

NEW YORK CITY'S FOOD CART SURVEILLANCE

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The New York City Department of Health and Mental Hygiene recently mandated¹ that all food carts be equipped with round-the-clock GPS trackers in order to “locate and find” the carts for inspection and health grading.² Data provided to the department by these GPS devices pinpoints the location of each cart and its occupant, and tracks their every movement.³ The requirement of such invasive technology infringes upon food cart owners’ and operators’ right against warrantless searches. