No. 19-_____

In The
Supreme Court of the United States

LMP SERVICES, INC.,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

On Petition For A Writ Of Certiorari To The Illinois Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Chicago's requirement that licensed food trucks install GPS devices that create comprehensive records of their movements in order to protect restaurants from competition is an unreasonable search under the Fourth Amendment.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioner LMP Services is an Illinois corporation wholly owned by Laura Pekarik. Petitioner has no parent corporations and no publicly held company owns 10% or more of its stock.

Respondent is the City of Chicago, a municipal corporation established under the laws of Illinois.

RELATED CASES

- *LMP Services, Inc.* v. *City of Chicago*, No. 12 CH 41235, Circuit Court Of Cook County, Illinois. Judgment entered December 5, 2016.
- *LMP Services, Inc.* v. *City of Chicago*, No. 1–16–3390, Illinois Appellate Court. Judgment entered December 18, 2017.
- *LMP Services, Inc.* v. *City of Chicago*, No. 123123, Illinois Supreme Court. Judgment entered May 23, 2019.

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INTRODUCTION

This case asks whether the government can require GPS tracking of licensed food trucks to protect local restaurants from competition. In 2012, Chicago prohibited food trucks from operating within 200 feet of any business selling food to the public. To enforce this "200-foot ban," Chicago mandates that food trucks install and operate GPS tracking devices, which allow the City to investigate if a food truck violated the ban at any point within the past six months. The scheme requires no warrant and offers no opportunity for pre-compliance review.

Chicago's GPS requirement is a search. In both *United States* v. *Jones* and *Grady* v. *North Carolina*, this Court held that the compelled installation of a GPS device is a Fourth Amendment "search." But on May 23, 2019, the Illinois Supreme Court held the opposite. Interpreting "the search and seizure clause in [the Illinois Constitution] using the same standards as are used in construing its federal counterpart," App. 16, the court held that Chicago's GPS requirement is not a search. *Id*. at 18. In so holding, the court distinguished both *Jones* and *Katz* v. *United States* by noting that they are "criminal cases" while Chicago's GPS requirement is civil in nature. *Id*. at 17. The court also held that, even if the GPS requirement is a search, it is reasonable under the *Colonnade–Biswell* exception to the warrant requirement, in part because the entire food industry is "closely regulated." *Id*. at 18.

The Illinois Supreme Court's decision warrants this Court's review. The court's holding that Chicago's GPS requirement is not a search squarely conflicts with this Court's decisions in *Jones* and *Grady*, which held that GPS tracking is a search whether done for criminal or civil purposes. Meanwhile, both the Second and Seventh circuits have refused to decide whether warrantless GPS tracking of regulated businesses is a search. These decisions carry grave implications, not just for mobile vendors, but for the millions of Americans who need a government license to do their jobs. Given the dramatic rise in the percentage of workers who need such a license over the past half-century, this question is of increasing national importance.

This Court should also review the Illinois Supreme Court's holding that Chicago's GPS requirement is reasonable under the *Colonnade–Biswell* exception, which permits warrantless searches of "closely" or "pervasively" regulated businesses. In *City of Los Angeles* v. *Patel*, this Court stressed that the *Colonnade–Biswell* exception is narrow, with the Court identifying only four industries that fall within it. Yet lower courts have stretched the exception to licensed and regulated businesses throughout the American economy. This includes Illinois courts, which have deemed the entire food industry closely regulated. This Court should accept review and instruct lower courts that *Colonnade–Biswell*'s narrow exception cannot be permitted to swallow the rule.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 2019 IL 123123. *See* App. 1–21. The opinion of the Illinois Appellate Court is reported at 95 N.E.3d 1259. *See* App. 22–53. The opinion of the Cook County Circuit Court is unpublished but included in the Appendix at pp. 54–79.

JURISDICTION

The Illinois Supreme Court entered judgment on May 23, 2019. *See* App. 1. On July 15, 2019, Justice Kavanaugh extended Petitioner's deadline for filing this petition pursuant to S. Ct. R. 13.5 until September 20, 2019. *See* Application No. 19A58. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Article I, Section 6 of the Illinois Constitution provides: "The people shall have the right to be secure in their persons, houses, papers and other possessions against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means. No warrant shall issue without probable cause, supported by affidavit particularly describing the place to be searched and the persons or things to be seized."

