No. 123123

In The Supreme Court of Illinois

LMP SERVICES, INC., Plaintiff-Petitioner, v. THE CITY OF CHICAGO, Defendant-Respondent.	)	After Opinion by 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*

BRIEF *AMICUS CURIAE* OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-PETITIONER

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INTEREST OF *AMICUS CURIAE*

Pacific Legal Foundation (PLF) was founded 45 years ago and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF engages in research and litigation over a broad spectrum of public interest issues in state and federal courts, representing the views of thousands of supporters nationwide who believe in constitutionally limited government, property rights, and the rule of law. In particular, PLF is known for its defense of private property rights, and has litigated important cases at the United States Supreme Court and in other courts across the nation, including, *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016); *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013); and *Sackett v. E.P.A.*, 566 U.S. 120 (2012). PLF also has experience in the area of the Fourth Amendment, *e.g.*, *United States v. Spivey*, 870 F.3d 1297 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 2620 (2018) (as *amicus curiae*)[1]; *Severance v. Patterson*, 566 F.3d 490 (5th Cir. 2009); and in the specific area of warrantless searches, including, *Santa Barbara Association of Realtors v. City of Santa Barbara*, No. 17CV04720 (Santa Barbara Cty. Super. Ct. filed Oct. 19, 2017); *Trautwein v. City of Highland, Cal*., No. 5:16-cv-01491 (C.D. Cal. filed July 8, 2016).

PLF attorneys are familiar with the legal issues raised by this case and believe that its public policy perspective and litigation experience will help this Court provide guidance to the lower courts regarding the protection of property rights under the Fourth Amendment to the U.S. Constitution and the Illinois Constitution.

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[1] *Available at*: https://pacificlegal.org/wp-content/uploads/2018/08/4.-Spivey-AC-Final.pdf.

INTRODUCTION AND SUMMARY OF ARGUMENT

Municipal Code of Chicago § 7-38-115(1) (GPS-tracking requirement) requires the owners of food trucks operating within Chicago's (City) boundaries to attach GPS tracking devices to their vehicles as a condition of retaining their food truck licenses, to collect information about their movement, and to make information available to the government and public. According to Chicago Mayor Rahm Emanuel, the GPS-tracking requirement is necessary "so that the City and consumers can follow [food truck] locations." Press Release, City of Chicago, *City Council Approves Mobile Food Ordinance to Expand Food Truck Industry Across Chicago* (July 25, 2012). But contrary to Mayor Emanuel's justification, there is no culinary convenience exception to the Fourth Amendment.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and *effects*, against unreasonable searches and seizures, shall not be violated.…" U.S. Const. amend. IV (emphasis added). The Fourth Amendment was originally grounded in property rights. *United States v. Jones*, 565 U.S. 400, 405 (2012). In the 1960s, this approach was augmented with a standard based on personal expectations of privacy. *See Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). In recent cases, the Supreme Court has made clear that "the *Katz* reasonable-expectations test 'has been added to, not *substituted* for,' the traditional property-based understanding of the Fourth Amendment…" *Florida v. Jardines*, 569 U.S. 1, 11 (2013) (citing *Jones*, 565 U.S. at 409). This Court has previously found that Article 1, Section 6, of the Illinois Constitution provides *greater* protection against unreasonable searches than the Fourth Amendment, *see, e.g.*, *People v. Caballes*, 221 Ill. 2d 282 (2006).

LMP and other Chicago area food truck proprietors have a property interest in their vehicles that is violated by a government requirement that a GPS tracking device be attached to those vehicles, separate and distinct from any privacy concerns they may have. Supreme Court decisions, including *United States v. Jones*, establish unequivocally that vehicles like food trucks are protected *effects* under the Fourth Amendment. *Jones*, 565 U.S. at 404 ("It is *beyond dispute* that a vehicle is an 'effect' as that term is used in the Amendment.") (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)) (emphasis added). Further, a Fourth Amendment search occurs where government requires physical trespass on protected property for the purpose of collecting information without the owner's consent. *See Jones*, 565 U.S. at 404-05. Finally, in the alternative, the searches effected by the GPS tracking requirement do not qualify for lax review as a so-called "administrative search."

The government's warrantless demand that food truck owners permanently place a GPS device on their vehicle, which continuously tracks its location, is a physical trespass in violation of the Fourth Amendment. If a food truck is protected property, then a required physical trespass, direct or indirect, constitutes a search, and a warrant is required under the Fourth Amendment. Hence, the GPS tracking requirement is unconstitutional. For these reasons, this Court should reverse the ruling below and find the City's GPS tracking requirement unconstitutional. This brief begins with a discussion of the Fourth Amendment's original focus on property rights, the shift toward a privacy-based analysis in the 1960s, and the Court's recent clarification of the property-based approach. The question at the heart of this case is not whether food trucks are protected property, but to which category of property protected by the Fourth Amendment do the food trucks at issue

belong. As demonstrated in Section II below, vehicles like food trucks qualify as protected "effects" under the Fourth Amendment. Section III offers a discussion of the meaning and importance of consent in the context of the Fourth Amendment. Sections IV and V discuss the so-called "administrative search" doctrine and urge the Court not to adopt that mode of analysis in the present case.

ARGUMENT

I. The Fourth Amendment Provides Specific Protection of Property Rights

For the first 178 years of the American Republic the essence of Fourth Amendment violations was not the breach of privacy, but the "invasion of [the] indefeasible right of personal security, personal liberty, and *private property*" *See Boyd v. United States*, 116 U.S. 616, 630 (1886) (emphasis added); *Jones* at 405 ("Consistent with [the Fourth Amendment's close connection to property] [], our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century."). This property-oriented approach to the Fourth Amendment was sidelined by a *privacy* based approach in *Katz*, 389 U.S. at 361 (Harlan, J., concurring). Instead of property rights, Fourth Amendment analysis became wedded to "a judge's personal sensibilities about the 'reasonableness' of [] expectations or privacy." *Carpenter v. United States*, No. 16-402, slip op. at 12 (U.S. 2018) (Gorsuch, J., dissenting) (citing *Jardines*, 569 U.S. at 11).

However, in recent years the Supreme Court has made clear that property rights provide a firm and separate basis for Fourth Amendment protection. This shift began with *United States v. Jones*, 565 U.S. 400, in which the Supreme Court held that the attachment of a GPS tracking device to a vehicle by government agents constituted a Fourth Amendment violation because it was a warrantless physical trespass on private property

for the purpose of gathering information. *Id.* at 411-13. The Court declared that "at a minimum" the Fourth Amendment provides protection against physical trespass on property interests by the government. *Id.* at 411. This property-based approach was further solidified in *Florida v. Jardines*, in which the Court held that a police officer's warrantless use of a drug-sniffing dog on the front porch of a home was a physical trespass of the home's curtilage in violation of the Fourth Amendment. *Florida v. Jardines*, 569 U.S. at 11. The Court noted "[t]he *Katz* reasonable-expectations test 'has been added to, not *substituted for*,' the traditional property-based understanding of the Fourth Amendment.…" *Id.* (citing Jones, 565 U.S. at 409). Therefore, it is unnecessary to consider privacy concerns when the government physically trespasses on "persons, houses, papers, and *effects*" protected by the Fourth Amendment. *Id* at 5.

In the recent 2017-18 term, the Court decided three cases that either relied upon a property-based Fourth Amendment analysis, or discussed this approach by way of ancillary opinions. *See Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018) (citing *Jardines*, 569 U.S., at 11) ("When a law enforcement officer physically intrudes on [private property] to gather evidence, a search within the meaning of the Fourth Amendment has occurred."); *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (considering appellant's common law Fourth Amendment property claim); *Carpenter v. United States*, No. 16-402, slip op. at 1 (U.S. 2018) (Thomas, J., dissenting) ("This case should not turn on…*whose* property was searched."); *Id.* at 12 (Gorsuch, J., dissenting) ("[T]he traditional approach [to the Fourth Amendment] asked if a house, paper or effect was *yours* under law. No more was needed.…").

While LMP no doubt has *Katz*-type privacy concerns at issue in this case, *see* Plaintiff's Petition for Leave to Appeal (Pl's Pet.) at 21-22 ("The facts presented in *Jones* demonstrate that Chicago's GPS requirement impinges on LMP's expectations of privacy and constitute a search under *Katz*."); *Id.* at 22 ("If left undisturbed, the opinion below would reduce privacy protections for Illinoisans."). Plaintiffs also possess an entirely separate and distinct property interest in their vehicles protected by the Fourth Amendment. The question is not whether food trucks are protected property, but to which category of property protected by the Fourth Amendment they belong.

II. Food Trucks Are Protected "Effects" Under the Fourth Amendment

The Fourth Amendment includes protection for four specific categories, "reflect[ing] its close connection to property." *Carpenter v. United States*, No. 16-402, slip op. at 7 (U.S. 2018) (Thomas, J., dissenting) (quoting *Jones*, 565 U.S. at 405). These four categories were derived from state constitutions that made clear that "effects" and "personal property" are considered as one and the same. *See, e.g.*, PA. Const. of 1776, art. X ("[T]he people have a right to hold themselves, their houses, papers, *and possessions* free from search and seizure.") (emphasis added). "[D]ictionaries from the period indicate that "effects" was synonymous with personal property." Maureen E. Brady, *The Lost "Effects" of the Fourth Amendment: Giving Personal Property Due Protection*, 125 Yale L.J. 946, 985 (2016). James Madison's original proposal for what became the Fourth Amendment also read that "[t]he rights of the people to be secured in their persons; their houses, their papers, and their *other property*, from all unreasonable searches and seizures, shall not be violated." *See* James Madison, Speech Before the First Session of Congress, 1 Annals of Cong. 457 (Joseph Gales ed., 1834).

Time and again the United States Supreme Court has recognized that effects and personal property are one and the same under the Fourth Amendment. *See, e.g., United States v. Place*, 462 U.S. 696, 716 (1983); *Chadwick*, 433 U.S. at 8. These items of personal property include footlockers, *Chadwick*, 433 U.S. at 12, personal luggage, *Place*, 462 U.S. at 705-06, letters and sealed packages, *United States v. Jacobsen*, 466 U.S. 109, 114 (1984), cell phones, *see Riley v. California*, 134 S. Ct. 2473, 2485, 2491 (2014), and specifically applicable to this case, vehicles like food trucks, *see Jones*, 565 U.S. at 404 ("It is *beyond dispute* that a vehicle is an 'effect' as that term is used in the Amendment.") (citing *Chadwick*, 433 U.S. at 12) (emphasis added).

There are several approaches that one can take in determining whether a given item of personal property is a protected effect under the Fourth Amendment. A food truck qualifies under any of them. For instance, at least one federal court has relied on whether a given item would have been considered a protected "effect" in 1791. *See Altman v. City of High Point*, 330 F.3d 194, 202 (4th Cir. 2003). Under such an approach, a private vehicle like a food truck would be easily comparable to a wagon used for transporting and selling goods. *Cf. Jones*, 565 U.S. at 407 n.3 (discussing analogy between an ancient constable concealing himself in a coach and modern GPS tracking); *id.* at 420. (Alito, J., concurring in the judgment) (same). One could also consider property as defined by modern state laws. *See generally* William Baude, James Y. Stern, The Positive Law Model of the Fourth Amendment, 129 Harv. L. Rev. 1821 (2016). That analysis demonstrates that food trucks are protected "effects." Under Illinois law, vehicles like food trucks are without doubt considered property. *See, e.g.*, 720 Ill. Comp. Stat. 5/§21-2 (2013) (Criminal trespass to vehicles); 720 Ill. Comp. Stat. 5/§18-3 (2013) (Vehicle hijacking); 720 Ill. Comp. Stat.

5/§18-4 (2015) (Aggravated vehicle hijacking). Finally, even under a holistic approach considering "whether the object is reasonably recognizable as personal property," food trucks would still qualify as protected effects. *See* Brady, *supra* at 1001-02. Classically, chattel property has been recognized where: 1) the owner has the right to exclude, 2) the right to transfer, and 3) control over use. *Id.* at 1002.

III. A Physical Trespass To Collect Information Without Consent Constitutes a Search

While the *Jones* Court did not enumerate all of the circumstances that constitute a "trespass to an effect," *see Jones*, 565 U.S. at 424-26 (Alito, J., concurring), the Court did explain how the concept applies to effects like LMP's food truck. "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted," *id.* at 404-05. It is of no moment in the present case that Chicago claims that the purpose of the GPS tracking requirement is to gather information to facilitate health and safety inspections, rather than as evidence for criminal prosecution. As a matter of fact, no such health and safety inspections have been executed. Pl's Pet. at 24. Moreover, "'[i]t is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations," *Ontario v. Quon*, 560 U.S. 746, 755 (2010), "and the government's purpose in collecting information does not control whether the method of collection constitutes a search," *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015). All that matters here is that the GPS tracking requirement requires a trespass on a protected effect to obtain information. *See Jardines*, 569 U.S. at 5-6; *Jones*, 565 U.S. at 408, n.5. Taking it for granted that the City's GPA tracking requirement constitutes a trespass on a constitutionally protected effect, one might ask

whether LMP consented to the search, thereby obviating any Fourth Amendment violation. The answer is no.

