**No. 123123**

# In the Supreme Court of Illinois

**LMP SERVICES, INC.,**

*Plaintiff–Appellant,*

**v.**

**THE CITY OF CHICAGO,**

*Defendant–Appellee.*

Appeal from Illinois Appellate Court, First District, No. 1-16-3390;

There on Appeal from the Circuit Court of Cook County, No. 12 CH 41235;

Hon. Helen A. Demacopoulos, Judge Presiding.

## BRIEF OF *AMICUS CURIAE* RESTORE THE FOURTH, INC. IN SUPPORT OF PLAINTIFF–APPELLANT LMP SERVICES, INC.

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# Points & Authorities

## Amicus Identity & Interest

Restore the Fourth, Inc. ("Restore the Fourth") is a national, non-partisan civil liberties organization dedicated to robust enforcement of the Fourth Amendment. Restore the Fourth believes that everyone is entitled to privacy in their persons, homes, papers, and effects. Restore the Fourth also believes protection of this right should be fostered—not hindered—by advances in technology, governance, and law.

Restore the Fourth furthers these principles by overseeing a network of local chapters whose members include lawyers, academics, advocates, and ordinary citizens. Each local chapter devises a variety of grassroots activities to bolster political recognition of Fourth Amendment rights. Restore the Fourth also files amicus briefs in major Fourth Amendment cases. *See, e.g.*, Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402); Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Petitioner, *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (No. 16-1027).

Restore the Fourth is interested in *LMP Services* because of this case's far-reaching Fourth Amendment implications. The Illinois Appellate Court's decision deprives Illinoisans of the full protection afforded by the Fourth Amendment's trespassory test for identifying government "searches"—especially in the context of invasive modern technologies. The appellate court's decision also turns occupational licensing into a backdoor by which the government may abrogate cherished Fourth Amendment rights. This Court should not allow these realities to stand.

## Argument

The City of Chicago requires food trucks to be "equipped with a Global Positioning System (GPS) that sends real-time data to any service that has a publicly accessible application programming interface." *LMP Servs., Inc. v. City of Chicago*, 2017 IL App (1st) 163390, ¶1. This case raises the important question of whether this GPS requirement violates Article I, § 6 of the Illinois Constitution, which secures all Illinoisans "against unreasonable searches, seizures, [and] invasions of privacy."

This Court has established that "the search and seizure clause of the Illinois Constitution" is to be read "in 'limited lockstep' with its federal counterpart." *People v. LeFlore*, 2015 IL 116799, ¶16. This requires the Court to "look first to the federal constitution"—i.e., the Fourth Amendment. *People v. Caballes*, 221 Ill. 2d 282, 314 (2006). If there is any fixed star in Fourth Amendment law, it is that the Fourth Amendment "appl[ies] to all invasions on the part of the government and its employés … [into] the privacies of life." *Boyd v. United States*, 116 U.S. 616, 630 (1886).

In this case, the Illinois Appellate Court lost sight of this principle. It held that Chicago's GPS requirement is not a "search" subject to Fourth Amendment limits because: (1) no physical trespass by a government entity is involved (i.e., the requirement compels food truck owners to self-install GPS devices); and (2) the GPS requirement is a mere condition of licensure. This analysis fails to "assure preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

## I. This Court should reject the Appellate Court's grave misunderstanding of the proper relationship between the Fourth Amendment, technology, and trespass.

### A. The Fourth Amendment assures individual privacy against innovations in government surveillance.

The Fourth Amendment represents our nation's profound commitment to the protection of individual privacy against government surveillance. It guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST., amend. IV. In doing so, "the Amendment seeks to secure the privacies of life against arbitrary power." *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quotes omitted). The "central aim of the Framers" was "to place obstacles in the way of a too permeating police surveillance." *Id.* And that aim is more important today than ever before "[a]s technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes." *Id.*

Courts are thus obligated to guard the Fourth Amendment against technological erosion. Justice Brandeis eloquently addressed this point over 90 years ago in *Olmstead v. United States*, 277 U.S. 438, 471–85 (1928) (Brandeis, J., dissenting). He observed how "[d]iscovery and invention" had already "made it possible for the Government … to obtain … what is whispered in the closet" and that "[t]he progress of science in furnishing the Government with means of espionage [was] not likely to stop with wire-tapping." *Id.* at 473–74. The Fourth Amendment would not survive this progress unless courts recognized that the Amendment was violated

by "every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed." *Id.* at 478–79.

In *Kyllo v. United States*, 533 U.S. 27 (1991), the Supreme Court vindicated Brandeis's view. At issue was the "[government's] use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home." *Id.* at 29. The imager let the government "explore details of the home that would previously have been unknowable without physical intrusion." *Id.* at 40. Faced with the "power of technology to shrink the realm of guaranteed privacy," the *Kyllo* court held that the Fourth Amendment applied to the government's use of the imager. *Id.* at 34. The *Kyllo* court refused to leave the "degree of privacy against government that existed when the Fourth Amendment was adopted" at the "mercy of advancing technology." *Id.* at 34–35.

Now, the usual way in which courts have advanced this principle is through the reasonable-expectation-of-privacy test. This test provides that when the government invades an "expectation of privacy that society is prepared to recognize as reasonable," the Fourth Amendment applies. *Kyllo*, 533 U.S. at 34. The importance of this test as a safeguard against technological erosion of the Fourth Amendment is exemplified by the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). The Court held that the Fourth Amendment encompasses government acquisition of cell phone location data (or CSLI) because "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI." *Id.* at 2217.

But courts are bound to consider more than just the reasonable-expectation-of-privacy test in ensuring that the Fourth Amendment is not eroded by advancing technology. That is the entire lesson of *United States v. Jones*, 565 U.S. 400 (2012). The Supreme Court held in *Jones* that the Fourth Amendment applied to "the [g]overnment's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements." *Id.* at 404. The Court reached this view because "[t]he [g]overnment physically occupied private property for the purpose of obtaining information" and the Fourth Amendment shields individuals against "government trespass upon the areas ('persons, houses, papers, and effects') it enumerates." *Id.* at 404, 406. The Court thereby emphasized that "the reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test." *Id.* at 409.

### B. The trespassory test for identifying government "searches" includes constructive trespasses, which then covers Chicago's GPS requirement for food trucks.

In this case, the Illinois Appellate Court rejected the idea that under the common-law trespassory test, the Fourth Amendment applies to Chicago's GPS requirement for food trucks. *See LMP Servs., Inc. v. City of Chicago*, 2017 IL App (1st) 163390, ¶52. The appellate court deemed the trespassory test to turn solely on whether the government has physically intruded upon private property. *See id.* And since the GPS requirement compelled food truck owners to self-install a GPS device, *see id.* at ¶48, the appellate court held that "[n]o search [has] occurred because the City has

not physically trespassed." *Id.* at ¶52. Put another way, the trespassory test was inapplicable unless the City "physically enter[ed] [a] … food truck to place [a] [GPS] device" or the device was "City property." *Id.*

The problem with this analysis is that *Jones* does not hold that *only physical intrusions* will meet the trespassory test. The *Jones* court declared that it "ha[d] no doubt that … a physical intrusion would … [be] within the meaning of the Fourth Amendment when it was adopted." *Jones*, 565 U.S. at 404–05. The critical determinant was "the common law when the Amendment was framed"—not the physicality of the intrusion. *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). Granted, the *Jones* court also appears to have assumed that the founding era recognized every physical intrusion upon persons, houses, papers, and effects as a common-law trespass. But this does not mean that the converse is true—i.e., that the only common-law trespasses to persons, houses, papers, or effects that the founding era recognized were physical intrusions. The appellate court's reading of *Jones* rests on a logical fallacy: "affirming the consequent." *Paulson v. State*, 28 S.W.3d 570, 572 (Tex. Crim. App. 2000) (example: "Pneumonia makes you cough; therefore, if you cough, you have pneumonia.").

