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Chicago's Over-Burdensome Regulation Of Mobile Food Vending

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CHICAGO’S OVER-BURDENSOME REGULATION OF MOBILE FOOD VENDING

*Elan Shpigel**

INTRODUCTION	354
I. ORDINANCE.....	356
II. PROTECTIONIST PURPOSE	362
III. IMPACT	367
IV. DUE PROCESS IN ILLINOIS	368
V. APPLICATION OF CASE LAW TO CHICAGO’S FOOD ORDINANCE ...	376
VI. THE TRUE IMPACT OF FOOD TRUCKS	381
VII. WHAT CAN THE CITY DO TO IMPROVE ITS POLICY?	386
CONCLUSION	387

INTRODUCTION

On November 14, 2012, plaintiffs George Burke, Kristin Casper, and LMP Services, Inc., owners of the “Schnitzel King” and “Cupcakes for Courage” food trucks, filed suit against the City of Chicago.¹ The suit alleged that the City’s ordinance regarding the regulation of mobile food vendors violated the Illinois Constitution,

* J.D. Northwestern University School of Law, 2015.

¹ Complaint for Declaratory Judgment and Injunctive Relief at 1-3, *Burke v. City of Chicago*, No. 12-CH-41235 (Cook Co. Cir. filed Nov. 14, 2012), 2012 WL 5513206.

including due process guarantees and freedom from unreasonable searches and seizures.²

The plaintiffs allege that the restrictions placed on mobile food vending in Chicago's municipal code make it virtually impossible to operate a food truck profitably.³ These restrictions include bans on the operation of mobile food vendors within "200 feet of any principal customer entrance to a restaurant which is located on the street level."⁴ The ordinance contains numerous other restrictions on the operation of food trucks, including establishing zones where food trucks cannot operate,⁵ dictating food truck hours of operation,⁶ and limiting the types of kitchens in which mobile food vendors can prepare their foods.⁷

The Illinois Constitution provides that, "No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws."⁸ The Illinois State Supreme Court has found that this Clause includes the right of state residents to engage in a lawful business when it does not threaten any public interest.⁹ In their complaint, the plaintiffs allege that the restriction on mobile food vending within 200 feet of a fixed food business prevents the plaintiffs from engaging in a lawful business pursuit.¹⁰ Furthermore, they allege that the ordinance serves no legitimate public interest, but exists only to protect fixed businesses, such as restaurants, from having to compete with food trucks.¹¹ The court has not dismissed the plaintiffs' due process claim, nor has it addressed the wisdom or merit of the ordinance or the plaintiffs' argument that

² *Id.*

³ *Id.*

⁴ CHICAGO, ILL., MUNICIPAL CODE § 7-38-115(f) (2012).

⁵ *Id.* § 7-38-117(c).

⁶ *Id.* § 7-38-115(b); § 7-38-115(d); § 7-38-115(f).

⁷ *Id.* § 7-38-075(7)(b).

⁸ ILL. CONST. art. I, § 2.

⁹ See *Scully v. Hallihan*, 6 N.E.2d 176, 179-181 (Ill. 1936).

¹⁰ Complaint for Declaratory Judgment and Injunctive Relief at 15-18, *Burke v. City of Chicago*, No. 12-CH-41235 (Cook Co. Cir. filed Nov. 14, 2012), 2012 WL 5513206.

¹¹ *Id.* at 19.

the ordinance largely exists to protect fixed restaurants from competition.¹²

This Note reviews the current regulatory framework in the City of Chicago concerning mobile food vending. Part I analyzes the current ordinances regulating food trucks. The Note then compares Chicago's mobile food vending regulations to those regulations in other American cities. Parts II and III argue the true purpose of some of the mobile food vending restrictions in Chicago is to protect restaurants from competition; Part III also shows that these restrictions have a significant negative impact on the Chicago mobile food vending industry. Part IV examines Illinois court cases that have analyzed mobile food vending and the right to a lawful profession. It also describes the rational basis framework which Illinois courts use in examining the legality of Chicago's mobile food vending ordinances. Part V juxtaposes Chicago's mobile food vending ordinances with these court decisions. This Note concludes that Chicago's mobile food vending ordinances violate the Illinois Constitution. Parts VI and VII argue that many of the current regulations are not optimized to meet stated policy objectives, and make a case for other policies. Finally, this Note argues that protecting restaurants, an implicit objective of many of the mobile food vending regulations, is not a legitimate objective for policymakers.

I. ORDINANCE

On June 27, 2012, Chicago's City Council voted to implement Ordinance 02012-4489 (the Ordinance), entitled "Amendment of Titles 2, 4, 7, 9, 10, and 17 of Municipal Code regarding mobile food vehicles."¹³ Prior to the vote, numerous groups called for reforms to

¹² See *Case Information Summary for Case Number 2012-CH-41235*, COOK CNTY. CLERK OF THE CIRCUIT COURT, <https://w3.courtlink.lexisnexis.com/cookcounty/Finddock.asp?DocketKey=CABC0CH0EBCDF0CH> (last visited Mar. 25, 2015).

¹³ The changes to Municipal Code made by the Ordinance can be found online. See *Amendment of Titles 2, 4, 7, 9, 10, and 17 of Municipal Code Regarding Mobile*

Chicago's regulation of mobile food vendors in Internet editorials¹⁴ and other forums.¹⁵ The Ordinance passed the City Council 44-1, with Alderman John Arena of Ward 45 being the sole vote against it.¹⁶

The Ordinance dramatically changed the mobile food vending landscape in Chicago.¹⁷ The Ordinance permits the preparation of food on mobile vehicles, which had previously been banned due to alleged public health concerns.¹⁸ To assuage those public health concerns, the Ordinance imposes numerous requirements on mobile food vendors, including mandatory consultations with a member of the Department of Public Health¹⁹ and inspection by the Chicago Department of Public Health.²⁰

Despite the near-unanimous support among the Aldermen, the Ordinance has left some mobile food vendors and their supporters disappointed.²¹ The Ordinance lists zones in which food trucks cannot

Food Vehicles, OFFICE OF THE CITY CLERK, CITY OF CHICAGO, <https://chicago.legistar.com/LegislationDetail.aspx?ID=1143317&GUID=36D8C889-ABEC-4474-8991-6BAA0B4085D5> (last visited Mar. 30, 2015) (follow "Attachments: SO2012-4489.pdf" hyperlink).

¹⁴ E.g., Sharon Shi, *Can We Cook Already?*, FOOD TRUCK FREAK (Oct. 31, 2011), <http://foodtruckfreak.com/can-we-cook-already/>.

¹⁵ E.g., ERIN NORMAN ET AL., *STREETS OF DREAMS: HOW CITIES CAN CREATE ECONOMIC OPPORTUNITY BY KNOCKING DOWN PROTECTIONIST BARRIERS TO STREET VENDING* (2011), available at http://www.ij.org/images/pdf_folder/economic_liberty/atl_vending/streetsofdreams_webfinal.pdf.

¹⁶ Baylen Linnekin, *Chicago's Disgusting New Food Truck Regulations*, REASON.COM (July 28, 2012), <http://reason.com/archives/2012/07/28/chicagos-disgusting-war-on-food-trucks>.

¹⁷ See Press Release, Mayor's Press Office, Mayor Emanuel to Legalize Cook-On-Site Food Truck Industry Across Chicago (June 26, 2012), available at http://www.cityofchicago.org/city/en/depts/mayor/press_room/press_releases/2012/june_2012/mayor_emanuel_tolegalizecook-on-sitefoodtruckindustryacrosschica.html.

¹⁸ Interview with John Arena, Alderman, Chicago Ward 45, in Chi., Ill., (Oct. 23, 2013) (notes from interview on file with author).

¹⁹ CHICAGO, ILL., MUNICIPAL CODE § 7-38-075(b) (2012).

²⁰ *Id.* § 7-38-126.

²¹ See e.g., Linnekin, *supra* note 16; Monica Eng & John Byrne, *Revised Food Truck Ordinance Still Disappoints Advocates*, CHI. TRIB. (July 18, 2012),

operate, including the Chicago Medical District, and empowers the City Council to create other non-mobile vending zones at their discretion.²² The Ordinance also details the operations of food trucks, including mandating that a truck cannot operate from a single space for more than two consecutive hours.²³ The Ordinance also bars trucks from operating between 2:00 AM and 5:00 AM,²⁴ a period in which many mobile food vendors in other cities achieve considerable success.²⁵ Other parts of the Ordinance cover food safety and storage, including specifics regarding dairy and milk products,²⁶ refrigeration standards,²⁷ and inspections of mobile food operators.²⁸ The Ordinance goes into tremendous detail about other aspects of food preparation and service, including what types of wrappers can be used²⁹ and what type of utensils can be provided.³⁰

Of the restrictions placed on mobile food vendors, one of the most controversial has been the spatial limitations on mobile food vendor operations. These restrictions include bans on the operation of a food truck within twenty feet of a crosswalk, thirty feet of a stop light or stop sign, or next to a protected bike lane.³¹ Additional restrictions apply to mobile food vendors who wish to operate in

http://articles.chicagotribune.com/2012-07-18/news/chi-revised-food-truck-ordinance-still-disappoints-advocates-20120718_1_food-truck-trucks-and-restaurants-truck-owners.

