational means of promoting the general welfare of the City of Chicago." *See* Op. at ¶ 32. Regardless of its merits, the 200-Foot Rule by any objective measure does not protect the type of health and safety interests at the core of the closely regulated industry exception.

Furthermore, a*mici* are aware of no instance where this Court or the U.S. Supreme Court upheld a warrantless search regime under the closely related industry exception that required the results of such searches to be made publicly available in real-time. In fact, the GPS Requirement goes even further, providing the public with every location each food truck has conducted business at over the past six months. There is no rational connection between this sweeping level of data dissemination and the enforcement of health and safety regulations.

D. This Court Should Decline to Extend the Administrative Search Exception to the Warrant Requirement to Allow GPS Surveillance Absent Health and Safety Concerns

The exception to the warrant requirement for closely regulated industries applies to a highly particular subcategory of warrantless administrative searches. Although the reasonableness of any warrantless search provision in a regulatory scheme will ultimately

[6] "No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m." *See* Chi. Ill., Mun. Code. § 7-38-115(f) (amended July 25, 2012).

"depend upon the specific enforcement needs and privacy guarantees of each statute.," *Barlow's*, 436 U.S. at 321, the cases have traditionally involved regular business premises inspections of inherently dangerous industries where the interests of health and safety preclude the individualized probable cause findings of a warrant regime. In *Patel* the U.S. Supreme Court recently cautioned against its expansion regarding which industries qualify as "closely regulated" for fear of "permit[ting] what has always been a narrow exception to swallow the rule." *Patel*, 135 S. Ct. at 2455. This Court should heed this warning and decline to expand the exception to the GPS Requirement, which presents fundamentally different characteristics and poses distinct threats to constitutional protections.

Warrantless administrative search regimes of closely regulated industries by their very nature will often involve substantial, generalized government interests in protecting health and safety measured against tangible, particularized privacy invasions. For this reason, it is essential that this Court ensure any such scheme possess significant restrictions on official discretion that accompany clear definitions of when, how, and why such searches are conducted.

Proper limits on executive discretion and procedural safeguards to prevent arbitrariness are and must be necessary prerequisites to any warrantless search regime under the closely regulated industry exception. The City is attempting to fit a square peg in a round hole. The *Burger* framework did not consider regimes of constant, real-time surveillance disconnected from health and safety enforcement epitomized by the GPS Requirement. The GPS Requirement cannot be saved under the exception because it fundamentally fails to cabin executive discretion in any meaningful way and provides no safeguards even approximating the protections of a warrant. Alternatively, the disconnect

between its underlying purpose and regulating health and safety render the exception wholly inapplicable.

To expand the breadth of acceptable government discretion and allow the pervasive monitoring of any "closely regulated" businesses for any reason whatsoever at a time when technological advances render this exceptionally feasible will inevitably erode protections and set norms incompatible with Fourth Amendment foundations. Closely regulated industries need not give way to constantly monitored industries.

Fortunately, this Court need not countenance such consequences. It need only hold that the GPS Requirement effects a "search" under *Jones*, and that the lack of constitutional safeguards and improper purposes underlying the regulatory scheme render it unreasonable and therefore unconstitutional under the Fourth Amendment to the U.S. Constitution and Article I, Section 6 of the Illinois Constitution.

II. THE ILLINOIS COURT OF APPEALS' BLANKET APPROVAL OF THE CITY'S 200-FOOT RULE FLIES IN THE FACE OF EMPIRICAL RESEARCH

The City's 200-Foot Rule fails both because it rests on the City's illegitimate purpose of elevating a favored economic class over another group, and because the City's stated reasoning for the adoption of the 200-Foot Rule crumbles when subjected to empiric study and data. Although state and local governments have broad discretion to adopt economic regulations that satisfy rational basis review, *see City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam), "rational basis review . . . is not 'toothless.'" *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998) (citing *Mathews v. Lucas*, 427 U.S. 495, 510 (1976)). Though the test is "highly deferential," it must "ensure that classifications rest on something other than a naked preference for one

person or group over another." Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum. L. Rev. 1689, 1713 (1984); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 323 n.3 (1993) (Stevens, J., concurring) ("Judicial review under the 'conceivable set of facts' test is tantamount to no review at all."); *Del. River Basin Comm'n v. Bucks Cty. Water & Sewer Auth.*, 641 F.2d 1087, 1099−1100 (3d Cir. 1981). Meaningful rational basis review requires this Court to strike down statutes and ordinances that fail to "bear a rational relationship to a legitimate state interest." *People v. Jones*, 223 Ill. 2d 569, 596 (Ill. 2006) (citing *People v. Linder*, 127 Ill. 2d 174, 184 (Ill. 1989)); *see also McLean v. Dep't of Revenue*, 184 Ill. 2d 341, 353 (Ill. 1998) (noting that with regard to the due process clause of the Illinois and United States constitutions, "the standard[] [of] validity under both constitutions [is] identical.").

