From: **Paul Dulberg** Paul_Dulberg@comcast.net
Subject: Template?
Date: January 4, 2024 at 9:16 AM
To: Alphonse Talarico contact@lawofficeofalphonsetalarico.com
Bcc: Paul Dulberg Paul_Dulberg@comcast.net

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In the Supreme Court of Illinois

LMP SERVICES, INC., Plaintiff-Petitioner, v. THE CITY OF CHICAGO, Defendant-Respondent.	On Petition for Leave to 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*

LMP SERVICES, INC.'S PETITION FOR LEAVE TO APPEAL

Robert P. Frommer (ARDC #6325160)
Robert W. Gall (ARDC #6325161)
Erica J. Smith (ARDC #6318419)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
rfrommer@ij.org
bgall@ij.org
esmith@ij.org

James W. Joseph
EIMER STAHL LLP
224 South Michigan Avenue
Suite 1100
Chicago, Illinois 60604
(312) 660-7600
jjoseph@eimerstahl.com

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Oral Argument Requested

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PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315, LMP Services, Inc. ("LMP") respectfully petitions for leave to appeal the judgment of the Illinois Appellate Court for the First Judicial District in *LMP Services, Inc. v. City of Chicago*, 2017 IL App (1st) 163390 (A1–A25).[1]

In its desire to uphold two provisions of Chicago's food-truck laws, the appellate court issued a ruling that pulled Illinois out of the mainstream of constitutional doctrine and created new and dangerous constitutional rules. Its holdings were wrong, but at a minimum, if Illinois is going to become an outlier, it should be this Court that decides to break with precedent.

The first provision the appellate court upheld is Chicago's 200-foot rule, which prevents food trucks from operating within 200 feet of the front door of any restaurant. The city admits that this rule, which applies both to public and private property, exists to protect restaurants from competition. Until the opinion below, an unbroken string of Illinois jurisprudence had held that "it is improper to directly legislate economic protection for one business against the normal competitive factors which are basic to our economic system." *Bossman v. Vill. of Riverton*, 291 Ill. App. 3d 769, 777 (4th Dist. 1997). Indeed, in *Chicago Title & Trust v. Village of Lombard,* this Court

[1] The record on appeal contains 21 common law volumes cited as "C__," and two volumes of transcripts cited as "__Tr.__." Citations to this Petition's appendix are cited "A__."

applied that principle to strike down a rule that blocked new gas stations from opening within 650 feet of existing stations.

But the opinion below, citing dicta from *Napleton v. Village of Hinsdale,* limited that line of cases to a single fact scenario: Where two competitors pay the same amount of taxes. Otherwise, said the appellate court, *Napleton* authorized cities to legislate economic protectionism. This holding created a direct conflict with *Chicago Title & Trust* and numerous other Illinois cases. It also broke with holdings from other states that have rejected the idea that tax receipts can justify such anti-competitive impulses. And, if left unchecked, the opinion below will spread confusion about whether the police power may indeed be used to shield preferred constituents from their competitors. This Court should accept review and reverse this unwarranted deviation from decades of precedent.

The appellate court also upheld Chicago's requirement that all food trucks install and operate Global-Positioning-System (GPS) tracking devices. This is a question of first impression nationally that has broad jurisprudential consequences. Although not decided in this particular context, cases from both federal and state courts hold that when the government uses its authority to mandate participation in a surveillance scheme, that scheme is a "search" that the government must show is reasonable.

But the opinion below held that Chicago's GPS requirement was not a "search" both because the requirement was a condition of licensure and because the government did not physically install the device itself. That opinion conflicts both with numerous cases where licensees have successfully challenged warrantless inspection programs and with federal cases that have held GPS monitoring to be a search without any regard as to who physically installed the device. And, if left uncorrected, the decision below would reduce constitutional protections not just for LMP, but for all businesses that need a government license to operate. This Court should accept review and declare that Chicago's GPS requirement violates Article I, Section 6.

JUDGMENT BELOW

The First District entered its judgment on December 18, 2017 (A1–A25). No petition for rehearing was filed. On January 11, 2018, this Court granted LMP's motion to extend the time for filing to February 19, 2018.