²² CHICAGO, ILL., MUNICIPAL CODE § 7-38-117(c) (2012).

²³ *Id.* § 7-38-115(b).

²⁴ *Id.* § 7-38-115(d).

²⁵ *See, e.g.*, Carol Kuruvilla, *Halal Guys Food Cart to Open Restaurant in East Village*, N.Y. DAILY NEWS (Oct. 2, 2013), <http://www.nydailynews.com/life-style/eats/halal-guys-food-cart-open-restaurant-east-village-article-1.1474330> (discussing the “Halal Guys” who operate in New York City at the intersection of 53rd Street and 6th Avenue from 11 AM to 4 AM and are “known for the long late-night lines”).

²⁶ CHICAGO, ILL., MUNICIPAL CODE § 7-38-095 (2012).

²⁷ *Id.* § 7-38-134(e)(7).

²⁸ *Id.* § 7-38-126.

²⁹ *Id.* § 7-38-105.

³⁰ *Id.* § 7-38-100.

³¹ *Id.* § 7-38-115(e).

private lots, including prohibiting mobile food vending in vacant lots or vacant buildings.³²

The restrictions also include the 200-foot rule, one of the clauses challenged in the suit filed by the *Burke* plaintiffs.³³ The 200-foot rule prohibits vending within 200 feet of a restaurant, defined as a

[f]ixed location kept, used, maintained, advertised and held out to the public as a place where food and drink is prepared and served for public consumption. . . . [s]uch establishments include, but are not limited to, restaurants, coffee shops, cafeterias, dining rooms, eating houses, short order cafes, luncheonettes, grills, tearooms and sandwich shops.³⁴

This restriction includes convenience stores, such as a 7-11.³⁵ The 200-foot rule applies at all times except between 12:00 AM and 2:00 AM.³⁶

The Ordinance does include measures to minimize some restrictions on mobile food vending. Among these, the Ordinance dictates that the City shall create stands where mobile food vendors may operate within 200 feet of a restaurant.³⁷ It does not specify how many stands will be created in total, but that a minimum of five will be created in any community area with more than 300 restaurants.³⁸ These community areas include the Loop, Streeterville, Lakeview,

³² *Id.* § 7-38-115(k)(2)(i)–(ii).

³³ Complaint for Declaratory Judgment and Injunctive Relief at 1-3, *Burke v. City of Chicago*, No. 12-CH-41235 (Cook Co. Cir. filed Nov. 14, 2012), 2012 WL 5513206.

³⁴ CHICAGO, ILL., MUNICIPAL CODE § 7-38-115(f).

³⁵ *Sweet Home Chicago? Food Trucks Get the Cold Shoulder in the Windy City*, INST. FOR JUSTICE, <https://www.ij.org/chicagofoodtrucks-background> (last visited Feb. 24, 2014).

³⁶ CHICAGO, ILL., MUNICIPAL CODE § 7-38-115(a)

³⁷ *Id.* at § 7-38-117(c).

³⁸ *Id.*

West Town, Wicker Park, and Lincoln Park.³⁹ At these stands, mobile food vendors will be able to cook and serve food in close proximity to brick and mortar restaurants.⁴⁰ One of the stated purposes of the stands is to permit the cooking and vending of food by mobile food vendors; the Ordinance includes provisions related to traffic congestion and waste to fixed locations so the City can monitor them.⁴¹

The Ordinance prohibits the operation of a mobile food vendor in a single space for more than two hours, which also applies to the stands.⁴² The Ordinance, however, does permit the Commissioner of the Department of Business Affairs and Consumer Protection to allow the use of mobile food vending stands between 2:00 A.M. and 5:00 A.M., contrary to other restrictions on mobile food vending.⁴³ Thus far, the City has announced the location of numerous food stands. These stands largely exist in the commercially dense community areas listed above, but many of the stands are on side streets or far from commercial centers.⁴⁴

The Ordinance is one of the most restrictive regulations of mobile food vendors among large American cities.⁴⁵ Of the fifty largest cities in the country, twenty have mobile food vending

³⁹ *Food Truck Stands to Start Up Next Week*, CHI. TRIB. (Nov. 2, 2012), www.chicagotribune.com/entertainment/dining/chi-chicago-food-truck-stands-begin-in-november-20121102-post.html.

⁴⁰ *Id.*

⁴¹ Defendant's Memorandum in Support of its Motion to Dismiss the Amended Complaint, *Burke v. City of Chicago*, No. 12-CH-41235, at 7 (Cook Co. Cir. filed Nov. 14, 2012) (Defendant's motion to dismiss was filed April 12, 2013).

⁴² CHICAGO, ILL., MUNICIPAL CODE § 7-38-115(b) (2012).

⁴³ *Id.* at § 7-38-115(d).

⁴⁴ See Phil Vettel, *Chicago Announces Food-Truck Parking-Spot Locations*, CHI. TRIB. (Oct. 3, 2012), http://articles.chicagotribune.com/2012-10-03/news/chi-chicago-announces-foodtruck-parking-locations-20121003_1_food-trucks-mobile-food-vehicles-locations; CITY OF CHI. SMALL BUS. CTR., MOBILE FOOD TRUCK STANDS MAP (Apr. 5, 2014), available at http://www.cityofchicago.org/content/dam/city/depts/bacp/general/Mobile_Food_Truck_Stands_Map-V.04.15.14.pdf.

⁴⁵ See NORMAN ET AL., *supra* note 15, at 17-25.

proximity restrictions in place similar to the one in Chicago.⁴⁶ However, among America's ten largest cities, only Chicago and San Antonio have proximity restrictions on mobile food vending.⁴⁷ New York, Los Angeles, Houston, Philadelphia, Phoenix, Dallas, Boston, and San Diego all regulate food trucks without using a proximity restriction.⁴⁸ Prior to the adoption of the Ordinance, which permits on-board cooking previously prohibited,⁴⁹ Chicago arguably had the most stringent mobile food vending regulations of any large city in the United States.⁵⁰

In comparison to the cities of New York and Los Angeles, Chicago imposes substantially more burdensome regulations on mobile food vendors.⁵¹ In addition to health and safety regulations, New York City has some restrictions on mobile food vendors, including requiring vendors to apply for a restricted area permit to operate their mobile food vendors from private property.⁵² However, unlike Chicago, New York City has no public property vending bans, nor proximity bans (like the 200-foot rule).⁵³ Furthermore, New York has no durational restrictions, unlike Chicago,⁵⁴ where vendors cannot sell from a fixed location for over two hours. As a result, nearly 5,000 mobile food vendors legally operate in New York City.⁵⁵

Regulations regarding mobile food vendors are substantially less stringent in Los Angeles than in Chicago. Los Angeles does not

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 18.

⁴⁸ *See id.* at 16.

⁴⁹ Monica Eng, *First Chicago Food Truck Gets Onboard Cooking License*, CHI. TRIB. (Jan. 31, 2013), http://articles.chicagotribune.com/2013-01-31/features/chi-first-chicago-food-truck-gets-onboard-cooking-license-20130131_1_mobile-food-preparer-food-truck-brick-and-mortar-restaurant.

⁵⁰ *See* NORMAN ET AL., *supra* note 15, at 15-23.

⁵¹ *See id.*

⁵² *Street Vending*, NYC BUS. SOLUTIONS, http://www.nyc.gov/html/sbs/nycbiz/downloads/pdf/educational/sector_guides/street_vending.pdf (last visited Mar. 25, 2015).

⁵³ NORMAN ET AL., *supra* note 15, at 16.

⁵⁴ *Id.* at 23.

⁵⁵ *See Street Vending*, *supra* note 52.

regulate mobile food vendors with either proximity or durational restrictions.⁵⁶ While Los Angeles bans the operation of food trucks on public property and creates restricted areas in the City in which food trucks cannot operate,⁵⁷ these restrictions are far less burdensome than those in Chicago. The lack of proximity restrictions means mobile food vendors in Los Angeles can operate in high restaurant-density areas such as Downtown Los Angeles. As a result of the lax restrictions, Los Angeles County has more than 6,000 food trucks.⁵⁸

II. THE ORDINANCE'S PROTECTIONIST PURPOSE

Aspects of Chicago's mobile food vending regulations, including those not found in most other large American cities, appear to have been implemented to protect other industries from competing with mobile food vendors. Unlike other restrictions on mobile food vending, which logically serve the interests of maintaining public health, preventing crime, and reducing noise and congestion, the 200-foot rule fails to serve any interest other than preventing mobile food vendors from operating near restaurants. Throughout the legislative process, various Chicago aldermen and restaurateurs have justified stringent restrictions on food trucks as necessary to protect brick-and-mortar restaurants.