Chicago's prohibition on food trucks operating within 200 feet of a restaurant is contained in Section 7-38-115(f) of the Municipal Code of Chicago:

> (f) No operator of a mobile food vehicle shall park or stand such vehicle within 200 feet of any principal customer entrance to a restaurant which is located on the street level; provided, however, the restriction in this subsection shall not apply between 12 a.m. and 2 a.m.

Chicago's mandate that food trucks install and operate GPS tracking devices is contained in Section 7-38-115(l) of the Municipal Code of Chicago:

> (l) Each mobile food vehicle shall be equipped with a permanently installed functioning Global-Positioning-System (GPS) device which sends real-time data to any service that has a publicly-accessible application programming interface (API). For purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at

places and times as shown in the data tracked from the vehicle's GPS device.

Chicago's regulations concerning the installation and operation of GPS devices by mobile food vendors can be found in the Appendix at pp. 86–88.

STATEMENT

A. Background

Petitioner LMP Services is an Illinois corporation that operates a food truck named Cupcakes for Courage. Laura Pekarik, LMP's sole owner, was inspired to start the food truck after taking time off work to care for her sister Kathryn, who had non-Hodgkin's lymphoma. Together, Laura and Kathryn baked cupcakes and came up with recipes to keep Kathryn's mind off her cancer. Once Kathryn recovered, Laura decided to become her own boss, so she took their recipes and bought her first truck. After getting licensed in 2011, Cupcakes for Courage began selling cupcakes on public and private property throughout Chicago.

At the time, Chicago was one of the few major U.S. cities that forbade cooking onboard food trucks. Although this did not affect Petitioner, others were excited when officials announced in 2012 they were considering a new ordinance. But the Illinois Restaurant Association and some restaurateurs were not enthusiastic about the prospect of new competition. They found a receptive ear in Alderman Tom Tunney, a former chairman of the Illinois Restaurant Association

and owner of several restaurants, who chaired the City Council's Economic Development Committee, the body chiefly responsible for vetting the ordinance.

Tunney announced he would "protect[ ] brick-and-mortar restaurants" from food trucks, and the resulting ordinance reflects that. It continued a ban on food trucks operating on public or private property within 200 feet of any brick-and-mortar business selling food. It quadrupled the fines for violating the 200-foot ban to up to $2,000 per violation—over ten times the fine for parking in front of a fire hydrant. And it required food trucks to install and operate GPS tracking devices as a condition of licensure. This GPS requirement serves to enforce the 200-foot ban; both reside in the same section of Chicago's code, and the requirement states that "[f]or purposes of enforcing this chapter, a rebuttable presumption shall be created that a mobile food vehicle is parked at places and times as shown in the data tracked from the vehicle's GPS device." Municipal Code of Chicago § 7-38-115(l).

After the Chicago City Council enacted the ordinance in July 2012, the Chicago Board of Health enacted GPS regulations. Those regulations mandate that a GPS device must send real-time location data to a GPS service provider—a private company with which the food truck must contract—at least once every five minutes whenever the truck is vending food, is otherwise open to the public, or is being serviced at a commissary. App. 86. The service provider must retain both the truck's current location and at least six months of historical data. *Id*. at 87. Officials may

request those data without prior judicial authorization for numerous reasons, including to "establish[] compliance with" the 200-foot ban. *Ibid*. Additionally, the ordinance requires service providers to make available "a publicly-accessible application programming interface (API)"—a virtual door through which the public can access GPS data. *Id*. at 88. A press release issued by the mayor made clear that "data on food truck locations will be available online to the public. Food truck operators will be required to use mounted GPS devices in each truck so that the City and consumers can follow their locations."[1]

B. Proceedings Below

On November 14, 2012, Petitioner brought suit in Cook County Circuit Court, contending that the 200-foot ban violated the Illinois Constitution's due process and equal protection guarantees because its sole purpose—protecting restaurants from potential food-truck competition—was illegitimate. Petitioner also challenged the GPS requirement as an unreasonable warrantless search under Article I, Section 6 of the Illinois Constitution, which Illinois courts analyze in limited lockstep with the Fourth Amendment. Chicago moved to dismiss, which the court substantially denied.

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[1] Press Release, Mayor's Press Office, City Council Approves Mobile Food Ordinance to Expand Food Truck Industry Across Chicago (July 25, 2012), https://www.chicago.gov/content/dam/city/depts/mayor/Press%20Room/Press%20Releases/2012/July/7.25.12ApproveFoodTrucks.pdf.

After discovery, the parties filed cross-motions for summary judgment.