POINTS RELIED UPON IN SEEKING REVIEW

This case poses two fundamental questions warranting review by this Court.

The first, concerning LMP's challenge to Chicago's 200-foot rule, asks if the police power may be used to discriminate against businesses for the express purpose of financially benefitting those businesses' would-be competitors. The city has admitted the 200-foot rule's purpose: To restrict competition between vendors and brick-and-mortar retailers out of concern the latter may suffer economically. The opinion below embraced pure

protectionism, and in so doing broke with decades of precedent that rejected such motivations. Because Chicago's 200-foot rule furthers no legitimate government interest, it violates Article I, Section 2.

The second question—one of first impression nationally—asks if requiring licensees to install and operate GPS devices constitutes a search and, if so, whether Chicago's GPS requirement—which makes LMP's location data available to anyone who requests it—violates the Illinois Constitution. The holding below conflicts with Illinois and federal decisions that held both that governments may not impose unconstitutional conditions on licensees and that the unconsented placement of a GPS device is a "search," no matter who does the placing. If left unchecked, the opinion below would gut constitutional protections for people who must secure a government license to operate a legal business. Because Chicago's GPS requirement is an unreasonable warrantless search, it violates Article I, Section 6.

STATEMENT OF FACTS

A. Chicago's Mobile Vending Regulations

LMP is a closely held Illinois corporation whose owner, Laura Pekarik, operates a mobile food vehicle ("food truck") called "Cupcakes for Courage." C.2508. Cupcakes for Courage is licensed in Chicago as a "mobile food dispenser," and, since June 2011, Laura has sold cupcakes from Cupcakes for Courage on both public and private property throughout Chicago. *Id*.

Chicago has many regulations that apply to food trucks like Laura's, two of which are constitutionally suspect. The first is MCC 7-38-115(f),

known as the "200-foot rule," which says that food trucks may not operate within 200 feet of any business that prepares and sells food to the public. C.412. The second is MCC 7-38-115(l), which requires that food trucks install a GPS device that sends location data to a private company every five minutes a truck is operating. C.417. That company must turn over that data to officials upon request and provide a publicly accessible application programming interface (API), a "door" that allows *anyone* to access LMP's current and historical data through a computer program. C.1623, 2366.

Chicago enacted these two requirements in Summer 2012. In a press release, the Mayor stated that the 200-foot rule "protects traditional restaurants." C.1521. Alderman Tom Tunney—owner of four restaurants and former chairman of the Illinois Restaurant Association—likewise argued in favor of the rule because it "regulates competition." C.423. And with respect to the GPS requirement, the Mayor stated that "[d]ata on food truck locations will be available online to the public. Food truck operators will be required to use mounted GPS devices in each truck so that the City and consumers can follow their locations." C.1524.

B. Circuit Court Proceedings

On November 14, 2012, LMP sued, contending that the 200-foot rule and GPS requirement violated Article I, Section 2 and Article I, Section 6, respectively. C.3–24. Following amendment, Chicago moved to dismiss. C.232–35. The court substantially denied the city's motion, C.382, and following an answer, C.398–467, the parties engaged in discovery.

Discovery regarding the 200-foot rule and GPS requirement was illuminating. City representatives testified that the 200-foot rule applies "as the crow flies," radiating out 200 feet in all directions from a restaurant's door. C.1535. Chicago admitted the rule applies on private property, which prevents LMP and other vendors from working in private lots with the owner's permission. C.1537. Officials testified that the GPS requirement was meant to facilitate health inspections but admitted it had *never* been used for that purpose, with officials instead locating trucks using social media. C.2278, 2285. Furthermore, although Chicago regulations do not require a food-truck owner to make its location information available on a *city-established website*, they do require that service providers who receive that information provide "[a]n application programming interface (API) that is available to the general public." C.1623. In fact, because "anyone can ask and get access," LMP's service provider acceded to one request for access because it had no other choice. C.2465.

On December 5, 2016, the circuit court granted Defendant's motion for summary judgment and denied LMP's motion. C.5152–70. It held in part that the 200-foot rule helped "balanc[e] [the] interests" of food trucks and restaurants by discriminating against the former to benefit the latter. C.5158–61. And with respect to the GPS requirement, the court first held that LMP lacked standing to challenge the requirement since Chicago had not requested its location data. C.5165. It then held that the scheme was not

a "search" because the government did not surreptitiously install the device; instead the ordinance and regulations required licensees to install the device themselves. C.5166–67.