Alderman Proco Moreno, who along with Alderman Tom Tunney introduced the Ordinance, stated the reason for the 200-foot rule was to balance competing interests, as “[y]ou want to not infringe on the brick-and-mortars but not to interfere with entrepreneurship.”⁵⁹ This suggests the Ordinance's true purpose was protecting restaurants, particularly in commercially dense parts of the City. Together, the

⁵⁶ NORMAN ET AL., *supra* note 15, at 16.

⁵⁷ *Id.* at 17-18.

⁵⁸ *Best Food Trucks in America 2012*, FOX NEWS (Nov. 23, 2012), <http://www.foxnews.com/leisure/2012/11/20/best-food-trucks-in-america-2012/>.

⁵⁹ Monica Eng, *Chicago Food Truck Plan Gains Mobility*, CHI. TRIB. (June 26, 2012), http://articles.chicagotribune.com/2012-06-26/news/chi-city-expected-to-move-forward-with-foodtruck-license-plan-20120625_1_food-truck-mobile-food-ordinance.

two aldermen received nearly \$50,000 in campaign contributions and ward funding from trade groups supporting the City's restaurants and merchants.⁶⁰ In an opinion article Alderman Moreno wrote for the *Huffington Post*, the Alderman argued that while Ordinance 02012-4490 may seem complex, its reforms were needed to "ensure public safety, dispel the competitive concerns of established businesses and help the food truck industry grow."⁶¹ Other aldermen, in support of the Ordinance, have made statements that suggest a similar protectionist purpose.⁶² For example, Alderman Brendan Reilly argued in favor of the Ordinance to "[i]magine parking a slider truck in front of Epic Burger. . . I'm trying to strike a very careful balance."⁶³

In addition to aldermen, restaurateurs similarly suggested the Ordinance has a protectionist purpose.⁶⁴ Glen Keefer, owner of restaurants "Keefer's" and "Keefer's Kaffe," stated at a City Council meeting that restaurants "carry the tax burden, so we do deserve a little protection from other businesses and people parking in front of businesses and siphoning off our customers."⁶⁵ In an opinion article published in *Crain's Chicago Business*, Keefer wrote:

⁶⁰ *Chicago Food Trucks Stalling, Running Out of Gas*, NACS (Jan. 19, 2012), <http://www.nacsonline.com/News/Daily/Pages/ND0119125.aspx#.VQCz5ULkMgM>.

⁶¹ Joe Moreno, *Responsible and Realistic Restaurants-on-Wheels: The New Food Truck Ordinance*, HUFFINGTON POST (Sept. 1, 2012, 5:12 AM), http://www.huffingtonpost.com/joe-moreno/responsible-and-realistic_b_1643989.html.

⁶² See Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 1, at 11-12.

⁶³ Ted Cox, *More Food Trucks But Still No Licenses to Cook Onboard*, DNAINFO (Jan. 25, 2013, 8:24 AM), <http://www.dnainfo.com/chicago/20130125/chicago/food-trucks-rise-despite-city-ordinance>.

⁶⁴ See Monica Eng, *Mobile Food Ordinance Rolls Through City Council Committee, Dismaying Advocates*, CHI. TRIB. (July 20, 2012), http://articles.chicagotribune.com/2012-07-20/news/ct-met-food-truck-passes-committee-20120720_1_duck-n-roll-food-truck-beth-kregor.

⁶⁵ *Id.*

We must find a way to prevent unscrupulous truck operators from parking in front of the highest-priced real estate in the city to siphon off customers headed to businesses paying property taxes, rent and fees for signs, loading zones, [and] building permits. Some hail the renegade truck as the ideal form of entrepreneurship, the ultimate shoestring startup. That's not superior business acumen and grit; that's piracy.⁶⁶

Jay Stieber, Executive Vice President of Lettuce Entertain You Enterprises, joined Keefer in supporting the Ordinance.⁶⁷ Stieber stated that it "is essential to maintain . . . the 200ft rule that is being promulgated to protect the bricks and mortar restaurants."⁶⁸

Of the forty-five aldermen who voted on the Ordinance, Alderman Arena was the only dissenting vote. In justifying his vote, Alderman Arena stated that the Ordinance served a protectionist purpose and had been "stuffed with protectionism and baked in an oven of paranoia."⁶⁹ In a phone interview, Alderman Arena described how his own interest in the issue began when a food truck wished to operate in the parking lot of a business within a food-underserved neighborhood in his ward and was unable to do so because of mobile food vending regulations.⁷⁰

⁶⁶ Glen Keefer, *Chicago Deserves Better Rules on Food Trucks*, CRAIN'S CHI. BUS. (May 10, 2012), <http://www.chicagobusiness.com/article/20120510/NEWS07/120509756/chicago-deserves-better-rules-on-food-trucks>.

⁶⁷ Alex Levine, *Summary of the Public Food Truck Hearing at City Hall*, FOOD TRUCK FREAK (Aug. 7, 2012), <http://foodtruckfreak.com/summary-of-the-public-food-truck-hearing-at-city-hall/>.

⁶⁸ *Id.*

⁶⁹ Ted Cox, *Chicago Food Trucks to Have Day in Court Over 'Anti-Competitive Laws'*, DNAINFO (June 12, 2013, 4:18 PM), <http://www.dnainfo.com/chicago/20130612/chicago/chicago-food-trucks-have-day-court-over-anti-competitive-laws>.

⁷⁰ Interview with John Arena, *supra* note 18.

Alderman Arena went on to describe the heavy lobbyist influence exerted by restaurants, including by different members of the Illinois Restaurant Association.⁷¹ He described committee meetings as having a less than professional atmosphere, including Michael Keefer describing the anatomical implications of not having bathrooms on food trucks.⁷² When asked why the Ordinance included certain provisions such as the 200-foot rule, Alderman Arena replied that the Ordinance was “allowed to basically be written by the Illinois Restaurant Association, to basically restrict entrepreneurial businesses in this way.”⁷³

When asked how he had become involved with mobile food vending politics, the Alderman described his own ward, located in the far northwestern corner of the City, which has limited access to many restaurants and eateries.⁷⁴ When a neighborhood bar wanted to host a food truck in its parking lot, it found it impossible to do so legally due to the 200-foot rule.⁷⁵

Alderman Arena stated that he believed the reason he was the sole dissenting vote against the Ordinance was because most aldermen were not meaningfully impacted by it.⁷⁶ Most wards in Chicago are neither particularly restaurant-dense nor attractive to food trucks. Alderman Arena also stated that many aldermen representing such districts voted for the Ordinance in the hopes that brick and mortar restaurants might move into their wards.⁷⁷

This logic, however, is not entirely persuasive. One might expect that in wards with few restaurants but substantial numbers of consumers, aldermen would be more attuned to the interests of consumers rather than restaurateurs. Thus, one might expect that aldermen would oppose food truck regulations. Alderman Arena’s behavior, in promoting the best interests of his own district with many

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

consumers and few restaurants, can be viewed this way. Thus, it remains unclear why the Ordinance enjoyed near unanimous support among City aldermen.

One possible explanation is that the small size and nascent nature of Chicago's mobile food vending industry lack the necessary political clout to compete with established brick and mortar restaurants. For example, in New York City, where thousands of mobile food vendors legally operate, mobile vendors have been active and effective in shaping ordinances regulating mobile food vending.⁷⁸ Perhaps the interests of Chicago mobile food vendors were ignored during the drafting of City ordinances because there are few mobile food vendors in Chicago. However, this is largely due to the restrictive nature of City ordinances, creating a cycle of political powerlessness. Thus, dispersed interests, such as those of consumers, may need to voice support for mobile food vendors for City policy to change and create an environment in which mobile food vendors can thrive.⁷⁹

⁷⁸ See Alissa Fleck, *NYC Food Carts: Behind the Scenes of New Regulations*, STRAUS MEDIA (Feb. 17, 2015), <http://nypress.com/nyc-food-carts-behind-the-scenes-of-new-regulations/>.

⁷⁹ The balance in policymaking and political power between small groups with concentrated benefits and large groups with diffuse costs is fundamental to political and public choice theory.

Economists call this the problem of concentrated benefits and diffuse costs. The benefits of any government program—Medicare, teachers' pensions, a new highway, a tariff—are concentrated on a relatively small number of people. But the costs are diffused over millions of consumers or taxpayers. So the beneficiaries, who stand to gain a great deal from a new program or lose a great deal from the elimination of a program, have a strong incentive to monitor the news, write their legislator, make political contributions, attend town halls, and otherwise work to protect the program. But each taxpayer, who pays little for each program, has much less incentive to get involved in the political process or even to vote.

David Boaz, *Well Worth the Money*, CATO INST. (Aug. 22, 2011), <http://www.cato.org/publications/commentary/well-worth-money>.

Some supporters of the Ordinance and the 200-foot rule cite reasons other than protectionism in their support of the law.⁸⁰ For example, Sam Toia, President of the Illinois Restaurant Association and a supporter of the Ordinance, stated that the aim of the 200-foot rule was “easing traffic congestion and ensuring access for emergency and police vehicles and garbage removal.”⁸¹ Despite a few comments similar to Toia’s, the overwhelming majority of statements indicate protectionist purposes, as described above.

III. IMPACT OF THE ORDINANCE

The 200-foot rule significantly affected mobile food vendors and their capacity to compete in the City. Nationwide, lunch provides a significant revenue-grossing period for mobile food vendors.⁸² For mobile food vendors who serve a lunch crowd, clustering in concentrated commercial areas can be an effective business practice.⁸³ In Chicago, this would include the Loop neighborhood. The 200-foot rule, which essentially prevents any mobile food vending in the Loop outside of designated stands, thus cuts off a significant source of revenue for mobile food vendors. A map of the areas in the Loop in which mobile food vending is prohibited can be seen in the image below:⁸⁴

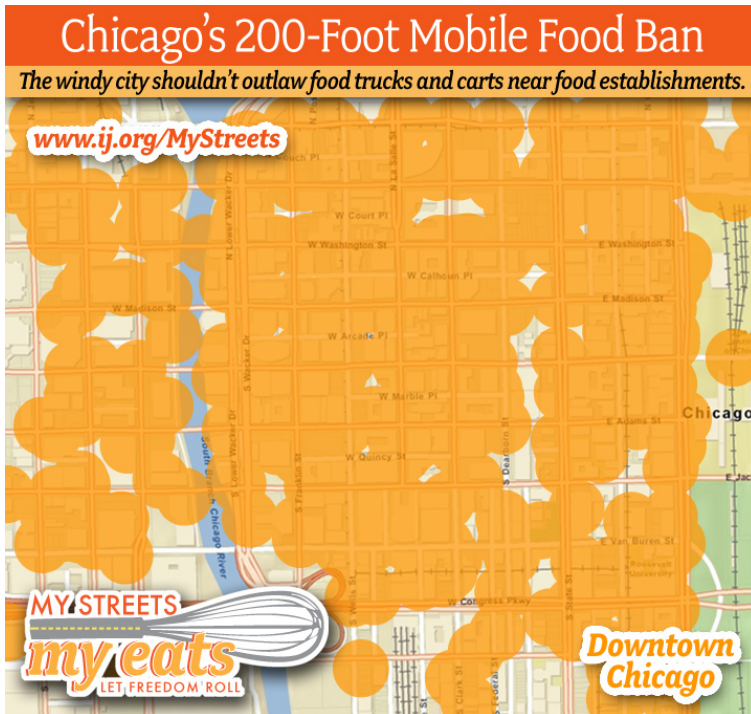
⁸⁰ E.g., Monica Eng, *Food Truck Ordinance Savory to Some, Sour to Others*, CHI. TRIB. (July 9, 2012), http://articles.chicagotribune.com/2012-07-09/news/ct-met-food-truck-followup-20120709_1_food-truck-truck-operators-fines.

⁸¹ *Id.*

⁸² See Alan Philips, *What You Need to Know About Starting a Food Truck Business*, IDIOT’S GUIDE, <http://idiotsguides.com/static/quickguides/businesspersonalfinance/what-you-need-to-know-about-starting-a-food-truck-business.html> (last visited Feb. 24, 2014).

⁸³ *Id.*

⁸⁴ Alex Levine, *Debunking and Contextualizing Claims About Proposed Chicago Food Truck Ordinance Amendments*, FOOD TRUCK FREAK (July 16, 2012), <http://foodtruckfreak.com/debunking-contextualizing-claims-about-proposed-chicago-food-truck-ordinance-amendments/>.



This image depicts the majority of Chicago's Loop, its central business district, as well as parts of the commercially dense West Loop neighborhood.⁸⁵ The impact of the restriction may be greatest in the Loop, but mobile food vending in other commercially dense areas in Chicago is similarly restricted. In many cities mobile food vendors concentrate in commercially dense neighborhoods to earn a profit,⁸⁶ which Chicago largely limits due to the 200-foot rule.

IV. DUE PROCESS IN ILLINOIS

⁸⁵ *Id.*

⁸⁶ See Philips, *supra* note 82.

The suit brought by the *Burke* plaintiffs challenges the legality of the restrictions imposed by the Ordinance.⁸⁷ Article I, section 2 of the Illinois Constitution guarantees due process and equal protection, providing that, “No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.”⁸⁸ Various Illinois courts have examined both mobile food vending regulations and spatial competition restrictions in light of the Illinois Constitution, finding that it requires laws and municipal ordinances to be rationally related to a public goal. While courts grant broad leeway to municipalities in designing these laws, courts have also shown that they are willing to strike them down when they serve no interest other than the protection of entrenched interests or industries.

Illinois courts have held that due process rights include the right to engage in lawful professional pursuits. A right to work recognition in Illinois dates back to the 1892 Illinois Supreme Court decision in *Frorer v. People*.⁸⁹ The court stated, “the manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason . . . why men should not be permitted to engage in it as a legitimate business, into which anybody may freely enter.”⁹⁰ In deriving a right to work, the court drew heavily from a West Virginia Supreme Court case, *State v. Goodwill*.⁹¹ The court, quoting *Goodwill*, stated, “the patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property.”⁹² This decision and language is consistent with other early court decisions concerning due process.⁹³

⁸⁷ Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 1, at 1–2.

⁸⁸ ILL. CONST. art. I, § 2.

⁸⁹ 31 N.E. 395 (Ill. 1892).

⁹⁰ *Id.* at 398–99.

⁹¹ *State v. Goodwill*, 10 S.E. 285 (W. Va. 1889).

⁹² *Id.* at 287.

⁹³ *See, e.g., Ritchie v. People*, 40 N.E. 454 (Ill. 1895).

Despite the Due Process protections for employment and work, Illinois courts have held that there are circumstances in which the state can regulate or restrict otherwise legal employment. The Tenth Amendment of the Constitution of the United States provides, “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”⁹⁴ This has been found to include the power to “enact measures to preserve and protect the safety, health, welfare, and morals of the community.”⁹⁵ In aggregate, this power is frequently referred to as the police power. Regulating food trucks and restaurants, which are clearly related to public health and safety, is uncontestedly within the purview of Illinois and Chicago’s police power. Furthermore, it is well established that regulating the use of public streets is within the state’s police power domain as well.⁹⁶ Nonetheless, Illinois courts have found that this exercise of the police power must be reasonable in its application.⁹⁷

Under substantive due process in Illinois, if a statute does not affect a fundamental constitutional right, it is analyzed under the rational basis test.⁹⁸ The regulation of mobile food vendors and food trucks, as an economic issue, would be considered under a rational basis review. Courts have found the test to be satisfied when “the challenged statute bears a rational relationship to the purpose the

⁹⁴ U.S. CONST. amend. X.

⁹⁵ *Police Powers*, US LEGAL, <http://municipal.uslegal.com/police-powers/> (last visited Feb. 25, 2014).

⁹⁶ *See, e.g.*, *Good Humor Corp. v. Vill. of Mundelein*, 211 N.E.2d 269, 272-73 (Ill. 1965) (holding that ice cream trucks had no property rights in the use of streets, and that an ordinance prohibiting the selling of ice cream was constitutional); *Olsen v. City of Chicago*, 184 N.E.2d 879, 880-81 (Ill. 1962) (holding that a law regulating and limiting the circumstances under which taxi drivers could accept fares was constitutional); *City of Decatur v. Chasteen*, 166 N.E.2d 29, 34-35 (Ill. 1960) (upholding a law banning operating taxis along a fixed route).

⁹⁷ *Sherman-Reynolds, Inc. v. Mahin*, 265 N.E.2d 640, 642 (Ill. 1970) (“To be a valid exercise of the police power, the enactment of the legislature must bear a reasonable relation to the public interest sought to be protected, and the means adopted must be a reasonable method to accomplish such an objective.”).

⁹⁸ *People v. Cornelius*, 821 N.E.2d 288, 304 (Ill. 2004).

legislature intended to achieve in enacting the statute.”⁹⁹ Under the test, a court does not attempt to analyze the “wisdom of the statute or with whether it is the best means to achieve the desired result,”¹⁰⁰ but instead upholds the law “[s]o long as there is a conceivable basis for finding the statute rationally related to a legitimate state interest.”¹⁰¹ However, when there has been no plausible justification for a law or ordinance other than protectionism, the Illinois Supreme Court has frequently struck down laws as violating the rational basis test.¹⁰²

Banghart v. Walsh represents an example of a case in which the Illinois Supreme Court struck down such a protectionist statute. In that case, the plaintiffs challenged a law regulating barbers and beauty culturists that restricted the licensing of individuals in these fields and the number of new permits distributed.¹⁰³ The Court found against the state, holding that:

When the police power is exerted to regulate the conduct of a useful business or occupation, the Legislature is not the sole judge of what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and exercise his own judgment as to the manner of conducting it, but the measures adopted to protect the public health and

⁹⁹ *Id.*

¹⁰⁰ *Village of Lake Villa v. Stokovich*, 810 N.E.2d 13, 26 (Ill. 2004).