On December 5, 2016, the trial court granted Chicago's motion for summary judgment and denied Petitioner's motion. App. 54. The court found the 200-foot ban legitimate because it helped "balanc[e] [the] interests" of food trucks and restaurants. *Id*. at 62–67. Regarding the GPS requirement, the court held in part that it was not a "search" because Chicago did not surreptitiously install the device but instead requires food trucks to install the devices themselves. *Id*. at 72–74.

Petitioner appealed the trial court's decision. But on December 18, 2017, the appellate court affirmed. App. 22. Regarding the 200-foot ban, the appellate court noted that restaurants pay property taxes and other fees it felt exceed similar payments made by food-truck owners. *Id*. at 38–39. Thus, the court held that Chicago could legitimately "protect those" restaurants from competition. *Id*. at 38. And like the trial court, the appellate court held that the GPS requirement was not a search because Chicago, rather than installing the tracking device itself, requires Petitioner to do it. *Id*. at 50.

Petitioner was granted leave to appeal to the Illinois Supreme Court, which affirmed on May 23, 2019. App. 1. The court first held that the 200-foot ban was constitutional because Chicago could legitimately protect restaurants from competition since they "bring stability" to neighborhoods while food trucks, in the court's opinion, do not. *Id*. at 9–10. The court then

rejected Petitioner's GPS claim, construing Illinois' search and seizure clause in "lockstep" with the Fourth Amendment and relying exclusively on U.S. Supreme Court cases.

Regarding Petitioner's GPS claim, the Illinois Supreme Court first held that Chicago's GPS requirement does not effect a search. The court noted that a search can occur under either the property-rights framework laid out in *Jones* or the reasonable expectation of privacy test developed in *Katz*. But the court distinguished both *Jones* and *Katz* as "criminal cases," whereas "[t]he City requires food truck owners to install GPS devices on their vehicles as a condition of their license . . . ." App. 16–18. The court further noted that Chicago requires GPS data be sent to service providers rather than to the City itself, and that the City had not requested data from any service provider. *Ibid*. Although the court claimed *Katz* was inapplicable, it went on to presume that any expectation of privacy Petitioner might have was attenuated to nonexistent because food trucks are licensed and Laura or her employees sometimes post the truck's location on social media. *Ibid*.

The Illinois Supreme Court then held that, even if Chicago's GPS requirement is a search, it is reasonable. The court first held, consistent with prior Illinois caselaw, that the food industry is "closely regulated" and therefore qualifies for one of this Court's narrow exceptions to the warrant requirement. App. 18–19. The court then held that Chicago's GPS requirement met the three-prong test for warrantless

administrative searches laid out in *New York* v. *Burger*, 482 U.S. 691 (1987). *Id*. at 19–21.

This timely Petition followed.

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court, purporting to apply this Court's precedents, held that subjecting licensed food trucks to warrantless GPS tracking is not a search—and that even if it is, no warrant is required because the food industry is "closely regulated." The first holding squarely conflicts with this Court's recent GPS cases; such requirements *are* Fourth Amendment searches. The second holding extends a growing trend among the lower courts of turning what has always been a *narrow* exception to the warrant requirement into the *de facto* rule. These are threshold Fourth Amendment questions with grave implications for the millions of Americans who work in licensed occupations. This Court should grant review and clarify that Americans do not forfeit protection from warrantless GPS tracking and other searches simply because they work in regulated industries.

I. The Illinois Supreme Court's holding that requiring licensed businesses to install GPS devices is not a search conflicts with this Court's precedents on an issue of national importance.

Twice in the past decade, this Court has held that installation of a GPS tracking device is a Fourth Amendment search. *United States* v. *Jones*, 565 U.S. 400, 404 (2012); *Grady* v. *North Carolina*, 135 S. Ct. 1368, 1371 (2015). In that same span, the Court has also reiterated that businesses do not forfeit Fourth Amendment protection simply because they are regulated. *City of Los Angeles* v. *Patel*, 135 S. Ct. 2443, 2452 (2015). Yet the Illinois Supreme Court, purporting to apply this Court's precedents, rejected both principles. App. 16–18. In the Illinois Supreme Court's view, when the government conditions entry into a regulated industry on the warrantless installation of a GPS device, no search has occurred. *Ibid*. On that logic, the millions of Americans who work in licensed occupations could be required to install GPS devices or submit to other warrantless intrusions, and the Fourth Amendment would have nothing to say. This Court should accept review to clarify that forcing licensed businesses to install GPS devices is a Fourth Amendment search.