C. Appellate Proceedings

LMP timely appealed the circuit court's decision. On appeal, two groups, the Illinois Policy Institute and the Street Vendors Association of Chicago, submitted amicus briefs in support of LMP's challenge to the 200-foot rule. But on December 18, 2017, the First District affirmed. A.1–25. With respect to the rule, the appellate court noted that brick-and-mortar restaurants pay property taxes and other associated fees that the court felt exceeded similar payments made by food-truck owners. A.13–15. Because of that, it held that Chicago could legitimately "protect those" restaurants from competition by mobile vendors. And, like the circuit court, the First District held that the GPS scheme did not constitute a "search" because LMP had to install the device itself. A.23.

This Court extended the deadline for this Petition until February 19, 2018. LMP now files this Petition for Leave to Appeal. LMP recognizes that amicus briefs in support of a Petition are not proper pursuant to *Kinkel v. Cingular Wireless, L.L.C.*, No. 100925, 2006 Ill. LEXIS 1, at *1 (Ill. Jan. 11, 2006). However, LMP has been authorized to state that, should this Court grant LMP's Petition, the following organizations intend to submit amicus briefs in support: The Street Vendors Association of Chicago, the National

Food Truck Association, the Illinois Food Truck Owners' Association, Restore the Fourth, and the Cato Institute.

ARGUMENT

I. This Court Should Accept Review and Reverse the Appellate Court's Erroneous Decision That Governments May Use the Police Power to Suppress Competition and Enrich a Preferred Constituency.

The opinion below held that the police power allows governments to enact blatantly discriminatory laws like the 200-foot rule to competitively harm one business if the government thinks that business's would-be competitors pay more in taxes and fees. This Court should accept review of this dangerous ruling and reverse for three reasons. *First*, the First District's decision conflicts with a decades-long, unbroken stream of holdings by both this Court and the appellate courts that the police power should not be used for the express purpose of suppressing competition and thereby financially benefiting a private business. *Second*, the decision conflicts with decisions from other states that have declared restrictions like the 200-foot rule unconstitutional. *Finally*, the First District's decision threatens to fundamentally alter Illinois jurisprudence by empowering cities to explicitly discriminate against lawful businesses whenever those cities feel that competition may harm the bottom line of a more-preferred constituency.

A. The decision below is irreconcilable with *Chicago Title & Trust* and other Illinois cases that hold that suppressing competition is illegitimate.

In upholding the 200-foot rule, the appellate court held that Chicago could protect restaurants at food trucks' expense because, in the court's view, restaurants pay more in property taxes and other fees. In support, the opinion below cited dicta from *Napleton v. Hinsdale*—a case that says nothing about competition—to hold that Chicago could discriminate against vendors out of a desire for "continued receipt of property taxes and other city fees" by restaurants. A.14 ¶ 33.

By embracing cities' ability to "legislate economic protection for existing businesses," *Exchange National Bank of Chicago v. Village of Skokie*, 86 Ill. App. 2d 12, 21 (1st Dist. 1967), the opinion below directly conflicts with decades of Illinois cases that have invalidated legislative attempts to use the police power for blatantly protectionist purposes. This Court's most applicable holding on that point is *Chicago Title & Trust v. Village of Lombard*, which invalidated a rule that prevented new gas stations from opening within 650 feet of existing stations. 19 Ill. 2d 98 (1960). After this Court rejected Lombard's pretextual justifications for its 650-foot rule, it recognized the rule's true purpose: To protect incumbent businesses from competition. This Court rejected that purpose, holding that the 650-foot rule's effect was "to promote monopoly," and stating that accordingly there was no "rational basis for the restriction." *Id*. at 107.