Much legal scholarship centers on the question of whether an individual has consented to a warrantless government search, with some writers estimating that as much as 90% of all warrantless searches by the government are comprised of alleged consent searches. Alafair S. Burke, *Consent Searches and Fourth Amendment Reasonableness*, 67 Fla. L. Rev. 509, 511 (2016). *See also* Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 214 & n.7 (2001) ("For every consent search that ends up in the books, there are likely hundreds that are never disputed.…); Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 Nw. U.L. Rev. 1609, 1662 (2012) ("[P]eople consent so often that it undermines both the meaningfulness of the consent and the believability that the police are really respecting the doctrine.").

It comes as no surprise, therefore, that consent analysis has been front and center in Fourth Amendment cases concerning GPS tracking requirements. *Cf. United States v. Karo*, 468 U.S. 705, 721-27 (1984) (O'Connor, J., concurring) (discussing consent in the context of pre-GPS era "beepers" used by the government to track movements). In her concurrence in *Jones*, for instance, Justice Sotomayor notes that the warrantless fixing of the GPS device by government agents for information collection was not the only legally significant fact at issue, but also that Jones did not *consent* to the placement of the device. *Jones*, 565 U.S. at 413 (Sotomayor, J., concurring). Lack of consent was also central to *Grady v. North Carolina*, in which the Court found that the requirement that a parolee affix a GPS tracking device to his body was a search within the meaning of the Fourth Amendment. *Grady*, 135 S. Ct. at 1370 ("[A] State also conducts a search when it attaches

a device to a person's body, *without consent*, for the purpose of tracking that individual's movements."). Lack of consent was also a key factor in the Court's consideration of the warrantless government search in *Jardines*, 569 U.S. at 6 ("[P]hysically entering and occupying [a property interest] to engage in *conduct not explicitly or implicitly permitted* by the homeowner" is a Fourth Amendment search.) (emphasis added).

Here, the requirement that LMP and other food truck proprietors to attach GPS tracking devices onto their own private property against their will for the City's purposes is no less a search because the City did not itself attach the device. In *Grady*, the U.S. Supreme Court found that simply *requiring* a physical trespass for this purpose was sufficient to constitute a search under the Fourth Amendment. *Grady*, 135 S. Ct. at 1371 (the offending tracking program was "plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search."). Chicago's law conditions a permit to operate a food truck on a demand that the owner accede to the warrantless search, effectively requiring a physical trespass on the truck to collect information for the government.

IV. This Court Should Not Adopt Lax Standards of Review Applicable to Administrative Searches in the Present Case

So-called "administrative searches," which require neither a warrant nor probable cause as demanded by the Fourth Amendment, are often justified by government on the basis of amorphous notions of public "health and safety," and considered by federal courts under a lax standard of constitutional review. Not only is the doctrine of administrative searches incoherent, it does not integrate with the property-based approach to the Fourth Amendment. This Court should decline to adopt this inapposite standard of review for property searches under the Illinois Constitution.

Courts evaluating administrative searches have balanced the government's interest, or "special needs" in conducting the warrantless search, against the degree of intrusion on the affected individual's privacy, to determine whether the search was "reasonable," *see, e.g.*, *Illinois v. Lidster*, 540 U.S. 419, 424-25 (2004) (privacy intrusions in "information-seeking highway stops" versus special needs in "soliciting the public's assistance"). Based on this reasoning, courts have applied lax standards of rational basis review to administrative searches. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 Wm. & Mary L. Rev. 197, 199-200 (1993).

But it is unclear how the administrative search doctrine is even supposed to function in actual practice. "[S]cholars and courts find it difficult to even define what an administrative search is, let alone to explain what test governs the validity of such a search." Eve Brensike Primus, *Disentangling Administrative Searches*, 111 Colum. L. Rev. 254, 257 (2011). Administrative search doctrine has been variously described as "notoriously unclear," *id.*, "incoherent," Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law-Abiding Public*, 1989 Sup. Ct. Rev. 87, 108-09 (1989), "abysmal," Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 St. John's L. Rev. 1053, 1070 (1998), "devoid of content," Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It, Anyway?*, 25 Am. Crim. L. Rev. 669, 735 (1988), and finally as a "conceptual and doctrinal embarrassment of the first order," Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 418 (1974). Despite these uncertainties, what is clear is that the current test for administrative searches does not account for *property rights* as required by the Supreme Court's recent precedent.