A. The Illinois Supreme Court's holding that warrantless installation of a GPS device is not a search conflicts with this Court's decisions in *Jones* and *Grady*.

Chicago forces food trucks, as a condition of licensure, to physically install a GPS tracking device that records their movements. App. 86. The device transmits that location data to a third-party servicer, which must make at least six months of data available to Chicago officials upon request.[2] *Id*. at 87. The scheme requires no warrant and offers no opportunity for pre-compliance review.

The Illinois Supreme Court, purporting to apply Fourth Amendment principles, App. 16, was "unable to find from the record or the cases cited by [Petitioner] that the GPS requirement effects a search." *Id*. at 18. Petitioner cited *Jones* and *Grady* for the proposition that warrantless installation of a GPS device is both a trespassory search and a violation of Petitioner's reasonable expectation of privacy. But the court distinguished *Jones* as a "criminal case[]" and found that Petitioner has virtually no expectation of privacy because Laura or her employees sometimes post the truck's general location online. *Id*. at 17. The court did not mention or attempt to distinguish *Grady*.

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[2] GPS servicers are City agents. *Cf. United States* v. *Ackerman*, 831 F.3d 1292, 1301–02 (10th Cir. 2016) (Gorsuch, J.) (private organization was government agent due to "comprehensive statutory structure" reflecting "congressional knowledge of and acquiescence in the possibility" that organization would conduct search pursuant to statute).

The Illinois Supreme Court's decision plainly conflicts with this Court's precedents. In *Jones*, officials attached a GPS device to a suspect's vehicle without his consent and recorded his location for four weeks. This Court unanimously found that a search had occurred. 565 U.S. at 404. A five-justice majority found a trespassory search because "[t]he Government physically occupied private property for the purpose of obtaining information." *Ibid*. Five justices also agreed that "longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy" and therefore constitutes a search under *Katz*. *Id*. at 430 (Alito, J., concurring); *id*. at 415 (Sotomayor, J., concurring).

These holdings of *Jones* are not limited to the criminal context. That much was clear when *Jones* was decided. *See City of Ontario* v. *Quon*, 560 U.S. 746, 755 (2010) ("It is well settled that the Fourth Amendment's protection extends beyond the sphere of criminal investigations.").

In any case, this Court expressly resolved the issue in *Grady*. There, a convicted sex offender challenged a North Carolina statute requiring him to wear a GPS device upon release. The lower courts distinguished *Jones*, placing "decisive weight on the fact that the State's monitoring program is civil in nature." *Grady*, 135 S. Ct. at 1371. But this Court unanimously rejected that logic, applied *Jones*, and held that forcing subjects to wear GPS devices "effects a Fourth Amendment search." *Ibid*. (citing *Quon*, 560 U.S. at 755).

Jones and *Grady* make clear that Chicago's GPS requirement is also a search. Chicago forces licensed food trucks to physically install GPS devices, which is a trespassory search under the *Jones* majority's property-based framework. And the requirement that GPS servicers store at least six months of location data for officials' review far exceeds the four weeks that five concurring justices in *Jones* said impinged on a reasonable expectation of privacy under *Katz*. The Illinois Supreme Court's attempt to distinguish *Jones* as "criminal" directly conflicts with this Court's precedents.

B. The Illinois Supreme Court also wrongly implied that licensing requirements cannot be searches, which conflicts with this Court's decision in *Patel*.

In finding no search, the Illinois Supreme Court also called Chicago's GPS requirement "very different" because food trucks are "require[d] . . . to install GPS devices on their vehicles as a condition of their license to operate." App. 17. The court thus implied that occupational licensing requirements, even those that "physically occup[y] private property for the purpose of obtaining information," *Jones*, 565 U.S. at 404, simply cannot be searches.

But in *Patel*, this Court said just the opposite. There, a Los Angeles ordinance required licensed hoteliers to maintain records about their guests and

make those records available to police for inspection. 135 S. Ct. at 2448. Though these requirements were conditions of licensure, *id.* at 2455, this Court repeatedly stated that the ordinance imposed "searches," *id.* at 2452–54. This makes sense, as the Court has repeatedly stressed that the right to earn a living cannot be conditioned on the waiver of constitutional rights.[3]

Simply put, this Court's decision in *Patel* shows that the government cannot immunize searches from Fourth Amendment scrutiny by making them conditions of licensure. The Illinois Supreme Court's contrary suggestion directly conflicts with that precedent.