This Court's decision in *Chicago Title & Trust* was no outlier, but was instead a single link in a long chain of Illinois cases that rejected legislative attempts to prevent new businesses from competing with existing establishments. In *Exchange National Bank of Chicago v. Village of Skokie*, for instance, the First District held that Skokie did not have the "power to legislate economic protection for existing businesses" and therefore could not deny a special use permit to an automated carwash out of fear it would effectively compete with existing manual carwashes. 86 Ill. App. 2d 12, 21 (Ill. App. Ct. 1967); *Cosmopolitan National Bank v. Village of Niles*, 118 Ill. App. 3d 87, 91 (1st Dist. 1983) (invalidating refusal to grant a permit on grounds that applicant would compete with existing businesses, holding that "the control or restriction of competition is not a proper or lawful zoning objective").

This same principle governs occupational licensing laws. This Court has held that "regulation of a business is within the State's police power *when such regulation is in the interest of protecting public health or safety.*" *People v. Johnson*, 68 Ill. 2d 441, 446 (1977) (emphasis added). Because enriching a private business furthers neither the public's health nor its safety, Illinois courts have repeatedly rejected attempts to use the police power to reduce the competition faced by incumbents. *See, e.g.*, *id.* (plumbers); *Church v. State*, 164 Ill. 2d 153, 167–68 (1995) (security alarm

installers); *Johnson v. Illinois Department of Professional Regulation*, 308 Ill. App. 3d 508, 513-14 (4th Dist. 1999) (private detectives).

The opinion below cast these cases to the side by attempting to distinguish them on their facts, such as by noting that this case does not involve an occupational license or a zoning decision. But this approach misses the forest for the trees and ignores both that *all* uses of the police power must comport with the Illinois Constitution and that it is improper to use that power to protect incumbent businesses from competition.

The lower court cited *Napleton v. Village of Hinsdale*, 299 Ill. 2d 296 (2008), as silently overthrowing that baseline principle of Illinois jurisprudence. In *Napleton*, building owners challenged an amendment that limited the number of banks and credit unions—businesses that do not generate sales taxes—that could occupy first-floor retail spaces in commercial zones. This Court affirmed the dismissal of the building owners' challenge because their complaint failed to provide the requisite degree of factual detail. *Id*. at 320–22. In dicta, this Court noted that because first-floor retail space was fixed, each additional bank or credit union in a first-floor retail space meant one less sales-tax-paying business.

Since its release in 2008, *Napleton* has been cited approximately 126 times either to discuss pleading requirements in Illinois or the varying standards of review in constitutional challenges. It has *never* before been cited to suggest that the government may constitutionally discriminate

against one business because that business's competitor pays more in tax revenue. Should the opinion below remain good law, it will confuse lower courts about whether the anti-discrimination principle articulated by *Chicago Title & Trust*, *Exchange National Bank*, *Church v. State* and numerous other decisions of Illinois courts remains good law or instead applies only in the rare situation where two entities pay the same amount in taxes and fees. Moreover, as discussed below, it would put Illinois out of step with the holdings of numerous other states that have rejected proximity restrictions like the 200-foot rule.

B. The decision below is out of step with decisions nationwide invalidating "proximity restrictions" like the 200-foot rule.

Just as this Court declared in *Chicago Title & Trust* that Lombard's 650-foot proximity restriction was unconstitutional, so too have courts around the nation declared that local governments may not use the police power to enact proximity restrictions like the 200-foot rule.

The New York Court of Appeals, for example, has squarely rejected the idea that tax receipts can justify pure protectionism. In *Good Humor Corp. v. City of New York*, the New York Court of Appeals held that the police "power is not broad enough to 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." 290 N.Y. 312, 317 (1943). Applying this principle, New York courts have held that New York City could not require vendors to stay 100 feet away from brick-and-mortar businesses

selling similar goods (or 250 feet away if the business complained). *Duchein v. Lindsay*, 345 N.Y.S.2d 53, 55-57 (N.Y. App. Div. 1973).

The New Jersey Supreme Court has likewise rejected the idea that cities may discriminate against vendors in order to financially benefit brick-and-mortar businesses. In *Fanelli v. City of Trenton*, 135 N.J. 582, 589 (1994), the New Jersey Supreme Court stated that "a municipal prohibition on peddling that serves no purpose other than to protect local businesses from competition is an invalid exercise of a municipality's police power." (citations omitted); *see also Moyant v. Borough of Paramus*, 30 N.J. 528, 545 (1959) (holding in vending case that police "power cannot . . . be exercised for a purpose to shield the local shopkeepers from lawful competition") (internal quotations and citations omitted). In applying that longstanding principle, New Jersey courts struck down a law preventing vending within 200 feet of businesses with similar merchandise, declaring that "a regulation patently for the benefit of local shopkeepers to prevent competition . . . will not be permitted under the mask of a police regulation." *Mister Softee v. Mayor of Hoboken*, 186 A.2d 513, 519-20 (N.J. Super. Ct. Law Div. 1962), *overruled on other grounds by Brown v. City of Newark*, 113 N.J. 565, 578 (1989).