A. The City's Stated Purpose for the 200-Foot Rule is Pure Economic Protectionism and Thus Impermissible

This Court, like other courts throughout the country, has long held that pure economic protectionism in the form of protecting one industry over another because of "fear of potential economic disadvantage to other [businesses] is not a permissible consideration." *Lazarus v. Village of Northbrook*, 31 Ill. 2d 146, 152 (Ill. 1964); *see also St. Joseph Abbey v. Castille*, 712 F.3d 215, 222 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose"); *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review."); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) ("[P]rotecting a discrete interest group from economic competition is not a legitimate governmental

purpose."). Nevertheless, the City argued, and contrary to directly applicable precedent from this Court, the Appellate Court agreed, that it is "completely rational" for the City to favor one business group over another. Op. at ¶ 33. Throughout the course of this litigation, the City has offered numerous justifications for its adoption of the 200-Foot Rule including: (1) balancing the economic interests of food trucks and traditional brick and mortar restaurants; (2) sidewalk congestion caused by queuing food-truck patrons; and (3) proliferation of sidewalk trash caused by food trucks. None of the City's justifications survive meaningful rational basis review. The first, on its face, amounts to pure economic protectionism and thus, is impermissible. *Lazarus*, 31 Ill. 2d at 152. In any event, the City's reasoning is soundly refuted by empiric data and scientific observation.

B. The City's Justifications for the 200-Foot Rule are Empirically Unsupported

Even if naked economic protectionism intended to protect "a discrete interest group from economic competition," *Craigmiles*, 312 F.3d at 224, were a legitimate government purpose—which both Illinois Courts and courts throughout the country agree it is not, *see Lazarus*, 31 Ill. 2d at 152; *see also St. Joseph Abbey*, 712 F.3d at 222; *Merrifield*, 547 F.3d at 991 n.15—none of the City's justifications for the 200-Foot Rule bear any rational or empiric relationship to the rule itself.

Though acknowledging several of the City's first three justifications, the Appellate Court analyzed only the first, explicitly concluding that the City's decision to favor merchant-restaurants over their food truck-competitors was justified by the need to "strike a balance" between higher-tax-paying restaurants and lower-tax-paying food trucks, and was therefore a rational means of promoting the City's general welfare. Op. at ¶ 31. Not only does the Appellate Court's reasoning fail basic rational basis analysis, *see supra* at

19−20, each of the City's justifications fail as a purely empiric matter, thereby rendering them incapable of bearing a rational relationship to any legitimate government purpose.

1. The City's Preferential Treatment of Brick-and-Mortar Businesses Does not Promote the City's General Welfare.

a. Restricting Food Trucks' Ability to Operate Depresses the City's Potential Tax Revenue.

The City asserts—and the Appellate Court agreed—that the City may legitimately enact policies favoring merchants whose businesses generate greater levels of tax revenue. Op. at ¶ 31. Yet, it is empirically wrong to conclude that severely limiting food truck's ability to operate within the City will result in greater tax revenue. Contrary to the City and Appellate Court's reasoning, the actual result of the City's current food truck restrictions is a "devastating" loss in terms of both "economic grown and human potential." Michael Lucci & Hilary Gowins, *Chicago's Food-Cart Ban Costs Revenue, Jobs*, Ill. Pol'y Inst., Special Report at 18 (August 2015). For example, a recent study by the Illinois Policy Institute found that widespread legalization of food trucks within Chicago could result in upwards of an additional $160 million in annual sales, generating up to $8.1 million in new state sales-tax revenue, and up to $8.5 million in additional revenue collected from local sales taxes. *Id.* at 2, 14−17. Those increased tax revenue figures do not even account for the additional revenue generated by brick-and-mortar businesses, resulting from food trucks "attract[ing] customers to a particular area." Vincent Geloso & Jasmin Guenette, *Food-Truck Freedom for Montreal*, Montreal Econ. Inst. at 1 (May 2016). Nor does the City seem to recognize that the food truck industry is booming nationwide, with an annual growth rate of approximately 7.9% in recent years. *America's Food-Truck Industry is Growing Rapidly Despite Roadblocks*, The Economist (May 4,