A careful examination of American legal history, in turn, reveals that common-law trespass includes both physical and *constructive* intrusions. "[C]onstructive trespass" is "[a] claim of dominion, an intention being indicated to interfere with [property] … under pretence of any right or authority." *Haythorn v. Rushforth*, 19 N.J.L. 160, 165 (1842) (collecting cases). "[A]ctual, forcible dispossession is not necessary." *Id.* "Any exercise

or claim of dominion, though by mere words, the speaker having the [property] within his power, may constitute such a taking as will sustain an action of trespass." *Id.* For example, "[m]erely making an inventory and threatening to remove goods … has been held sufficient although the goods are not touched by the officer." *Id.* Another example is when a person makes an unauthorized sale of another person's property without any related physical intrusion. *See Wall & Wall v. Osborn*, 12 Wend. 39, 40 (N.Y. Sup. Ct. 1834) ("By the act of selling the plaintiffs' property, the defendant assumed a control over it …."). Simply put, "any unlawful interference with or assertion of control over the property of another, is sufficient to subject the party to an action of trespass." *Id.*

The importance of constructive trespass has not been lost on this Court. In 1906, the Court affirmed a trespass verdict against a title company that wrongfully seized and sold a private hardware store. *See Chi. Title & Tr. Co. v. Core*, 223 Ill. 58, 60–61, 66 (1906). The title company argued that the jury's verdict had to be reversed because the trial court refused to instruct the jury to acquit if the jury "believed, from the evidence, that the [store owner] voluntarily delivered possession" of the store keys to the title company. *Id.* at 62. In the title company's view, if the store owner had "handed over the keys upon demand … there was, in fact, no force and no trespass." *Id.* This Court disagreed: "[a]ny unlawful exercise of authority over the goods of another will support trespass, even though no force be exerted, and it was not necessary to prove that the keys were obtained by physical force." *Id.* at 62–63.

Hence, in applying the Fourth Amendment's trespassory test, attention must be paid to *constructive* government trespasses as much as to *physical* ones. To do otherwise diminishes "the degree of protection" that the common law afforded against trespasses when the Fourth Amendment was adopted. *Jones*, 565 U.S. at 406. A simple thought experiment confirms this point. Imagine a city passes an ordinance requiring all homeowners to install a large bay window with no curtains or blinds so that any member of the public may look into the home from the street. Can it really be the case that until the Supreme Court recognized the reasonable-expectation-of-privacy test in 1967, no Fourth Amendment challenge could have been made against this mandatory-bay-window ordinance? Under the appellate court's view of the trespassory test, the answer must be 'yes.' After all, the ordinance involves no physical government intrusion—the homeowners are compelled to install their own window, and "mere visual observation does not constitute a search." *Jones*, 565 U.S. at 412.

That cannot be right. "[C]ommon sense sometimes matters in resolving legal disputes." *S. New England Tel. Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015). And common sense dictates that a mandatory-bay-window ordinance involves a trespass even though no physical intrusion is involved. What matters is the "assertion of control over the property of another"—i.e., the city dictating that homes must contain large, uncovered windows for surveillance purposes. *Haythorn*, 19 N.J.L. at 165. Chicago's GPS requirement is no different. It is "[a] claim of dominion" over food trucks, with the City dictating "under pretence of … right or authority"

that such trucks must contain a GPS tracker. *Id.* This falls squarely within the trespassory test—and robust application of this test is vital to ensuring that the Fourth Amendment is not reduced "to a form of words." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920).

### C. Absent robust application of the trespassory test, Fourth Amendment rights will be left at the mercy of ever-advancing surveillance technology.

Given all the ways "technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes," the trespassory test is no less important than the reasonable-expectation-of-privacy test in safeguarding the Fourth Amendment. *Carpenter*, 138 U.S. at 2214. To be sure, the reasonable-expectation-of-privacy test has kept a number of surveillance innovations from eliding Fourth Amendment limits—including, most recently, acquisition of cell phone location data. *See id.* at 2217. But the test is no guarantee of this. One vivid example is the Supreme Court's finding that "a police helicopter hovering 400 feet above a person's property invades no reasonable expectation of privacy." *Id.* at 2266 (Gorsuch, J., dissenting) (citing *Florida v. Riley*, 488 U.S. 445 (1989)). As Justice Gorsuch puts it: "Try that one out on your neighbors." *Id.*

Against this backdrop, the trespassory test is an integral complement to the "often unpredictable—and sometimes unbelievable—jurisprudence" of the reasonable-expectation-of-privacy test. *Id.* This reality is brought into sharp relief by the Supreme Court's admonition that in applying the Fourth Amendment, courts must contemplate not only "what has been"

but also "what may be." *Weems v. United States*, 217 U.S. 349, 374 (1910). For good reason: "[t]ime works changes" and "brings into existence new conditions and purposes." *Id.* Forward-looking Fourth Amendment analysis ensures that "[r]ights declared in words" are not "lost in reality." *Id.*; *see also Kyllo*, 533 U.S. at 36 ("[T]he rule we adopt must take account of more sophisticated systems that are … in development….").

With this in mind, the Court should consider what the appellate court's physical-intrusions-only view of the trespassory test means for recent and foreseeable innovations in surveillance technology. One example is the advent of devices enabling the government to intercept cell phone location data in real time. Commonly known as "stingrays," these devices fool "nearby cell phones into believing that the device is a cell tower so that the cell phone's information is then downloaded into the [device]."[1] The intercepted location data may then be used "to determine, with a reasonable degree of certainty, … where an individual is located while a cell call is being placed."[2] And these devices are becoming more powerful all the time, with one of the latest iterations consisting of a plane-mounted "two-foot-square box" that enables location data to be captured "from tens of thousands of cell phones" at a time.[3]

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1 Brian L. Owsley, *TriggerFish, StingRays, & Fourth Amendment Fishing Expeditions*, 66 HASTINGS L.J. 183, 185 (2014).

2 *Id.* at 193.

3 Jonathan Bard, *Unpacking the Dirtbox: Confronting Cell Phone Location Tracking with the Fourth Amendment*, 57 BOSTON COLLEGE L. REV. 731, 749–50 (2016).

Stingrays are no stranger to Illinois. A freedom-of-information lawsuit against the Chicago Police Department has led to the production of public records establishing that Chicago has "spent more than $340,000 between 2005 and 2010 on cell-site simulators, as well as software upgrades and training."[4] It is also suspected that "police have been using the[se] devices to monitor protesters at events such as the [2012] NATO Summit."[5] This suspicion has stemmed from protestors reporting "that the batteries in their cellphones seemed to become quickly depleted during [certain] protests—something caused by cell-tower simulators."[6] These reports bear a troubling resemblance to the experience of human rights activists in the former Soviet state of Belarus.[7] These activists have reported seeing government vehicles "decked with antennae near protest events" that appeared to be "tracking protestors' phones."[8]

The trespassory test offers a ready response to these surveillance innovations, above and apart from the reasonable-expectations-of-privacy test whose applicability remains an open question. *See Carpenter*, 138 S. Ct. at 2272 (refusing to "express a view" on "real-time" collection of cell phone

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4 Frank Main, *Chicago Cops Lose Bid to Toss Lawsuit Over Secret Cell-Phone Tracking*, CHI. SUN-TIMES, Jan. 11, 2016, http://bit.ly/2uwZc9M.

5 *Id.*

6 *Id.*

7 *See* AMNESTY INT'L, "IT'S ENOUGH FOR PEOPLE TO FEEL IT EXISTS": CIVIL SOCIETY, SECRECY, & SURVEILLANCE IN BELARUS 6–8 (2016), http://bit.ly/2uuF7Fv (detailing surveillance abuses in Belarus "based on interviews with more than fifty civil society activists, the majority in Belarus").

8 *Id.* at 21.

location data). Without question, a stingray causes an "interference with or assertion of control over the property of another"—namely, a cell phone. *Wall & Wall*, 12 Wend. at 40. By intercepting the phone's transmissions of location data—transmissions meant only for the wireless provider—the government commandeers the phone to serve its own ends. It is no different than the government taking a letter out of the hands of a postal employee. *Cf. Ex parte Jackson*, 96 U.S. 727, 733 (1877) ("Letters … in the mail are as fully guarded from examination and inspection…."). In both cases, a trespass has occurred—the only difference is that the letter trespass is physical while the cell phone trespass is constructive.

Yet, under the appellate court's decision here, that is all the difference in the world. This decision presumes that when it comes to identifying Fourth Amendment violations—at least under the trespassory test—"the essence of the offence" is "the breaking of … doors" and "the rummaging of … drawers." *Boyd v. United States*, 116 U.S. 616, 630 (1886). Not so. What in fact matters is the "invasion of [a person's] indefeasible right of personal security, personal liberty and private property." *Id.* Recognizing Chicago's GPS requirement as a constructive trespass upholds this principle, thereby ensuring that the privacy of Illinoisans is not left to "the mercy of advancing technology." *Kyllo*, 533 U.S. at 36. And the importance of that protection cannot be overstated given the limitless capacity of technology to erode privacy—including in ways we cannot predict.[9]

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[9] *E.g., If These Walls Could Talk: The Smart Home & the Fourth Amendment Limits of the Third Party Doctrine*, 130 HARV. L. REV. 1924 (2017).

## II. This Court should reject the Appellate Court's grave misunderstanding of the proper relationship between the Fourth Amendment and occupational licensing.

### A. The Fourth Amendment protects entrepreneurs, even in the context of occupational licensing.

The "theory of our institutions of government" squarely rejects the idea that individuals "may be compelled to hold … [their] means of living … at the mere will of another." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). As such, the Fourth Amendment protects a person against government surveillance regardless of whether the person is at home or on the job. "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. Seattle*, 387 U.S. 541, 543 (1967). That right is then jeopardized when the government sees fit to subject a person's business to an administrative or regulatory search without proper respect for the Fourth Amendment. *See id.*

Of course, "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." *GM Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977). Consider searches of businesses that operate within "closely regulated" industries. *See New York v. Burger,* 482 U.S. 691, 702 (1987). The Fourth Amendment permits warrantless inspections of such businesses on three conditions. *See id.* at 702–03. **First,** the "regulatory scheme" behind the inspections must serve a "substantial government interest." *Id.* **Second,** the inspections must be "necessary to further the regulatory scheme." *Id.*

**Third,** the inspection regime must provide "a constitutionally adequate substitute for a warrant" in terms of providing notice to the owner and "limit[ing] the discretion of the inspecting officers." *Id.*

This Fourth Amendment exception then proves the rule: the Fourth Amendment applies to all government searches of a person's business. And this remains so even though it may be said that "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978) (citation omitted). Implied consent does not exempt search-related restrictions from having to comply with the Fourth Amendment in the first instance. Otherwise, the Supreme Court's decision in *Burger* would have begun and ended with the fact that the junkyard owner in the case was part of a closely-regulated industry, requiring him to accept any search mandated by his license. But what the Court instead said in *Burger* is that "[the] operator of commercial premises in a 'closely regulated' industry has a **reduced** expectation of privacy"—not zero expectation. 482 U.S. at 702 (bold added). The Court then laid out three separate conditions to protect this reduced expectation of privacy against further diminishment. *See id.* at 702–03.