California, too, has rejected the appellate court's holding. In *People v. Ala Carte Catering Co.*, for instance, a California court invalidated a Los Angeles rule that kept food trucks from selling within 100 feet of a restaurant. 159 Cal. Rptr. 479 (Cal. Ct. App. 1979). That court, after

rejecting Los Angeles' pretextual congestion and spreading retail food options rationales, invalidated Los Angeles' rule as a "rather naked restraint of trade." *Id*. at 484 (citation omitted).

The opinion below conflicts with these decisions. If Illinois is to depart from the mainstream of states that have rejected the idea that the government may suppress competition to support those who it thinks pay more in property taxes, then that should be a decision made by this Court. Moreover, this Court's review is needed so as to rectify any confusion among the lower courts regarding whether the opinion below gives localities license to discriminate against any number of lawful businesses.

C. The decision below would let cities restrict or eliminate competition so as to protect preferred interests.

This Court should review the opinion below, which conflicts with decisions by both Illinois courts and the courts of numerous other states, so that Illinois courts know whether *Napleton* means that local governments may discriminate against lawful businesses whenever they feel those businesses' competitors contribute more to the tax base. Although this particular case concerns only food trucks, its jurisprudential effects are potentially far broader.

Take, for instance, the Street Vendors Association of Chicago, which submitted an amicus brief at the appellate stage. These vendors—principally Hispanic Americans who use carts to vend in their own neighborhoods—are climbing the first rung of the economic ladder. They have little in the way of

personal, let alone real, property and, consequently, pay less in property taxes than their brick-and-mortar competitors. If the lower court correctly held that *Napleton* authorizes pure protectionism in such instances, then Chicago could constitutionally extinguish these vendors' livelihoods to benefit established, well-heeled businesses.

The same is true of small takeout restaurants, which often have a small footprint, little to no seating, and a tax bill that is a fraction of that paid by full-size restaurants. Under the appellate court's view of *Napleton*, cities would be entitled to restrict or outlaw such small-scale entrepreneurs out of concern that consumers, if given a choice, may choose that less-expensive option.

Or consider the effect on online businesses. Online retailers like Amazon frequently have few physical locations in prime real-estate markets; they, just like food trucks, use the Internet and city streets to bring their wares to willing customers. They may pay little in property tax to the city as compared to downtown department stores. The decision below would authorize cities to restrict or even eliminate competition by online retailers in order to prop up brick-and-mortar competitors.

This Court should grant review to authoritatively declare whether the dicta from *Napleton* has effectively overruled *Chicago Title*, *Exchange National Bank*, *Church* and other cases such that the Illinois Constitution

now permits the government to use the police power to suppress competition for the financial benefit of a preferred industry.

D. The 200-foot rule furthers no legitimate government interest.

Because the appellate court held that protecting established businesses from competition was a rational basis for the 200-foot rule, it did not pass on the city's other justifications: Mitigating pedestrian congestion and spreading retail food options to underserved communities. But the briefing below demonstrates the rule is not a reasonable means of achieving either end. With respect to congestion, LMP adduced evidence showing that how close a food truck operated from a restaurant had no effect on pedestrian congestion. C.2587–90. And as to retail food options, LMP demonstrated both that the rule applies in the very underserved communities the city claims it wants to help and that the rule lacked any theoretical or empirical support. C.2515–53. Because the rule's sole purpose is to frustrate competition, this Court should accept review and reverse.

II. This Court Should Grant Review and Hold That Chicago's GPS Requirement Is an Unconstitutional Search That Violates the Fourth Amendment and Article I, Section 6.