2017), https://econ.st/2OJF0ey. Yet because of the City's strict food truck regulations, the City has foreclosed itself from a dynamic opportunity to collect revenue associated with the approximately 180,000 additional meals that could be served on a daily basis following widespread legalization of food truck operations. Lucci & Gowins, *supra*, at 18.

Not only would business revenue increase, allowing food trucks to freely operate within Chicago would also cause individuals' wages to rise. The vast majority of food truck owners and operators are immigrants and ethnic minorities who find that they are able to earn a higher wage owning or operating a food truck than they could otherwise earn. *Id.* at 5−6, 9. The Illinois Policy Institute's study concluded that legalizing food trucks would have the immediate effect of legalizing over 2,000 individual's jobs, with the potential to create at least 6,000 additional new jobs, generating up to $78 million in individual's annual earnings. *Id.* at 2.

The empirical data demonstrates that, far from depressing taxable revenue streams, allowing food trucks to operate within areas where they are currently barred by the 200-Foot Rule would increase the City's tax revenue. This economic reality exposes the City's justification for the rule for what it really is—a preference for one type of business over another—which this court has repeatedly labeled impermissible, and insufficient to survive rational basis review. *See Lazarus*, 31 Ill. 2d at 152 (citing *Catholic Bishop of Chi. v. Kingery*, 371 Ill. 257 (Ill. 1939)).

b. Limiting Food Trucks' Area of Operation Does Not Have an Adverse Effect on Traditional Storefront Businesses.

The true economic import of the City's decision to curtail food truck's vending abilities will be to lower the economic prospects of brick-and-mortar businesses. After all, when the City shuttered the Maxwell Street Market—one of the nation's "oldest open-air

public markets" featuring street vending and pushcart peddling, Alfonso Morales et al., *The Value of Benefits of a Public Street Market: The Case of Maxwell Street*, 9 Econ. Dev. Q. 304, 304−05 (1995)—in 1994, the well-documented result was "lowered revenues for fixed businesses" in the Market's vicinity. Gregg Kettles, *Regulating Vending in the Sidewalk Commons*, 77 Temple L. Rev. 1, 31−32 (2004). Closure of the Maxwell Market resulted in nearby brick-and-mortar businesses experiencing reduced revenue as shoppers, originally "drawn to the [Maxwell Market] area [and who] then shop[ped] at nearby fixed-location stores" were no longer drawn to the area. Morales et al., *supra*, at 312.

Far from depressing the business of traditional storefronts, allowing food trucks to operate freely throughout the City attracts additional business to brick-and-mortar storefronts. Traditional storefronts in other parts of the country actively solicit food trucks to operate in front of or near their storefront—characterizing the food truck's presence as a "win-win-win." *Food Truck Delivering a Boost to Region's Craft Breweries*, BizWest (June 7, 2018) https://bit.ly/2Ms2HeM (noting that food trucks provide a complementary good for breweries and their patrons). Another struggling industry—the retail mall—has also begun to embrace "food trucks as a way to increase foot traffic, tenant synergy and local buzz." Kathy Sturzenegger et al., *From Food Truck to Franchise: The Impact of Mobile Food on Commercial Real Estate*, Utah Bus. (July 7, 2017), https://bit.ly/2MwxkyY. In other scenarios, food trucks provide an avenue for traditional storefront businesses to expand their operating platform. In Washington, D.C., for example, the wildly popular chicken sandwich eatery Chick-fil-A debuted a food truck in 2012, "inspir[ing] ecstasy" among D.C. locals. Amy McKeever, *The Day of the Chick-fil-A Food Truck is Finally at Hand*, Wash. D.C. Eater (July 9, 2012), https://bit.ly/2vTyKdb.