¹⁰¹ *Id.*

¹⁰² *See, e.g., Church v. State*, 646 N.E.2d 572, 580 (Ill. 1995) (holding a law unconstitutional that granted an irrational monopoly); *People v. Johnson*, 369 N.E.2d 898, 903 (Ill. 1977) (holding a law that required an apprenticeship period before anyone could be licensed as a plumber to be unconstitutional); *People v. Masters*, 274 N.E.2d 12, 14 (Ill. 1971) (holding that a law requiring someone to post a large bond and pay a licensing fee to become a plumber was unconstitutional); *Suburban Ready-Mix Corp. v. Vill. of Wheeling*, 185 N.E.2d 665, 666-67 (Ill. 1962) (holding a law that denied a certain type of manufacturing plant in an industrial district created a monopoly and was unconstitutional).

¹⁰³ *Banghart v. Walsh*, 171 N.E. 154, 155-56 (Ill. 1930).

secure the public safety and welfare must have some relation to these proposed ends.¹⁰⁴

In an earlier case, the Supreme Court of Illinois stated, “the power of the legislature to thus limit the right to contract must rest upon some reasonable basis, and cannot be arbitrarily exercised.”¹⁰⁵ The Court would later elaborate, “[a]n act which deprives a citizen of his liberty or property rights cannot be sustained under the police power unless a due regard for the public health, safety, comfort or welfare requires it.”¹⁰⁶

Chicago Title & Trust Co. v. Village of Lombard is an Illinois Supreme Court case that closely resembles the action filed in regards to Chicago’s mobile food vending ordinance. *Chicago Title & Trust* analyzed an ordinance, similar to the Ordinance at issue in *Burke*, regulating spatial limitation on competition within an industry.¹⁰⁷ A local ordinance banned the opening of gasoline filling stations within 650 feet of an existing station.¹⁰⁸ The Village of Lombard claimed that the ordinance was a legitimate exercise of state police power, as it was enacted to further the legitimate ends of public safety and fire prevention.¹⁰⁹ The plaintiffs, who wished to open a petroleum filling station within 650 feet of an existing station, claimed there was no relationship between distances between filling stations and fire risk.¹¹⁰ Experts in the case testified that there was virtually no fire contamination risk between two stations.¹¹¹

The court acknowledged that the regulation of filling stations, which affected public health and safety, was clearly under the

¹⁰⁴ *Id.* at 156.

¹⁰⁵ *Ritchie v. People*, 40 N.E. 454, 456 (Ill. 1895).

¹⁰⁶ *Chicago Title & Trust Co. v. Village of Lombard*, 166 N.E.2d 41, 45 (Ill. 1960).

¹⁰⁷ *Id.* at 42-43.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 43-44.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 45.

purview of the state police power.¹¹² Filling stations posed a potential fire risk and produced fumes that could be hazardous.¹¹³ The Court noted that such ordinances were valid if “they bear a sufficient relationship to the promotion of public health and safety.”¹¹⁴ The court also made clear that ordinances not generalized in their application are invalid, since if an ordinance is “not general in character, or if it does not operate equally upon all persons of the same class within the municipality, it cannot be sustained.”¹¹⁵

In striking down the ordinance, the Court found the 650-foot rule bore an insufficient relationship to the promotion of public safety.¹¹⁶ The Village of the Lombard filling station ordinance also prevented filling stations from operating within 150 feet of churches, hospitals, and schools, places where many individuals congregate and where a fire hazard would be particularly acute.¹¹⁷ The Court noted that if the true purpose of the ordinance was public health, it was unreasonable to impose a 650-foot restriction on two filling stations, and only a 150-foot restriction between filling stations and places of public gathering.¹¹⁸

¹¹² *Id.* at 46 (“It is not disputed that the village may impose requirements on filling stations in addition to zoning restrictions. It has power to regulate the manner in which a permitted use is carried on, the way in which buildings are erected or maintained, and the like.”).

¹¹³ *Id.* at 44.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 45.

¹¹⁶ *Id.* at 46.

¹¹⁷ *Id.* at 44-45.

¹¹⁸ *Id.*

Under section 17 of the Lombard filling station ordinance, filling stations are prohibited within 150 feet of any hospital, church or school; and it can hardly be supposed that proximity to such places, where numbers of people are accustomed to assemble, involves less danger than proximity to another filling station. To require filling stations to be separated by at least 650 feet, while requiring an intervening distance of only 150 feet between a filling station and a hospital, church or school, is clearly unreasonable if the test is danger to the public.

One of the few Illinois Supreme Court cases to deal specifically with the issue of mobile food vending is *Triple A Services, Inc. v. Rice*.¹¹⁹ In this case Thunderbird Catering and Triple A Services, Inc. filed a complaint to enjoin an ordinance imposing a ban on street vendors in the Chicago Medical Center District.¹²⁰ Both companies were mobile food vendors that sold food in the Chicago Medical Center District.¹²¹ In 1984, Chicago enacted an ordinance banning mobile food vending within the Medical Center District,¹²² a prohibition that remains to this day.¹²³ The City claimed the ban was created to prevent traffic congestion within the area, which was necessary to ensure adequate access to hospitals by emergency service vehicles.¹²⁴ The plaintiffs brought in expert testimony that the Medical District had relatively low traffic and the ban on mobile food vending actually increased traffic as workers were forced to leave the area to purchase food.¹²⁵ Furthermore, expert witnesses testified that mobile food vendors had “no measurable impact upon the flow of traffic or upon health and sanitation considerations in the District.”¹²⁶

Id.

¹¹⁹ 528 N.E.2d 267 (Ill. App. Ct. 1988), *rev'd*, 545 N.E.2d 706 (Ill. 1989).

¹²⁰ *Id.* at 268.

¹²¹ *Id.*

¹²² *Id.* The ordinance stated, in relevant part:

No person shall conduct the business of a Mobile Food Dispenser or Peddler, as defined in this code, on any portion of the public way within the boundaries of the Medical Center District, to wit: Ashland Avenue on the east, Congress Parkway on the north, Western Avenue on the west, and a line co-incident with the north line of the property at or near 14th Street and 15th Street owned or used by the Baltimore and Ohio Chicago Terminal Railroad Company for railroad purposes, on the south.

Id. (quoting CHICAGO, ILL., MUNICIPAL CODE § 27-269.1 (1984)).

¹²³ CHICAGO, ILL., MUNICIPAL CODE § 9-80-190 (2012) (“Mobile food vendors and peddlers prohibited in medical center district.”).

¹²⁴ *Triple A Servs.*, 528 N.E.2d at 271.

¹²⁵ *Id.* at 269.

¹²⁶ *Id.* at 269-70.

In overturning the relevant ordinance, the Illinois appellate court found the ordinance unreasonable, including its overbroad ban on mobile food vending.¹²⁷ The court also found that even if some restrictions were needed to ensure traffic access, the City failed to show that a 24 hours per day, 7 days per week ban was necessary to accomplish this purpose.¹²⁸

Eleven months later, the Supreme Court of Illinois overturned the appellate court's decision.¹²⁹ The Illinois Supreme Court noted that an ordinance need only be rationally related to a legitimate government interest to be valid.¹³⁰ Furthermore, the court relied on Illinois case law, which requires plaintiffs challenging an ordinance as not rationally related to a legitimate government purpose to show the ordinance is "arbitrary, capricious and unreasonable municipal action."¹³¹

In overturning the lower court, the Supreme Court of Illinois found the ordinance rationally related to the goal of enhancing the Medical District.¹³² Furthermore, it rejected that the prohibition of sale 24 hours a day, 7 days a week was so overly broad as to be arbitrary.¹³³ Noting "the fit between the means and the end to be achieved need not be perfect," the court rejected the argument that the statute needed to conform with scientific or accurate data.¹³⁴ The Court further asserted that traffic in the Medical District could rationally hinder public health at all times.¹³⁵

¹²⁷ *Id.* at 277-78.

¹²⁸ *Id.* at 280-82 (finding no rational basis on which to ban food trucks, including that no studies on food trucks and congestion had been conducted by the City).

¹²⁹ See *Triple A Servs., Inc. v. Rice*, 545 N.E.2d 706, 714-15 (Ill. 1989).

¹³⁰ *Id.* at 709 ("It is well established that unless an act impinges on a fundamental personal right or is drawn upon an inherently suspect classification, it is presumptively valid, and it will survive constitutional scrutiny if it is rationally related to a legitimate governmental purpose.").

¹³¹ *Id.* (quoting *City of Decatur v. Chasteen*, 166 N.E.2d 29, 33 (Ill. 1960)).