Chicago also forces LMP to purchase, install, and operate a GPS tracking device so the city can monitor Cupcake for Courage's location. Although requiring someone to install a device on their vehicle so government officials can learn its whereabouts is a search, s*ee United States v. Jones*, 565 U.S. 400 (2012), the opinion below distinguished *Jones* because Chicago

mandates the GPS device as a condition of licensure and because Chicago orders that truck owners physically install the devices rather than doing it itself. Accordingly, it held that Chicago could require licensees to install GPS devices without triggering *any* analysis under the Fourth Amendment or Article I, Section 6, even though this Court and the U.S. Supreme Court have repeatedly held, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to" the constitution. *United States v. Chicago, M., St. P. & P.R. Co.*, 282 U.S. 311, 328–29 (1931).

This Court should accept review and reverse. *First*, although this is an issue of first impression across the nation, federal courts have indicated that subjecting an individual to GPS monitoring is a search under *Jones*. They have so held no matter whether such monitoring is a condition of licensure or whether the individual or the government attached the device. *Second*, the long-term monitoring Chicago's rule requires impinges on LMP's reasonable expectation of privacy. And *third*, should the appellate court's holding be left undisturbed, it would diminish constitutional protections by allowing the government to require businesses of all stripes to install monitoring devices while avoiding all constitutional scrutiny.

A. A law requiring the installation and use of GPS devices so the government can obtain information accomplishes a search.

The appellate court's GPS decision is the first of its kind in the nation and an issue of first impression. But the weight of authority from across the

nation suggests that mandatory GPS tracking is a search no matter whether such tracking is mandated by statute or whether the government or the individual was the one to install the device.

First, *Jones* holds that the unconsented placement of a GPS tracking device is a warrantless search that the government must show to be reasonable. *Jones*, 565 U.S. at 413 (noting that the problem was placing the GPS "without Jones' consent") (Sotomayor, J., concurring). It is immaterial whether officials order the owner to install the GPS device or whether those officials instead install the device themselves. The U.S. Supreme Court's decision in *Grady v. North Carolina* illustrates this point. 135 S. Ct. 1368 (2015). In *Grady*, a civil statute required certain sex offenders, upon release, to be monitored via GPS tracking devices worn on their person. Torrey Grady acknowledged being eligible for monitoring under the statute but did not consent to its placement and argued that mandating that he wear a GPS device was an unreasonable warrantless search. Like the appellate court here, North Carolina courts rejected Grady's argument, holding that the statute's GPS requirement did not constitute a search for Fourth Amendment purposes.

But a unanimous U.S. Supreme Court disagreed, holding that North Carolina's program "is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search." *Id.* at 1371. Thus, *Grady* turned on whether North

Carolina's program *required* Grady to wear a tracking device. Whether North Carolina officials attached the device in the first instance, or whether Grady did it himself at those officials' direction, was not treated as an important fact. Nor was it relevant that North Carolina had enacted a statute mandating GPS tracking. *See also El-Nahal v. Yassky*, 835 F.3d 248, 259 (2d. Cir 2016) (Pooler, J., concurring) (stating that regulations requiring taxi owners to install GPS tracking devices "worked an unlicensed physical intrusion on a constitutionally protected effect" and therefore constituted a search). All that mattered was that the government sought information, and it intended to acquire that information by requiring Grady to wear a monitoring device. *Jones*, 565 U.S. at 404; *see also Belleau v. Wall*, 811 F.3d 929, 937 (7th Cir. 2016).

Second, the fact that Chicago ordered LMP to install a GPS device as a condition of licensure in no way shields that order from constitutional review. Another recent U.S. Supreme Court case, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015), concerned a Los Angeles ordinance that required licensed hoteliers to maintain records about guests and their vehicles and make those records available to police for inspection. *Id*. at 2448. A group of hoteliers brought suit, contending that Los Angeles' ordinance violated the Fourth Amendment.

Under the appellate court's reasoning, Patel's lawsuit should have failed at the outset. The appellate court's statement that licensees may not

"raise a fourth amendment challenge to 'bar * * * enforcement of the very conditions upon which extension of the license is predicated,'" A.24 ¶ 56 (quoting *Grigoleit, Inc. v. Bd. of Trustees*, 233 Ill. App. 3d 606, 613 (4th Dist. 1992)), would mean that Los Angeles could force the *Patel* plaintiffs to choose between one of two constitutional rights—their right to practice their trade or their right to be free from unreasonable searches. But that is not what happened. Instead, the Supreme Court held not only that Patel and his fellow plaintiffs could challenge Los Angeles' ordinance, but that their challenge was successful. *Id*. at 2453.