In addition, every administrative search case in the modern era has been focused on implicated privacy rights, not the property rights at issue in this case. This has been true in the context of "dragnet searches" in which "the government searches or seizes every person, place, or thing in a specific location or involved in a specific activity based only on a showing of a generalized government interest." *See* Primus, *supra* at 263; *Camara v. Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967); *United States v. Biswell*, 406 U.S. 311 (1972); *Donovan v. Dewey*, 452 U.S. 594 (1981); *New York v. Burger*, 482 U.S. 691 (1987). And has also been the case in "special-subpopulation" searches, in which groups of individuals with reduced expectations of privacy are searched without individualized probable cause. *See* Primus, *supra* at 270; *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *O'Connor v. Ortega*, 480 U.S. 709 (1987); *Griffin v. Wisconsin*, 483 U.S. 868 (1987), *Samson v. California*, 547 U.S. 843 (2006). In all, the U.S. Supreme Court has focused on individual *privacy* concerns, not implicated *property rights* as required in the wake of cases like *United States v. Jones*.

Regardless of the federal precedent, this Court has the ability to provide, and a history of providing, greater protection against unreasonable warrantless searches under the Illinois Constitution. In addition to this Court finding that exceptions to the warrant requirement "must be closely guarded and, consequently, the burden of showing that a search without a warrant was reasonable rests upon the law officers who must justify their conduct before the courts," *People v. Bussie*, 41 Ill. 2d 323, 327 (Ill. 1968), it has also found that the Illinois Constitution provides *greater* protection than the federal Fourth Amendment, *see e.g.*, *People v. Caballes*, 221 Ill. 2d 282, (2006). *See, also People v. DeLaire*, 240 Ill. App. 3d 1012, 1020 (Ill. App. 2 Dist., 1993) ("[T]he Illinois Constitution

provides greater protection than the Federal constitution."); *People v. Nesbitt*, 405 Ill. App. 3d 823, 830 (Ill. App. 2 Dist., 2010); *People v. Bankhead*, 27 Ill. 2d 18, 20 (Ill. 1963) ("[W]here there is a wrongful entry upon protected premises without [] a search warrant…to justify it, the fruits of the entry are tainted with illegality.").

Both the current federal and Illinois tests for privacy-based administrative searches are insufficient to consider the facts of this case. As discussed above, while LMP no doubt has *Katz*-type privacy concerns at issue in this case, they also possess an entirely separate and distinct property interest in their vehicles regardless of the merits of any related privacy interest that this Court may consider. *See Jardines*, 569 U.S. at 11 (citing *Jones*, 565 U.S. at 409). A balancing test that weighs asserted government "special needs" on one side and individual privacy interests on the other simply does not account for the property rights that LMP possesses in their food trucks. As such, this case presents this Court with the opportunity to continue providing greater protection than the federal Fourth Amendment for property owners subject to warrantless search in Illinois.

V. The City's GPS Tracking Requirement Is Unconstitutional Even Under Permissive Administrative Search Standards

Even considered under the current test for administrative searches, the GPS-tracking rule is unconstitutional because it does not meet even the relatively loose requirements of a valid administrative search. For example, Chicago's law requiring the GPS tracking device does not include safeguards providing an adequate substitute for a warrant. *See, e.g., Burger*, 482 U.S. at 703. "[T]he regulatory statute must perform the two basic functions of a warrant: it must advise the owner…that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers." *Id.* Both the scope and discretion elements of the GPS tracking

requirement fail to meet this standard, as the attendant GPS devices must transmit their data *every five minutes* while a food truck is in operation and requires the data to be provided to *anyone who requests access* to the search data. *See* IJ Pet. at 5, 24. Also "the duration of a particular regulatory scheme" is important "in deciding whether a warrantless inspection pursuant to the scheme is permissible." *Burger*, 482 U.S. at 701 (citing *Donovan*, 452 U.S. at 606). The fact that Chicago's GPS tracking requirement is the first of its kind in the nation and has only been in operation since 2012 should weigh heavily against its constitutionality.

CONCLUSION

For these reasons, this Court should reverse the ruling below regarding the constitutionality of Chicago's GPS-tracking requirement.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, and the certificate of service, is 4,019 words.

/s/ Timothy R. Snowball