The need for government intrusions related to a business license to comply with Fourth Amendment limits is also confirmed by the following, "long … settled" principle: that "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." *United States v. Chicago,*

*Milwaukee, St. Paul & Pac. R.R. Co.*, 282 U.S. 311, 328–29 (1931) (collecting cases). By nature, this principle is "broader than the applications … made of it." *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 598 (1926). And so it must be, for "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Id.* at 594. This eliminates any basis for a court to conclude that via occupational licensing, the Fourth Amendment may be "manipulated out of existence" by the government. *Id.*

Yet, that is the import of the appellate court's decision in this case. *See LMP Servs., Inc.*, 2017 IL App (1st) 163390, ¶55–56. The appellate court determined that because Chicago's GPS requirement for food trucks "is a condition precedent that … all food trucks must comply with to obtain a license," there was "no search implicating the [F]ourth [A]mendment." *Id.* The appellate court then took this analysis a step further to conclude that whenever a person "accept[s] a license to conduct business," that person "cannot raise a [F]ourth [A]mendment challenge to … the very conditions upon which extension of the license is predicated." *Id.* at ¶56 (citation and internal quotation marks omitted). Such reasoning cannot be reconciled with the longstanding, black-letter rule that the government "may not impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co.*, 271 U.S. at 594. Such reasoning also cannot be reconciled with the history of the Fourth Amendment, which demonstrates that the main driving force behind the Amendment was to protect those who 'conduct business' against abusive searches.

### B. Founding era history shows that the Fourth Amendment was meant to protect entrepreneurs from surveillance like Chicago's GPS requirement for food trucks.

In applying the Fourth Amendment, it is always a good idea to "begin with history"—the seminal events of the founding era that gave rise to "the norms that the Fourth Amendment was meant to preserve." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). On this score, the history of the founding era establishes that the origins of the Fourth Amendment may be traced in large part to the "merchants and businessmen whose premises and products were inspected for compliance with … [those] parliamentary revenue measures that most irritated the colonists." *Marshall*, 436 U.S. at 311. Three aspects of this history stand out in terms of considering whether Chicago's GPS requirement for food trucks "risks [g]overnment encroachment of the sort the Framers … drafted the Fourth Amendment to prevent." *Carpenter*, 138 S. Ct. at 2223. These aspects are: (1) the writs of assistance; (2) the use of informants; and (3) the Excise Act.

Writs of Assistance: The Fourth Amendment "grew in large measure out of the colonists' experience with … writs of assistance." *United States* v. *Chadwick,* 433 U.S. 1, 7–8 (1977). "A writ of assistance was a court order to individuals to assist customs officers in … their duties."[10] "[T]he writ did not authorize a search; it merely vouched for the identity of the customs officers who by their commissions were authorized to search."[11]

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[10] Tracy Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1053 n.18 (2011).

[11] *Id.* (internal punctuation and alterations omitted).

The writs afforded "customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws." *Stanford v. Texas*, 379 U.S. 476, 481 (1965). This included "suspected vaults, cellars, or warehouses." *Boyd*, 116 U.S. at 623. Sixty-three Boston merchants hired James Otis to challenge the writs in court. *See Commw. v. Haynes*, 116 A.3d 640, 649–50 (Pa. Super. Ct. 2015). Otis did so in a 1761 speech that later inspired President John Adams to proclaim: "Then and there the child Independence was born." *Riley v. California,* 134 S. Ct. 2473, 2495 (2014). During his speech, Otis explained that a "person with this writ … may enter all houses, shops, etc., at will, **and command all to assist him**."[12] Otis accordingly decried the writs as "the worst instrument of arbitrary power."[13] And to prove his point, Otis offered the following example of how one "Mr. Ware" had exercised the writ:

> Th[e] wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts. … Mr. Justice Walley had called … Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-day Acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, "Yes." "Well then," said Mr. Ware, "I will show you a little of my power. I command you to permit me to search your house for uncustomed goods"—and went on to search the house from the garret to the cellar; and then served the constable in the same manner![14]

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12 2 WORKS OF JOHN ADAMS 524 (C. Adams ed. 1850) (bold added).

13 *Id.* at 523.

14 *Id.* at 524–25.