C. Whether it is a search to condition licensure on warrantless GPS tracking is an issue of national importance on which lower courts need guidance.

The Illinois Supreme Court's holding has national implications. Just last year, this Court expressed concern over the use of technology "rapidly approaching GPS-level precision" to monitor ordinary citizens. *Carpenter* v. *United States*, 138 S. Ct. 2206, 2219 (2018);

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[3] *See*, *e.g.*, *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 679 (1989) (urine samples taken as condition of state employment were still searches subject to Fourth Amendment); *Garrity* v. *New Jersey*, 385 U.S. 493, 497–98 (1967) (police officers' choice to waive Fourteenth Amendment rights or "lose their means of livelihood" was not truly "voluntary"); *Frost* v. *R.R. Comm'n of Cal.*, 271 U.S. 583, 593 (1926) (commercial trucker's choice "to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden" was "no choice" at all).

see also Jones, 565 U.S. at 430 (Sotomayor, J., concurring) (worrying that "Government will [soon] be capable of duplicating the [location] monitoring undertaken in this case by enlisting . . . owner-installed vehicle tracking devices").

Yet just as government's capacity to monitor citizens' physical movements has become "remarkably easy, cheap, and efficient," *Carpenter*, 138 S. Ct. at 2218, occupational licensing has become ubiquitous. As both the Obama and Trump administrations have observed, "[m]ore than one-quarter of U.S. workers now require a license to do their jobs[.]"[4]

The implications are clear: If Chicago can mandate the warrantless installation and use of a GPS tracking device as a condition of occupational licensure without it effecting a "search," the millions of Americans who need a license to work can be subjected to warrantless searches with Fourth Amendment impunity.

Indeed, that prospect is *already* a reality for millions of Americans. Over a dozen major cities have adopted ordinances requiring licensed for-hire drivers

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[4] Dep't of the Treasury Office of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, Occupational Licensing: A Framework for Policymakers 3 (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf; *accord* Press Release, Dep't of Labor, U.S. Secretary of Labor Addresses Occupational Licensing Reform (July 21, 2017), https://www.dol.gov/newsroom/releases/opa/opa20170721.

and others to install GPS devices,[5] yet the Second Circuit refused to say whether such ordinances impose searches. *See El-Nahal* v. *Yassky*, 835 F.3d 248, 253 (2d Cir. 2016).[6] The United States Department of Transportation has imposed a similar requirement on 3.5 million federally-licensed commercial truckers, yet the Seventh Circuit likewise declined to say whether those truckers have been searched. *See Owner-Operator Indep. Drivers Ass'n* v. *U.S. Dep't of Transp.*, 840 F.3d 879, 892 (7th Cir. 2016). And now, the Illinois Supreme Court has decided that requiring food trucks to install GPS devices is *not* a search—a decision with major implications for trucks subject to similar requirements in cities like Boston and New York.[7]

This Court should grant review and say what all these courts refused to say—and what lower courts

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[5] *See*, *e.g.*, Anchorage, Alaska, Code § 11.10.185(A) (2019); Atlanta, Ga., Code §§ 22-332, 22-242 (2019); Birmingham, Ala., Code § 12-16-3 (2017); Charlotte, N.C., Code § 22-176(b)(4) (2019); Cincinnati, Ohio, Code § 407-153 (2019); Columbus, Ohio, Code § 593.06 (2019); Hous., Tex., Code § 46.11(c) (2019); Minneapolis, Minn., Code § 341.597 (2019); New Orleans, La., Code § 162-661 (2019); N.Y.C. Admin. Code § 19-609(b) (2019); Portland, Or., Code § 16.40.140(J) (2017); Sacramento, Cal., Code § 5.18.230 (2019); S.F., Cal., Transp. Code § 909(f)(5) (2019); Seattle, Wash., Code § 6.310.320(T) (2019); Washington, D.C., Mun. Regulations § 822.16 (2016).

[6] *But see id.* at 259 (Pooler, J., concurring in part and dissenting in part) (stating that conditioning taxicab licenses on installation of GPS tracking devices "worked an unlicensed physical intrusion on a constitutionally protected effect" and therefore constituted a search).

[7] *See* Boston, Mass., Code § 17.10.8(9) (2018); N.Y.C. Rules, tit. 24, § 6-21(a) (2019).

across the country need to hear: that requiring warrantless inspections as a condition of licensure triggers Fourth Amendment scrutiny. The millions of Americans who need a government license to earn a living deserve nothing less.