This lesson from *Patel*—that warrantless searches prescribed as a condition of licensure are not immune from constitutional scrutiny—can also be seen in numerous holdings by Illinois courts. In *Hansen v. Illinois Racing Board*, 179 Ill. App. 3d 353 (1st Dist. 1989), for instance, the Racing Board's regulations stated that individuals, "in accepting a license, do[] thereby irrevocably consent to" inspections of any "stables, rooms, vehicles, or other places" by Board officials. *Id*. at 357 (citation omitted). The Board suspended Warren Hansen, a Racing Board licensee, after he refused to allow a search of his pick-up truck.

Hansen brought suit to challenge his license suspension. As with *Patel*, the reasoning of the opinion below would suggest that Illinois courts should have rejected Hansen's challenge because he had implicitly consented to inspections. But not only was Hansen able to *raise* a Fourth Amendment

challenge, he *won*. The First District struck down the Racing Board's rule because it—just like Chicago's GPS scheme—failed to adequately cabin inspecting officers' discretion. *Id*. at 359; *see also 59th & State St. Corp. v. Emanuel*, 2016 IL App (1st) 153098, ¶ 21 (holding that a rule requiring licensees to submit to warrantless searches was unreasonable). This Court should accept review to prevent the lower court's opinion from sowing confusion and weakening constitutional protections for a broad range of individuals and businesses.

B. The GPS rule, by authorizing long-term monitoring of LMP's location, impinges on LMP's reasonable expectation of privacy.

The primary holding in *Jones* was that the unconsented placement of a GPS tracking device constitutes a Fourth Amendment search. But it was not the Court's only holding. The majority recognized that "the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." 565 U.S. at 409. And five justices in *Jones* employed that *Katz* reasonable expectations of privacy test, concluding that "longer term GPS monitoring . . . impinges on expectations of privacy" and therefore constitute a search because such monitoring has the potential to reveal otherwise private information. 565 U.S. at 430 (Alito, J., concurring); *see also id*. at 415 (Sotomayor, J., concurring) (agreeing with Justice Alito's statement).

The facts presented in *Jones* demonstrate that Chicago's GPS requirement impinges on LMP's expectations of privacy and constitute a

search under *Katz*. In *Jones*, Justice Alito noted that the government had monitored Jones' vehicles for four weeks and stated that "[w]e need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark." 565 U.S. at 430. This is far less intense than the monitoring Chicago's GPS requirement mandates. Under Chicago's regulations, a GPS device must transmit its location every five minutes a food truck is operating. Those regulations require GPS providers to record that location information so that Chicago officials may review it. And the regulations mandate that providers retain at least *six months* of records regarding a truck's movements. If that is not long-term monitoring, it is hard to envision what could be.

Nor does it matter that LMP tweets out its general location. It is true that "when an individual reveals private information to another, he assumes the risk that his confidant will reveal that information," *United States v. Jacobsen*, 466 U.S. 109, 117 (1984), and LMP does not claim its tweets are private. But in transmitting LMP's location every five minutes, its GPS device reveals far more than what LMP shares. Both the precision and constancy of Chicago's surveillance scheme reveal it as a warrantless search the city must justify.

C. If left undisturbed, the opinion below would reduce privacy protections for Illinoisans.

The lower court's GPS decision is a radical departure from the mainline of Fourth Amendment and Article I, Section 6 jurisprudence. Its

reasoning, however, could be applied equally to any number of other businesses.

One business potentially affected by the lower court's ruling would be retail stores, which, like food trucks, must acquire a license before opening. The opinion below would let cities require that stores install video security systems that transmit their data to a remote server. Because the requirement would be a condition of licensure—and because the licensee installed the cameras, rather than the government—no search for Fourth Amendment and Article I, Section 6 purposes would take place, and therefore no inquiry into whether the regulations were reasonable would occur. *But see Midwest Retailer Associated, Ltd. v. City of Toledo*, 563 F. Supp. 2d 796, 804 (N.D. Ohio 2008) (holding that an ordinance requiring stores to install cameras and give police access as a condition of licensure violated the Fourth Amendment).