Use of Informants: Writs of assistance were not the only tool in the customs official's arsenal that rankled founding era Americans. These officials also used "informants to learn of places where smuggled goods were being kept." *Haynes*, 116 A.3d at 649. "The informer was essential to the … enforcement regime of the Boston customs house in the 1750s."[15] This was because "it was one thing to have a legal power of entry and another to know when and where to make use of it."[16] "Random searches … might often be so much wasted effort."[17] Customs officials needed "a reliable tip-off" since "no amount of legislation could lead a customs officer to where a particular lot of smuggled merchandise lay hidden."[18] So, these officials recruited informants through advertisements promising that "if any Person or Persons will give Information," such persons would be "handsomely rewarded" and "their Names concealed."[19]

Excise Act: Following the government abuses made possible by the writs of assistance and informants, the Excise Act of 1754 was the "final straw for some colonists."[20] The Excise Act empowered tax collectors to "interrogate any citizen under oath concerning his annual consumption of spirits."[21] The Excise Act also "required everyone to maintain an account

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15 M.H. SMITH, THE WRITS OF ASSISTANCE CASE 128 (1978).

16 *Id.* at 127.

17 *Id.*

18 *Id.* at 127–28.

19 *Id.* at 128.

20 Maclin & Mirabella, *supra* note 10, at 1053.

21 *Id.* (citation and internal quotation marks omitted).

of his family's annual consumption [of spirits] and swear to its veracity if the local excise officer asked."[22] Public outcry against these requirements was voluminous and widespread.[23] "[O]pposition … transcended merchants and narrow class interests."[24] In the end, the Excise Act not only "broaden[ed] the consensus against general searches and seizures," it also "bred legislation implementing specific warrants for impost and customs searches as a way to curb promiscuous searches."[25]

With the above founding era history now in view, all of the Fourth Amendment problems with Chicago's GPS requirement for food trucks become transparent. In short, the GPS requirement commands food truck owners to assist the government by installing a device that acts as an informant of the truck's location and keeps an account of that information that may be later accessed by the government at any time. The colonial equivalent of the GPS requirement would have been a law requiring merchants to hire a private employee to keep an account of every place the merchant went by the hour, and then make that account available to any customs official who had cause to see it, or to any member of the public. It is impossible to believe that such a law would have passed muster with the same colonists who drafted the Fourth Amendment to combat the writs of assistance, the use of informants, and the Excise Tax.

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22 *Id.* (citation and internal quotation marks omitted).

23 *See id.*

24 *Id.* (citation and internal quotation marks omitted).

25 *Id.* at 1053–54 (citation and internal quotation marks omitted).

### C. Absent recognition that a search is a search—even when made a condition of licensure—the Fourth Amendment will become a nullity for entrepreneurs.

Founding era history is not the only reason why this Court should reject the appellate court's conclusion here that search-based licensure conditions fall outside the Fourth Amendment. The Court should also look toward the future and consider the long-term ramifications of the appellate court's decision in this case. If occupational licensing is now a backdoor for the government to effectuate searches free of Fourth Amendment limits, the future privacy of countless Illinoisans is in jeopardy.

According to a 2015 study, "24.7 percent of the workforce in Illinois [is] licensed."[26] In concrete terms, this means that "roughly 1.6 million Illinoisans are currently required to have a license to legally practice their occupation."[27] Among the occupations that Illinois licenses are a litany of "low- and moderate-income [professions]," which include everything from auctioneers to makeup artists to manicurists to athletic trainers to massage therapists.[28] Illinois has also taken certain steps in recent years to make it easier for more people to obtain occupational licenses (i.e., by reducing barriers to entry), paving the way for the total number of professionally-licensed Illinoisans to grow even higher in the future.[29]

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26 PATRICK A. MCLAUGHLIN, ET AL., MERCATUS CENTER, THE STATE OF OCCUPATIONAL LICENSURE IN ILLINOIS 1 (2017), *available at* https://bit.ly/2vZhbZf.

27 *Id.*

28 *Id.* at 1–2.

29 *See id.* at 3.