II. The Illinois Supreme Court's decision deepens confusion over the scope of the *Colonnade–Biswell* exception to the warrant requirement.

Review is also warranted because the Illinois Supreme Court's decision deepens confusion over the scope of the *Colonnade–Biswell* exception to the warrant requirement. The Illinois Supreme Court held that, even if Chicago's GPS requirement is a search, it is reasonable under the *Colonnade–Biswell* exception because the food industry is "closely regulated" and Chicago's ordinance and regulations are an adequate warrant substitute. App. 18–20. Lower courts across the country have similarly expanded the *Colonnade–Biswell* exception to cover much of the economy. But this trend, if left uncorrected, would turn what has always been a *narrow* exception to the warrant requirement into the *de facto* rule.

Over 50 years ago, this Court held that, absent consent or a warrant, the government cannot enter "the portions of commercial premises which are not open to the public." *See* v. *City of Seattle*, 387 U.S. 541, 544 (1967). Petitioner's food truck is private property whose interior is not open to the public. That means

Chicago's warrantless GPS requirement is "*per se* unreasonable" unless the City can establish that one of "a few specifically established and well-delineated exceptions" applies. *Patel*, 135 S. Ct. at 2452 (quotation marks omitted).

One of those few exceptions permits warrantless inspection of "closely" or "pervasively" regulated industries. This Court first recognized the exception in *Colonnade Catering Corp.* v. *United States*, where federal agents conducted a warrantless inspection of a federal liquor licensee, kicking down a door in the process. 397 U.S. 72 (1970). The Court concluded that while the agents' use of force was unreasonable, they needed no warrant given the long history of federal liquor regulation. *Id*. at 76. Two years later in *United States* v. *Biswell*, the Court held that warrantless inspections of federal firearms dealers were not unreasonable given the "urgent federal interest" in regulating firearms. 406 U.S. 311, 317 (1972).[8]

But this Court has always stressed that the *Colonnade–Biswell* exception is a narrow one. Six years after *Biswell*, the Court rebuffed Congress's attempt to require warrantless inspections of all businesses engaged in interstate commerce. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978). In so doing, the Court held that warrantless inspections of liquor businesses and firearms dealers were "exceptions"

[8] *See also Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981) (holding warrantless mine inspections constitutional in light of "the mining industry [being] among the most hazardous in the country").

arising from "relatively unique circumstances." *Id.* at 313. So too in *New York* v. *Burger*, where the Court extended *Colonnade–Biswell* to include junkyards but maintained the doctrine's "narrow focus." 482 U.S. 691, 701 (1987).

The Court maintained that narrow focus in *City of Los Angeles* v. *Patel*, where it rejected Los Angeles' claim that hotels were closely regulated. 135 S. Ct. 2443, 2455 (2015). The Court explained that "[t]he clear import of our cases is that the closely regulated industry . . . is the exception." *Ibid*. Indeed, "[o]ver the past 45 years, the Court has identified *only four* industries" that qualify for the exception: liquor, firearms, mining, and junkyards. *Id*. at 2454 (emphasis added). Adding hotels to that list simply because they were licensed or commonly regulated would have allowed "what has always been a narrow exception to swallow the rule." *Id*. at 2455.

Despite these warnings, the Illinois Supreme Court held that the *Colonnade–Biswell* exception applied because "the food industry . . . is traditionally closely regulated." App. 18. Long before Petitioner challenged Chicago's GPS requirement, federal and state courts in Illinois deemed the entire food industry closely regulated. *Contreras* v. *City of Chicago*, 119 F.3d 1286, 1291 (7th Cir. 1997); *City of Chicago* v. *Pudlo*, 123 Ill.App.3d 337, 379 (1st Dist. 1983). But those decisions are controversial, and other courts have rejected their conclusion.

In *Sweet Sage Café, LLC* v. *Town of North Redington Beach*, for instance, a federal district court examined an ordinance declaring restaurants "closely regulated" and requiring warrantless inspections to ensure they were "complying with Town code provisions." 380 F. Supp. 3d 1209, 1216 (M.D. Fla. 2019). The town defended the ordinance by citing several cases holding that food businesses were subject to the *Colonnade–Biswell* exception, all of which relied on the Seventh Circuit's decision in *Contreras*. But in rejecting those cases, the court in *Sweet Sage Café* noted that the Seventh Circuit did not evaluate the district court's view in *Contreras* that restaurants are closely regulated. When the *Sweet Sage Café* court did that evaluation, it noted that the district court's view in *Contreras* relied entirely on two inapposite cases. *Id*. at 1227. The court in *Sweet Sage Café* concluded that "as feared by the Court in *Patel*, finding that a restaurant, or more broadly an establishment that sells food, is part of a closely-regulated industry would allow the [*Colonnade–Biswell*] exception to swallow the rule." *Ibid*.