¹³² *Id.* at 714.

¹³³ *Id.* at 712.

¹³⁴ *Id.* at 710.

¹³⁵ *Id.* at 710-714; see also *Vaden v. Village of Maywood, Ill.*, 809 F.2d 361, 363 (7th Cir. 1987) (reviewing plaintiff's claim regarding an ordinance banning the

V. APPLICATION OF CASE LAW TO CHICAGO'S FOOD ORDINANCE

Nationally, state and federal courts remain deeply skeptical of proximity-based restrictions for the operation of the same type of business.¹³⁶ The Ordinance is only valid under the Illinois Constitution if its restrictions are rationally related to legitimate public ends. There is reason to be skeptical that the Ordinance passes this test. Chicago's stated public goals for the Ordinance are the promotion of public health, traffic congestion, and safety, which are all within the purview of the state's police power. As shown in *Chicago Title & Trust*, protectionism by itself is not a valid exercise

operation of mobile food vendors near a school from 8:00 AM to 4:00 PM during the months of June and July). The *Vaden* Court stated:

The Village's disparate treatment of food vendors apparently reflects the Village's determination that because mobile food dispenser vehicles are allowed to travel the public streets of the Village in search of customers, they are more likely to attract and delay school children and to cause disturbances in residential areas. This determination is entirely rational. The distinctions between street vendors and merchants with a fixed place of business have been accepted by other courts in upholding similar ordinances against equal protection challenges.

Id. at 365-66.

¹³⁶ *E.g.*, *Mister Softee v. Mayor & City Council of Hoboken*, 186 A.2d 513, 519 (N.J. Super. Ct. Law Div. 1962) ("Regulation of a business is not objectionable because similar restrictions are not placed on other businesses. The discrimination that gives rise to relief exists only where persons engaged in the same business are subjected to different restrictions, or are extended different privileges under the same conditions."), *overruled on other grounds* by *Brown v. City of Newark*, 552 A.2d 125, 132 (N.J. 1989); *People v. Ala Carte Catering Corp.*, 159 Cal. Rptr. 479, 485 (Cal. App. Dep't Super. Ct. 1979) ("Like the trial court, we conclude that section 80.73(b) 2A(2)(bb) is a 'rather naked restraint of trade,' and determine that it is ' . . . arbitrarily made for the mere purpose of classification, . . . (and not) based upon (a) distinction, natural, intrinsic or constitutional, which suggests a reason for, and justifies, the particular legislation.'"); *Duchain v. Lindsay*, 345 N.Y.S.2d 53,55-58 (N.Y. App. Div. 1973), *aff'd*, 311 N.E.2d 508 (N.Y. 1974) (striking down a law which prevented operating a mobile vendor within a certain proximity of certain businesses).

of a police power.¹³⁷ For the ordinance to be constitutional, it would need to rationally serve some other goal such as reducing congestion or protecting public health.

The prevention of traffic congestion is a constitutional goal, and a city ordinance that entirely banned food trucks for this purpose would probably be valid under the Illinois Constitution.¹³⁸ A law or ordinance that restricts the operations of food trucks need not be optimal in achieving that end, but it must at least be rationally related to that goal.

However, the 200-foot restriction on the operation of mobile food vendors does not appear to be rationally related to traffic congestion. A specific ban on the operation of food trucks in high traffic areas (such as the Loop, where under the Ordinance food trucks are effectively banned)¹³⁹ or in areas where traffic congestion represents a substantial social ill (such as the Medical District) would appear to satisfy the rational basis test. However, there is no reason to believe that the existence of a brick-and-mortar restaurant or food vendor is materially related to congestion.

As noted above, the Ordinance does create mobile food vending stands in community areas with a high concentration of restaurants.¹⁴⁰ The Ordinance dictates that the stands will be placed in areas where they do not impede traffic flow and are to the benefit of the public. In the Defendant's motion to dismiss in *Burke*, the City argues that a mobile food vending stand might create less congestion than an otherwise-operating mobile food vendor as "congestion and litter trouble that may arise has a consistent location, which makes it easier to police and correct the problem in a way tailored to the site."¹⁴¹

¹³⁷ This rule appears to be limited to Illinois jurisprudence. *See* *New Orleans v. Dukes*, 427 U.S. 297, 304-06 (1976) (holding that the City of New Orleans could reasonably conclude that street vendors would negatively affect a local restaurant monopoly, and that this represented a legitimate government end).

¹³⁸ *Triple A Servs., Inc. v. Rice*, 545 N.E.2d 706, 710-15 (Ill. 1989).

¹³⁹ *Levine*, *supra* note 84.

¹⁴⁰ CHICAGO, ILL., MUNICIPAL CODE § 7-38-117(c) (2012).

¹⁴¹ Defendant's Memorandum in Support of its Motion to Dismiss the Amended Complaint, *supra* note 41, at 8.

A blanket ban on the operation of food trucks within 200 feet of a brick-and-mortar restaurant or fixed food vendor does not appear even obliquely related to congestion. The reasoning in *Chicago Title & Trust*, which held that it was entirely irrational to prohibit the operation of filling stations within 650 feet of other filling stations, but only within 150 feet of areas where many people congregated, if the purpose was fire-risk prevention, may serve as a guide in viewing the reasonableness of the Ordinance.¹⁴² The Ordinance prohibits mobile food vendors from operating within twenty feet of a cross walk, thirty feet of a stop sign or stop light, or next to a protected bike lane.¹⁴³ All three restrictions are rationally related to reducing congestion; parking near a stop sign, stop light, or cross walk could increase delays in areas which are frequently highly congested. Parking adjacent to a bike lane potentially endangers cyclists and deters cycling, an activity that reduces congestion. The Ordinance requires mobile food vendors to operate farther from a restaurant than from a stoplight, cross walk, or bike lane. This is an irrational way to minimize congestion.

Furthermore, the creation of fixed stands where mobile food vendors may operate is dubiously related to congestion. The creation of the stands in some of the most congested parts of the City suggests that the purpose of the Ordinance is not primarily to alleviate congestion. Rather, the stands appear to be a way for the City to deflect criticism that the Ordinance essentially bans all mobile food vending from areas with many restaurants, including most of the downtown area.¹⁴⁴

¹⁴² See *supra* Part V (discussing *Chicago Title & Trust*).

¹⁴³ CHICAGO, ILL., MUNICIPAL CODE § 7-38-115(e) (2012).

¹⁴⁴ The City argues that an ordinance is not doomed if it is seemingly contradictory to its stated purpose. Defendant's Memorandum in Support of its Motion to Dismiss the Amended Complaint, *supra* note 41, at 7. The City relies upon *Greyhound Lines, Inc. v. City of Chicago*, 321 N.E.2d 293, 303 (Ill. App.1974), as an example in which seemingly contradictory laws were held rational, quoting that a city need not apply a rule to "all cases which it might possibly reach." The City also uses *Petition of K.J.R.*, 687 N.E.2d 113, 123 (Ill. App. 1997), arguing the city "need not run the risk of losing an entire remedial

The City argues in response that stands are more easily monitored than mobile food vendors that travel to different locations. Furthermore, the City argues that as Chicago has historically had few food trucks and many fixed restaurants, “the City has had decades to figure out how to handle congestion and litter caused by fixed businesses, the new proliferation of food trucks brings new challenges, and the City has great latitude” to approach them in a piecemeal fashion.”¹⁴⁵ This argument, however, does not satisfy the test that the ordinance be rationally related to its goal of reducing congestion. Regardless of whether stands are related to reducing congestion, the 200-foot rule does not appear to have any rational relationship to congestion relief.

In addition to congestion reduction, another potential rationale under the police power for a mobile food truck ban is public health concerns. Chicago has a clear interest in ensuring that vendors of foods maintain a quality standard that ensures the health and safety of its residents. Prior to the passage of the Ordinance, Chicago’s prohibition of the preparation of food on mobile food trucks represented a rational, if not optimal, legislative response intended to prevent the outbreak of disease and ensure food safety.

Furthermore, if the City chose to ban all mobile food vendors, citing poor onboard sanitation or the lack of available restrooms for workers or clientele, the Ordinance would likely be rationally related to promoting public health. Indeed, the Ordinance contains numerous clauses dealing specifically with food safety, including those that limit the material the vehicle may be constructed out of,¹⁴⁶ refrigeration standards,¹⁴⁷ the serving of milk products, food storage, and inspections of mobile food operators.¹⁴⁸ The restriction on the operation of mobile food vendors within 200 feet of a fixed food

scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.” *Id.* at 123.

¹⁴⁵ *Id.* at 8.

¹⁴⁶ CHICAGO, ILL., MUNICIPAL CODE § 7-38-095 (2012).

¹⁴⁷ *Id.* § 7-38-134(e)(7).

¹⁴⁸ *Id.* § 7-38-126.

seller, however, appears even less remotely related to public health than it is to congestion.