Meanwhile, in Houston, which already boasts two of the busiest Chick-fil-A locations in the country, Ken Hoffman, *Houston Will Roll Out Texas' First Chick-fil-A Food Truck*, Hous. Chron. (Dec. 1, 2016), https://bit.ly/2L20Qb9, the successful franchise expanded its foray into the food truck market by introducing a Houston-based food truck. Whitney Filloon, *Chick-fil-A is Expanding Its Food Truck Fleet*, Eater (Dec. 2, 2016), https://bit.ly/2nNk2Ac. Once again, the City's justification for the 200-Foot Rule fails under empiric scrutiny and application to real world situations.

c. Allowing Widespread Food Truck Operation Improves a City's Culinary Scene.

Across the nation, restaurateurs, food truck patrons, and local communities agree that the presence of a vibrant food truck scene enhances the vibrancy of a city's gastrological scene. Diners in Los Angeles reported to a *Zagat* survey that the LA's restaurant scene was improved, despite the presence of food trucks. Bert Gall & Lancee Kurcab, *Seven Myths and Realities About Food Trucks: Why the Facts Support Food Truck Freedom*, Inst. for Justice's Nat'l Street Vending Initiative 3 (Nov. 2012), https://bit.ly/2waj3hm. In Austin, TX—one of millennials' favorite trendy cities—restaurant owners *credit* the food truck industry with "boost[ing] industry employment and the local restaurant industry as a whole." Brian Gaar, *Food Trailers Bloom Into Key Piece of Austin's Economy*, Statesman (Sept. 15, 2012), https://atxne.ws/2wbfdUV. Meanwhile, in New York, "[t]he direct competition between [street vendors and brick-and mortar businesses] is not really there." Jennifer Lee, *Street Vending as a Way to Ease Joblessness*, N.Y. Times (Apr. 29, 2009), https://nyti.ms/2MrpcRa.

In fact, across the nation, many successful brick-and-mortar restaurant enterprises began as popular food truck destinations. In Texas, Colorado, and Oklahoma, customers

can dine at any of Torchy's Tacos 17 storefront locations, owing their success to the company's humble 2006 food truck beginnings. *See* Layne Lynch, *Michael Rypka of Torchy's Tacos Talks Expansion and Secret Menu*, Tex. Monthly, (June 29, 2012), https://bit.ly/2PgAlSB. Meanwhile, in Seattle, an entrepreneur with the culinary flair for the dramatic (and the bacon jam to match), opened a food truck called "Skillet Street Food" in 2007, which he has successfully leveraged into three storefront restaurant locations, in addition to his still popular food truck. *See The Company*, Skillet, https://bit.ly/2MVInPf.

The same model has thrived in Chicago. In 1963, Dick Portillo opened a hot dog stand in Villa Park. *Our Story*, Portillo's, https://bit.ly/2wbhDTx. Thirty-one years later, the first Portillo's storefront opened at the intersection of Clark and Ontario Streets, and Portillo was named Entrepreneur of the Year by Inc. Magazine as the Company's brand continued to expand. *Id.* Portillo's now operates 50 locations throughout the Midwest, and has expanded into the Southwest as well as California. *Id.* Portillo's is "the largest privately owned restaurant company in the Midwest." Gall & Kurcab, *supra*, at 3. Yet again, market realities expose the City's justification for the 200-Foot rule for what it really is: an illegitimate (and ill-conceived) attempt to prop up a favored class of businesses.

2. None of the City's Other Justifications for the 200-Foot Rule are Empirically Supported.

The City's other justifications for the 200-Foot Rule fare no better when subjected to empiric scrutiny. A study that specifically set out to analyze the City's justifications for the 200-Foot Rule visually monitored locations where food trucks are allowed to operate to assess whether food trucks created sidewalk hazards or undesirable amounts of garbage. The study concluded that pedestrians, who are "marvelously complex and efficient transportation units" capable of navigating "rapidly moving, changing, and varied

pedestrian environments without formal regulations," are capable of "adeptly maneuvering" the sidewalks as a result of the food truck patrons "self-organizin[ing] . . . to facilitate pedestrian flow." Renia Ehrenfeucht, *Do Food Trucks and Pedestrians Conflict on Urban Streets?*, 22 J. Urb. Design 273, 277 (2017) (quoting W. H. Whyte, City: Rediscovering the Center 56 (1988)). The same study also noted "no overflowing garbage cans near the food trucks" and observed "no incidences of littering." *Id.* at 282. Similar data hails from Washington, D.C.—which also boasts a vibrant food truck scene, as several authors of this brief can attest—and indicates that the presence of a food truck does not drastically increase sidewalk foot traffic, nor does it slow a pedestrian's transit between city blocks. Gall & Kurcab, at 7; Erin Norman et al., *Streets of Dreams: How Cities Can Create Economic Opportunity by Knocking Down Protectionist Barriers to Street Vending*, Inst. for Justice at 33−34 (July 2011), https://bit.ly/2w9tVvV.