Although the court in *Sweet Sage Café* meaningfully evaluated whether an industry was closely regulated, most lower courts do not. As a result, courts across the country have expanded *Colonnade–Biswell* to cover not just restaurants, but a wide swath of industries and occupations spanning much of the

economy, including barbershops,[9] day cares,[10] funeral homes,[11] banks,[12] nursing homes,[13] insurance companies,[14] securities agents,[15] recycling centers,[16] medical providers,[17] precious metal dealers,[18] dog breeders,[19] commercial trucking,[20] taxidermists,[21] sellers of rabbits

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[9] *Stogner* v. *Kentucky*, 638 F. Supp. 1, 3 (W.D. Ky. 1985).

[10] *Rush* v. *Obledo*, 756 F.2d 713, 720–21 (9th Cir. 2009); *but see id.* at 722 ("We cannot stress forcibly enough that there is no basis for applying the 'pervasively regulated business' exception to the warrant requirement merely because a business . . . requires a license.").

[11] *Heffner* v. *Murphy*, 745 F.3d 56 (3d Cir. 2014).

[12] *United States* v. *Chuang*, 897 F.2d 646, 651 (2d Cir. 1990).

[13] *People* v. *Firstenberg*, 155 Cal. Rptr. 80, 84–86 (Ct. App. 1979).

[14] *De La Cruz* v. *Quackenbush*, 96 Cal. Rptr. 92, 98 (Ct. App. 2000).

[15] *In re Karel*, 144 Idaho 379 (2007).

[16] *Merserole Street Recycling, Inc.* v. *City of New York*, No. 06 Civ. 1773, 2007 WL 186791, at *4 (S.D.N.Y. Jan. 23, 2007).

[17] *Medical Soc'y of N.J.* v. *Robins*, 729 A.2d 1056, 1058 (N.J. Super. Ct. App. Div.1999); *but see Tucson Woman's Clinic* v. *Eden*, 379 F.3d 531, 551 (9th Cir. 2004) (holding that medical facilities providing abortions are *not* closely regulated).

[18] *Liberty Coins, LLC* v. *Goodman*, 880 F.3d 274, 285 (6th Cir. 2018).

[19] *Professional Dog Breeders Advisory Council* v. *Wolff*, No. 1:CV-09-0258, 2009 WL 2948527, at *9 (M.D. Pa. Sept. 11, 2009).

[20] *United States* v. *Delgado*, 545 F.3d 1195 (9th Cir. 2008).

[21] *United Taxidermists Ass'n* v. *Ill. Dep't of Natural Resources*, No. 07-3001, 2011 WL 3734208, at *3 (7th Cir. Aug. 25, 2011).

for research,[22] commercial fishing,[23] seed producers,[24] convenience stores,[25] and cigarette sellers.[26]

This expansion has prompted confusion and criticism from both courts and commentators. One federal district court recognized, for instance, that "[t]here is no clearly defined test used to determine whether a particular business is closely regulated."[27] Last year, the Colorado Court of Appeals noted that "[d]espite the Court's admonition that the closely regulated industry 'is the exception,' other courts have found that many and varied industries fall within that exception."[28] One scholar echoed that insight, noting "[t]hat these industries span much of the commercial world highlights the exception's transformation from a limited and narrow doctrine to the default rule in searches of businesses."[29] In another's view, this "regulatory power threatens individual liberties, particularly since

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[22] *Lesser* v. *Espy*, 34 F.3d 301, 1307 (7th Cir. 1994).

[23] *United States* v. *Raub*, 637 F.2d 1205, 1209 n.5 (9th Cir. 1980).

[24] *Gunnink* v. *Minnesota*, No. A09-396, 2010 WL 10388, at *3 (Minn. Ct. App. Jan. 5, 2010).

[25] *Midwest Retailer Associated, Ltd.* v. *City of Toledo*, 563 F. Supp. 2d 796, 805–06 (N.D. Ohio 2008).

[26] *United States* v. *Hamad*, 809 F.3d 898, 906 (7th Cir. 2016).