Now, if the appellate court's decision in this case is correct, then the government may condition the occupational licenses of some 1.6 million Illinoisans on submission to searches without any possibility of Fourth Amendment review. The government may also do the same thing in the course of creating new occupational licenses. Imagine a city passes an ordinance requiring all babysitters, regardless of age, to be licensed if they are paid. Then imagine that a condition of this license is that the babysitter must purchase and wear a body camera at all times while on the job and broadcast the video data to the public. According to the appellate court's decision, any babysitter who "accept[s] [such] a license … cannot raise a [F]ourth [A]mendment challenge to … the very conditions upon which extension of the license is predicated." *LMP Servs., Inc.*, 2017 IL App (1st) 163390 at ¶56 (citation and internal quotation marks omitted).

This hypothetical should not be dismissed on the ground that no government would ever authorize such an intrusive search. Instead, the Court should recognize "the tendency of a principle to expand itself to the limit of its logic."[30] And from this perspective, to affirm the appellate court's decision in this case "would unleash a principle of constitutional law that would have no obvious stopping place." *Luis v. United States*, 136 S. Ct. 1083, 1094 (2016). The Fourth Amendment would become a nullity for licensed professionals, rendering hollow the Amendment's central promise of governing "all invasions on the part of the government and its employés of the … privacies of life." *Boyd*, 116 U.S. at 630.

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30 B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1921).

## Conclusion

When it comes to the Fourth Amendment's guarantee of individual privacy, "all owe [a] duty of vigilance for its effective enforcement." *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931). While the City of Chicago's GPS requirement for food trucks may be "divested of many of the aggravating incidents of actual [physical] search and seizure," this requirement "contains the[] substance and essence" of a government search. *Boyd v. United States*, 116 U.S. 616, 635 (1886). Because the Illinois Appellate Court held otherwise, this Court should reverse.

Respectfully submitted,

Dated: August 20, 2018

**RESTORE THE FOURTH, INC.**
***Amicus Curiae***

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## Certificate of Compliance

I, Mahesha P. Subbaraman, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is **5,609 words**.

Dated: August 20, 2018

By: /s/Mahesha P. Subbaraman
One of Restore the Fourth, Inc.'s Attorneys

## Certificate of Service

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned attorney certifies that upon approval of Restore the Fourth, Inc.'s motion for leave to file this brief, the foregoing Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellant LMP Services, Inc. will be served by e-mail and one copy will be served by U.S. Mail on each of the following parties through their respective counsel-of-record as indicated below.

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# In the Supreme Court of Illinois

| | |
|---|---|
| LMP SERVICES, INC.,<br><br>Plaintiff–Appellant,<br><br>v.<br><br>THE CITY OF CHICAGO,<br><br>Defendant–Appellee. | On Appeal from the Illinois Appellate Court, First Judicial District, Case No. 1-16-3390<br><br>There on Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division, No. 12 CH 41235<br><br>Hon. Helen A. Demacopoulos, *Presiding Judge*. |

**NOTICE OF FILING & PROOF OF SERVICE**

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PLEASE TAKE NOTICE that on August 20, 2018, the undersigned filed with the Clerk of the Supreme Court of Illinois through an approved electronic filing service provider (the efileIL system) the [Proposed] Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellant LMP Services, Inc., a copy of which is attached to this notice and hereby served upon you.

Pursuant to Illinois Supreme Court Rules 11 and 12, the undersigned certifies under penalty as provided by Section 1-109 of the Code of Civil Procedure, that on August 20, 2018, the undersigned served the [Proposed] Brief of *Amicus Curiae* Restore the Fourth, Inc. in Support of Plaintiff-Appellant LMP Services, Inc., together with this Notice of Filing & Proof of Service, upon the following persons as indicated below:

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Upon the Court's acceptance of this filing: (1) the persons identified above with identified email addresses will be served using the Court's electronic filing system or by e-mail; and (2) one copy of Restore the Fourth, Inc.'s Amicus Brief will be sent via U.S. Mail to Plaintiff-Appellant's counsel and Defendant-Appellee's counsel, respectively. If the motion for leave to file is granted, the undersigned will send 13 copies of Restore the Fourth, Inc.'s Amicus Brief to the Clerk of the Supreme Court of Illinois.

Dated: August 20, 2018

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