There is no reason to believe that health risks related to mobile food vendors would be elevated if they operated in close proximity to a fixed restaurant.¹⁴⁹ Further, the City has not presented evidence indicating that food contamination is more likely in food truck operations. This is akin to the lack of evidence concerning cross contamination of filling stations in *Chicago Title & Trust*.¹⁵⁰ Furthermore, arguments related to restroom access¹⁵¹ do not appear materially related to the proximity a mobile food vendor has to a fixed restaurant.

Because the Ordinance is not rationally related to either the aim of reducing congestion or promoting public health, it should be found in violation of the Due Process Clause of the Illinois Constitution. For an ordinance that curtails an otherwise legal occupation to be constitutional, it must “bear a sufficient relationship to the promotion of public health and safety.”¹⁵² Chicago’s mobile food vending Ordinance fails this standard. Since aspects of the Ordinance, and in particular the 200-foot rule, have little relation to the promotion of public health or safety, the Ordinance violates the Illinois Due Process Clause.

The City’s best argument is that the Ordinance, despite possible flaws, should not be struck down under the permissive rational basis standard. For example, in *Triple A Services*, the Court stated “the fit

¹⁴⁹ Other cities that have attempted to implement proximity restrictions on food trucks have failed due to public outcry and claims that the laws are arbitrary. For example, a bill proposed in California that would have banned food trucks from operating within 1,500 feet of public schools, for the purpose of promoting healthy eating by school children, but imposed no restrictions on fast food restaurants or convenience stores, was withdrawn due to public outcry. See Baylen J. Linnekin, et al., *The New Food Truck Advocacy: Social Media, Mobile Food Vending Associations, Truck Lots, & Litigation in California & Beyond*, 17 NEXUS: CHAP. J.L. & POL’Y 35, 45-46 (2011-2012).

¹⁵⁰ See *Chicago Title & Trust Co. v. Village of Lombard*, 166 N.E.2d 41, 45 (Ill. 1960).

¹⁵¹ Interview with John Arena, *supra* note 18.

¹⁵² *Chicago Title & Trust Co.*, 166 N.E.2d at 44.

between means and the end to be achieved need not be perfect” for an ordinance to pass the rational basis test.¹⁵³ Furthermore, the Court held that a plaintiff must show that an ordinance is “arbitrary, capricious and unreasonable municipal action” to be found in violation of the rational basis test.¹⁵⁴

However, the facts concerning the 200-foot rule are distinct from those in *Triple A Services*. While one can see how increased congestion might affect the Chicago Medical District, there is no direct relationship between mobile food vendors and congestion or public health. Furthermore, other aspects of the Ordinance, such as the more extensive bans for parking near a restaurant than near a traffic intersection, appear to satisfy the arbitrary, capricious and unreasonable standard. Therefore, Chicago’s proximity restrictions on mobile food vending should be struck down.

VI. THE TRUE IMPACT OF FOOD TRUCKS

Regardless of whether Illinois courts find aspects of the Ordinance unconstitutional, current mobile food vending restrictions may not represent optimal policy. Supporters of food trucks claim that they increase consumer options for eating out,¹⁵⁵ create a pathway to entrepreneurship for individuals who lack the resources to open a brick-and-mortar restaurant,¹⁵⁶ and generally contribute to a city’s cultural fabric.¹⁵⁷ Detractors claim that food trucks create a congestion nuisance and health hazard,¹⁵⁸ and harm brick-and-mortar restaurants

¹⁵³ *Triple A Servs., Inc. v. Rice*, 545 N.E.2d 706, 710 (Ill. 1989).

¹⁵⁴ *Id.* at 709 (quoting *City of Decatur v. Chasteen*, 166 N.E.2d 29, 33 (Ill. 1960)).

¹⁵⁵ See, e.g., Melisa Hardie et al., *Auburn Food Trucks Bring Variety, Convenience to Campus*, AUBURN U., OFFICE OF COMM. & MARKETING (Jan. 14, 2013), http://ocm.auburn.edu/featured_story/food_trucks.html.

¹⁵⁶ See, e.g., NORMAN ET AL., *supra* note 15, at 9-11.

¹⁵⁷ See Jonathan Gold, *How America Became a Food Truck Nation: Our New Food Columnist Traces the Food Truck Revolution Back to its Los Angeles Roots*, SMITHSONIAN MAG. (Mar. 2012), <http://www.smithsonianmag.com/travel/how-america-became-a-food-truck-nation-99979799/>.

¹⁵⁸ See Interview with John Arena, *supra* note 18.

without paying, what some consider, their fair share in taxes.¹⁵⁹ Evaluating these claims is crucial in determining optimal food truck policy.

While there do not seem to be any scientific surveys of food truck safety, there is evidence that regulated food trucks do not pose a significant health hazard to consumers.¹⁶⁰ Food trucks are subject to many of the same inspection requirements as brick-and-mortar restaurants.¹⁶¹ Indeed, food trucks often find themselves inspected by health inspectors more frequently than brick-and-mortar restaurants.¹⁶² Records from Los Angeles County show that, on average, food trucks are “just as clean and sanitary as restaurants.”¹⁶³ Thus, there is no clear policy justification for restricting food trucks based on food safety considerations.

Critics of mobile food vendors often assert that they increase vehicular and pedestrian congestion. Intuitively, it seems apparent that adding parked vehicles to city streets might increase local traffic. However, there is also evidence that suggests these congestion effects may be overblown. A survey conducted by the Institute for Justice found that having a food truck present in a crowded Washington D.C. neighborhood did not meaningfully impact foot traffic.¹⁶⁴ The study found that adding a food truck to an area added only approximately 100 additional pedestrians over a two-hour period.¹⁶⁵ This increase in

¹⁵⁹ See Eng, *supra* note 64.

¹⁶⁰ See Karen Cicero, *Are Food Trucks Safe?*, CNN (Apr. 8, 2013, 8:06 AM), <http://www.cnn.com/2013/04/08/health/food-trucks-safety/>.

¹⁶¹ Stephanie Armour, *Gourmet Food Trucks Fight Inspectors' Perceptions*, BLOOMBERG BUS. (May 9, 2012, 1:05 PM), <http://www.bloomberg.com/news/articles/2012-05-09/gourmet-food-trucks-fight-inspectors-perceptions>.

¹⁶² See *Food Trucks Inspected for Safety*, WBNS-10TV (July 19, 2012, 6:16 PM), <http://www.10tv.com/content/stories/2012/07/19/columbus-food-trucks-inspected-for-safety.html>.

¹⁶³ BERT GALL & LANCÉE KURCAB, SEVEN MYTHS AND REALITIES ABOUT FOOD TRUCKS: WHY THE FACTS SUPPORT FOOD-TRUCK FREEDOM 7 (Nov. 2012), available at http://www.ij.org/images/pdf_folder/economic_liberty/vending/7-myths-and-realities.pdf.

¹⁶⁴ NORMAN ET AL., *supra* note 15, at 34.

¹⁶⁵ *Id.*

pedestrians leads to a negligible one-second increase for pedestrians to travel a block.¹⁶⁶

As evidenced by the numerous restaurateurs and restaurant advocates who endorsed restrictive mobile food vending regulations, some restaurant owners believe that food trucks negatively impact their business and a city's restaurants, more generally. Furthermore, some restaurateurs have complained the mobile food vendors have an unfair advantage relative to brick-and-mortar restaurants due to reduced costs.¹⁶⁷ There are substantial reasons to believe this impact is overstated.¹⁶⁸ Food trucks can increase the number of customers available to restaurants by drawing consumers to an area and by providing restaurants an affordable way to expand their operations.¹⁶⁹ Nonetheless, contemporary food trucks, which often sell restaurant-quality fare, may sometimes overlap markets with brick-and-mortar establishments.

None of the arguments advanced by the restaurateurs and restaurant advocates speak to the creation of good policy. Whether or not food trucks really do hold a competitive advantage over brick-and-mortar restaurants should be tested in a competitive market. If restaurants find themselves disadvantaged because food trucks can either produce a superior product or offer a comparable product at a reduced price, market factors may drive out some restaurants. The meteoric rise of food trucks over the past few years,¹⁷⁰ with the number of gourmet food trucks increasing over tenfold between 2009 and 2011 in the Los Angeles area alone, suggests consumers have an appetite for what food trucks are selling.¹⁷¹ The net outcome for Chicago residents of more food trucks will be expanded access to culinary options at a reduced price.

Furthermore, proponents of tightened regulations on mobile food vendors often argue that brick-and-mortar restaurants, which are

¹⁶⁶ *Id.*

¹⁶⁷ See GALL & KURCAB, *supra* note 163, at 5.

¹⁶⁸ *Id.* at 8.

¹⁶⁹ *Id.*

¹⁷⁰ See Linnekin et al., *supra* note 149, at 40.