Likewise, many people trying to make ends meet use their personal vehicles and ridesharing applications like Lyft and UberX to ferry passengers in their spare time. These companies also must get a license to operate in Chicago. Under the reasoning of the opinion below, Chicago could require that all vehicles in their fleets—including the personal vehicles used by Lyft and UberX drivers—be equipped with GPS tracking devices that transmit information 24 hours a day, no matter whether its driver is picking up fares or taking her children to school. Because this requirement would not be a

search, whether such a regime is reasonable would be of no constitutional moment.

D. Chicago's GPS requirement is unreasonable.

Because the opinion below held that the GPS requirement was not a search, it did not inquire as to whether the requirement was reasonable. Warrantless inspections like Chicago's GPS requirement are constitutional only if they meet three criteria: First, the regulatory scheme must serve a substantial government interest. Second, warrantless inspections must be necessary to further that interest. And third, the law must be an adequate substitute for a warrant. *New York v. Burger*, 482 U.S. 691, 702–03 (1987).

The city claimed that the GPS requirement facilitates health inspections, and LMP does not deny that protecting public health is a substantial interest. But Chicago's GPS requirement fails the latter two *Burger* criteria. It is not necessary: Not only did the city not put forward any evidence that, absent the GPS scheme, it could not enforce its health ordinances as effectively, *see id.*, but it has *never* requested GPS data to conduct a health inspection.

Nor are the law and regulations an adequate substitute for a warrant. This requirement, in part, requires that the law limit inspecting officers' discretion by constraining the search's scope. *Id.* at 711 (holding that the "time, place, and scope of the inspection [must be] limited") (internal quotations omitted). But the GPS requirement's plain text requires service providers to allow anyone who asks to retrieve data about when and where

Cupcakes for Courage operated. This is intentional; as the Mayor stated, "[d]ata on food truck locations will be *available online to the public*. Food truck operators will be required to use mounted GPS devices in each truck so that the City *and consumers can follow their locations*." C.1524 (emphases added).

Neither public health nor any regulatory interest can justify this broad level of access. Because the GPS requirement is unreasonably overbroad, this Court should grant the Petition and reverse.

APPENDIX

LMP has attached an appendix of the following documents: (1) December 18, 2017 Appellate Order (A1–A25); (2) Rule 707 Verified Statements of Out-of-State Attorneys (A26–A46); and (3) Entry of Appearance of James W. Joseph (A47–A48).

CONCLUSION

For the foregoing reasons, LMP respectfully requests that this Court grant LMP's Petition and reverse the First District's December 18, 2017 ruling.

Dated: February 16, 2018

Respectfully submitted,

LMP SERVICES, INC.
Plaintiff-Petitioner

By: /s/ James W. Joseph
One of its Attorneys

Robert P. Frommer (ARDC #6325160)
Robert W. Gall (ARDC #6325161)
Erica J. Smith (ARDC #6318419)
INSTITUTE FOR JUSTICE
901 N. Glebe Road, Suite 900
Arlington, Virginia 22203
(703) 682-9320
rfrommer@ij.org
bgall@ij.org
esmith@ij.org

James W. Joseph
EIMER STAHL LLP
224 South Michigan Avenue,
Suite 1100
Chicago, Illinois 60604
(312) 660-7600
jjoseph@eimerstahl.com

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 containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and the Appendix, is 5,983 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 February 16, 2018, a copy of the foregoing **LMP Services, Inc.'s Petition for Leave to Appeal** and the attached **LMP Services, Inc.'s Appendix to Petition for Leave to Appeal** were 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:

Via Email and Messenger Delivery
Suzanne M. Loose
City of Chicago, Department of Law
Appeals Division
30 North LaSalle Street, Suite 800
Chicago, Illinois 60602
(312) 744-8519
suzanne.loose@cityofchicago.org
appeals@cityofchicago.org

Counsel for Defendant-Respondent

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/ James W. Joseph

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Carolyn Taft Grosboll
SUPREME COURT CLERK