[27] *United States* v. *Kolokouris*, No. 12-CR-6015, 2015 WL 4910636, at *20 (W.D.N.Y. Aug. 14, 2015), report and recommendation adopted, 2015 WL 7176364 (W.D.N.Y. Nov. 13, 2015).

[28] *Maralex Res., Inc.* v. *Colo. Oil & Gas Conservation Comm'n*, 428 P.3d 657, 663 (Colo. Ct. App. 2018).

[29] Note, *Rethinking Closely Regulated Industrie*s, 129 Harv. L. Rev. 797, 806 (2016).

virtually all regulatory regimes can be premised on some public health or public safety rationale."[30]

This cannot go on. The Court has repeatedly held that the "ban on warrantless searches . . . applies to commercial premises" and that *Colonnade–Biswell* is only a narrow exception to that ban. *Marshall*, 436 U.S. at 312; *Patel*, 135 S. Ct. at 2455. Yet lower courts, including the Illinois Supreme Court, continue to expand the exception with little discretion and no end in sight. *See Pennsylvania* v. *Maguire*, ___ A.3d ___, 2019 WL 3956257, at *14 (Pa. Aug. 22, 2019) (Wecht, J., concurring and dissenting) (criticizing holding that trucking is closely regulated as "more akin to an assumption reached by piggybacking off of the uncited, unverified, and unidentified work of the lower courts rather than a carefully contemplated legal holding"). This Court should accept review to stem the flood and provide much-needed guidance for lower courts on the proper scope of the *Colonnade–Biswell* exception.[31]

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[30] Fabio Arcila, *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 Admin. L. Rev. 1223, 1225 (2004).

[31] Accepting review will also guide lower courts on how to decide whether warrantless searches are reasonable under the *Colonnade-Biswell* exception. Although warrantless searches are *per se* unreasonable and the government bears the burden of proving their reasonableness, *Chimel* v. *California*, 395 U.S. 752, 762 (1969), numerous courts conduct only glancing review and actually require the *party being searched* to prove that the search is *unreasonable*. Indeed, that is what happened here when the Illinois Supreme Court declared that "Plaintiff has failed to establish that [Chicago's GPS requirement is] unconstitutional." App. 21.

III. This case is an ideal vehicle for clarifying these issues.

This case presents the Court with an ideal vehicle for clarifying that warrantless GPS tracking of licensed businesses is a Fourth Amendment search and that *Colonnade–Biswell* is a narrow exception to the warrant requirement that does not include restaurants. Because the case was resolved on summary judgment, there are no factual disputes for this Court to parse, nor any factual findings to which this Court must defer. At each level below, the courts rejected Petitioner's argument that Chicago's GPS requirement is a search. Moreover, both the Illinois Supreme Court and the trial court held that, even if the GPS requirement was a search, it was reasonable under *New York* v. *Burger*. App. 19–21.

Additionally, the decision below turns on U.S. Supreme Court precedent and does not rest upon any independent and adequate state grounds.[32] The Illinois Supreme Court evaluated Chicago's GPS requirement using Fourth Amendment principles. Although Petitioner's challenge to the requirement arose under Article I, Section 6 of the Illinois Constitution, courts in Illinois employ a limited lockstep approach that uses Fourth Amendment principles to resolve the challenge. Indeed, the Illinois Supreme Court's decision acknowledged that "we interpret the search

[32] The Illinois Supreme Court's decision contains no statement "that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983).

and seizure clause in our state constitution using the same standards as are used in construing its federal counterpart, unless a narrow exception applies." App. 16. The court found no such narrow exception. Nothing prevents this Court from reaching and resolving these critical threshold Fourth Amendment issues.

CONCLUSION

As surveillance tools become ever more sophisticated, this Court has stood vigilant to "assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." *Carpenter*, 138 S. Ct. at 2214 (quoting *Kyllo* v. *United States*, 533 U.S. 27, 34 (2001); brackets in original). Indeed, *Kyllo*, *Jones*, and *Carpenter* all rejected attempts to conduct "tireless and absolute surveillance" "without regard to the constraints of the Fourth Amendment." *Carpenter*, 138 S. Ct. at 2218. The Illinois Supreme Court's decision that GPS tracking of regulated businesses is exempt from Fourth Amendment scrutiny flouts these precedents. And left unchecked, it would put millions of

hardworking Americans at risk of warrantless surveillance. The petition for a writ of certiorari should be granted.

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