¹⁷¹ *Id.* at 38.

subject to property taxes, create more tax revenues for cities, and thus deserve preferential treatment over mobile food vendors.¹⁷² While food trucks do pay some taxes, including sales tax, they lack storefronts and thus do not pay property tax.¹⁷³

To determine whether food trucks decrease a city's total tax income, one must determine to what extent food trucks siphon off customers that would have patronized restaurants, thus harming the restaurant industry and reducing tax receipts, and to what extent this decrease in restaurant revenue and tax payments is offset by sales taxes paid by food trucks. To date, no comprehensive study has been conducted on this topic.

If policy makers conclude that food trucks do decrease city tax revenues, there are less intrusive ways to decrease this impact than spatial limitations. One possible solution is to change the taxes imposed on restaurants.¹⁷⁴ Another is to permit mobile food vendors to operate throughout the City but to impose a mobile food vendor tax. For example, during the City's Taste of Chicago festival mobile food vendors are charged a 25% tax rate on revenue, whereas pop-up restaurants are charged 20% to account for increase costs restaurants have to participate in the event.¹⁷⁵ While it would have a negative impact on the growth of the Chicago food truck industry, the imposition of such taxes would create a better competitive environment than an outright ban.¹⁷⁶

¹⁷² *E.g.*, Eng, *supra* note 64.

¹⁷³ See Beth Kregor, *Five Ways to Give Chicagoans the Food Trucks They Deserve*, CRAIN'S CHI. BUS. (May 15, 2012), <http://www.chicagobusiness.com/article/20120515/NEWS07/120519897/five-ways-to-give-chicagoans-the-food-trucks-they-deserve>.

¹⁷⁴ *Id.*

¹⁷⁵ Alex Levine, *Emanuel Swings and Misses: Taste of Chicago & Food Trucks*, FOOD TRUCK FREAK (Apr. 29, 2013), <http://foodtruckfreak.com/emanuel-swings-and-misses-taste-of-chicago-food-trucks/>.

¹⁷⁶ The notion that taxes, including taxes on negative externalities such as Pigovian taxes, are market preferable to outright bans or limits is well-established in classic economics. Numerous academic and public sources support this contention. See, e.g., Nathan Sadeghi-Nejad, *NYC's Soda Ban is a Good Idea, but a Tax Would Be Better*, FORBES (Sept. 13, 2012, 5:10 PM),

In addition, the Ordinance also increases incentives for business owners to operate outside the confines of the law. Burdensome regulation can lead to a black market in which a city could not monitor health and safety conditions.¹⁷⁷ Goods sold on a black market are those that cannot be exchanged legally or which are exchanged in a way contrary to the laws or regulations of the country where they are sold.¹⁷⁸ Major causes for black markets include the prohibition of goods and high tax levels.¹⁷⁹ Furthermore, government imposed licensing requirements “cause some workers to enter the black market because they don’t want or can’t afford to invest the time and money to obtain required licenses.”¹⁸⁰

While statistics on illicit mobile food vending in the City of Chicago are limited, certain entrepreneurs do engage in mobile food vending outside the confines of the law. Many Chicago pushcarts, including Mexican food and elote carts, are operated without a license.¹⁸¹ Many of these non-licensed mobile food businesses appear to be tacitly tolerated.¹⁸² Easing restrictions on mobile food vending would decrease illicit mobile food vending and bring more of Chicago’s vendors under the City’s oversight.¹⁸³

<http://www.forbes.com/sites/natesadeghi/2012/09/13/nycs-soda-ban-is-a-good-idea-but-a-tax-would-be-better/>.

¹⁷⁷ Amy Fontinelle, *The Mechanics of the Black Market*, INVESTOPEDIA, <http://www.investopedia.com/articles/economics/12/mechanics-black-market.asp> (last visited Mar. 25, 2015).

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ See Claire Bushey, *Legalize It: City Pushcart Vendors Could Legally Prepare Food with a Type of License that Already Exists in the Parks. Why Not Let Them?*, READER (May 28, 2009), <http://www.chicagoreader.com/chicago/legalize-it/Content?oid=1141442>.

¹⁸² *Id.*

¹⁸³ The proposition that over-regulation will lead to an underground economy is widely supported. See, e.g., *Underground Economy*, ENCYCLOPEDIA CHI., <http://www.encyclopedia.chicagohistory.org/pages/1280.html> (last visited Nov. 6, 2013); Andrew Henley et al., *On Defining and Measuring the Informal Sector* (World Bank Policy Research, Working Paper No. 3866, 2006), available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3866>; Martha Alter Chen,

VII. WHAT CAN THE CITY DO TO IMPROVE ITS POLICY?

As analyzed above, neither public health nor congestion concerns validate the Ordinance as representing good mobile food vending policy. Furthermore, while the ongoing case of *Burke v. Chicago* represents a strong challenge to Chicago's mobile food Ordinance, it is unclear if the court will find in favor of the plaintiffs. Chicago would be best served by reforming its mobile food vending Ordinance to promote the safe operation of mobile food vendors throughout the City.

Removing the 200-foot rule in its entirety would serve the City's best interests. There is simply no rational relationship between proximity to a brick-and-mortar restaurant and preventing congestion or protecting public health. Maintaining public health would be best served by maintaining food truck regulations related to food safety and vehicle specifications, as well as maintaining public health inspections of mobile food vendors.¹⁸⁴

If the City is concerned that mobile food vending will exacerbate congestion in areas such as the Loop, there are steps it can take to alleviate this traffic. One option is to prohibit the operation of mobile vendors on certain streets, or at certain times, when congestion is particularly problematic. A more elegant and efficient solution is to implement a congestion tax for mobile vendors in high traffic areas or during high congestion times. Such a tax could operate by charging mobile food vendors a substantial fixed fee for the right to operate in highly congested parts of the City. Such a tax would incentivize only

Rethinking the Informal Economy: Linkages with the Formal Economy and the Formal Regulatory Environment (United Nations Dep't of Econ. & Soc. Affairs, Working Paper No. 46, 2007), available at http://www.un.org/esa/desa/papers/2007/wp46_2007.pdf.

¹⁸⁴ It is important to remember that a policy change alone will not necessarily lead to improved outcomes. For example, six months after Chicago changed its laws to allow onboard cooking for mobile food vendors, not a single Chicago vendor had been permitted to do so. See Monica Eng, *Nothing's Cooking on Chicago Food Trucks*, CHI. TRIB. (Jan. 2, 2013), http://articles.chicagotribune.com/2013-01-02/news/ct-met-food-trucks-cooking-20130102_1_food-truck-gabriel-wiesen-new-trucks.

vendors with high sales expectations to operate in areas of the City with high congestion.

As analyzed above, the City's mobile food vending laws were largely a product of lobbying and pressure applied to local aldermen. While there are limits to what restrictions the City can place on lobbying, there are other issues concerning aldermen participation in the licensing of food trucks that lead to concern. Aldermen are highly invested in the process of approving small businesses, including mobile food vendors.¹⁸⁵ Removing aldermanic discretion from licensing and permitting processes might defang lobbyists wishing to slow the growth of the mobile food industry.¹⁸⁶

CONCLUSION

Chicago regulates mobile food vendors in a myriad of ways. Some mobile food vending ordinances, and in particular the 200-foot rule, represent a major barrier to the operation of mobile food vendors in the City. Removing the barrier would increase consumer access to different food choices and empower entrepreneurs to create new businesses, as well as reduce the incentive to operate in a black-market business.

Ordinance 02012-4489 does not appear to be related to the state policy goals of reducing congestion or protecting public health. Additionally, many aspects of the Ordinance, as well as statements made by its defenders, suggest the true purpose of mobile food vending restrictions is the protection of brick and mortar restaurants. The lack of a rational relationship between policy objectives and the

¹⁸⁵ See ELIZABETH MILNIKEL & EMILY SATTERTHWAITE, INST. FOR JUSTICE, REGULATORY FIELD: HOME OF CHICAGO LAWS: BURDENSOME LAWS STRIKE OUT CHICAGO ENTREPRENEURS 6 (Nov. 2010), *available at* http://www.ij.org/images/pdf_folder/city_studies/ij-chicago_citystudy.pdf (arguing "requirements for aldermanic approval that make Chicago look like a medieval fiefdom"; for example, Chicago's Building's Department must give the local alderman notice any time a permit application to renovate building to create a new business, "presumably so that the alderman can object to the building permit if he or she does not support the business plan.").

¹⁸⁶ *Id.* at 5.

Ordinance suggests that it should be found in violation of the Illinois Constitution. The motion filed by plaintiffs Schnitzel King and Cupcakes for Courage in *Burke* represents an excellent opportunity for Illinois courts to strike down the Ordinance.

Chicago's mobile food vending laws are substantially more stringent than those in other American cities. Furthermore, legitimate City interests such as public health and reducing congestion can be furthered through less restrictive means than current restrictions, and, empirical evidence contradicts critiques of food trucks. Ultimately, Chicago stands to accrue significant benefits by amending its mobile food vending laws.