In short, the City's rationale behind the 200-Foot Rule is incapable of surviving rational basis scrutiny, because of the complete disconnect between the City's justifications and empiric realities. If, as the data shows, allowing food trucks to freely operate within Chicago will increase the City's tax revenue, boost sales at brick-and-mortar storefronts, and not appreciably impact pedestrian transit through the city or unwanted accumulation of garbage, then the 200-Foot Rule bears no "rational relationship to a legitimate state interest" and should be invalidated by this Court. *Jones*, 223 Ill. 2d at 596 (Ill. 2006). As a result, the return of the City's food trucks will "enhance Chicago's reputation as the fun, flavorful, dynamic city that it has become known to be." Lucci & Gowins, *supra*, at 19.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court reverse the Appellate Court's decision.

August 20, 2018

Respectfully Submitted,

/s/ Matthew A. Clemente
MATTHEW A. CLEMENTE
(Bar #6255757)
SIDLEY AUSTIN LLP
1 South Dearborn St.
Chicago, IL 60603
mclemente@sidley.com
Telephone: (312) 853-7914
Fax: (202) 736-8711

GORDON D. TODD
DAVID A. MILLER
MACKENZI SIEBERT
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, D.C. 20005
gtodd@sidley.com
david.miller@sidley.com
msiebert@sidley.com
Telephone: (202) 736-8000
Fax: (202) 736-8711

Counsel for Proposed Amici Curiae
Cato Institute
National Food Truck Association
Illinois Food Truck Owners Association

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 7,607 words.

/s/ Matthew A. Clemente
Matthew A. Clemente

PROOF OF SERVICE

The undersigned certifies under penalties as provided by law that on August 20, 2018, a copy of the foregoing **PROPOSED BRIEF OF *AMICI CURIAE* ILLINOIS FOOD TRUCK OWNERS ASSOCIATION, NATIONAL FOOD TRUCK ASSOCIATION, AND CATO INSTITUTE IN SUPPORT OF PETITIONER LMP SERVICES, INC.** was filed and served upon the Clerk of the Illinois Supreme Court via the Court's electronic filing system and was served on counsel of record below via email:

Robert Frommer
Robert Gall
Erica J. Smith
Institute for Justice
901 North Glebe Road, Suite 900
Arlington, VA. 22203
(703) 682-9320
rfrommer@ij.org; bgall@ij.org;
esmith@ij.org

James W. Joseph
Eimer Stahl, LLP
224 South Michigan Ave., Suite 1100
Chicago, IL. 60604
(312) 660-7612
jjoseph@eimerstahl.com

Counsel for the Plaintiff

Suzanne M. Loose
City of Chicago, Department of Law
Appeals Division
30 North LaSalle Street, Suite 800
Chicago, IL. 60602
Suzanne.loose@cityofchicago.org

Counsel for Defendant

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/ Matthew A. Clemente
Matthew A. Clemente
Sidley Austin LLP
Counsel for Proposed Amici Curie

Exhibit 2
Proposed Order

No. 123123

IN THE
SUPREME COURT OF ILLINOIS

LMP SERVICES, INC. *Plaintiff-Petitioner*,	)	On Petition for Leave to Appeal from Appellate Court of Illinois First District, No. 16-3390
	)	On Appeal from Circuit Court of Cook County Case No. 12 CH 41235
	)	Trial Judge: Hon. Helen Demacopoulos
THE CITY OF CHICAGO *Defendant-Respondent*.	)	

[PROPOSED] ORDER GRANTING ILLINOIS FOOD TRUCK OWNERS ASSOCIATION, NATIONAL FOOD TRUCK ASSOCIATION, AND CATO INSTITUTE LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER LMP SERVICES, INC.

This matter coming to be heard on the motion of the Illinois Food Truck Owners Association, the National Food Truck Association, and the Cato Institute for leave to file their proposed brief as *amici curiae* in support of Plaintiff-Petitioner LMP Services, Inc., the motion is hereby GRANTED / DENIED.

Date: _____ Entered: _____
JUSTICE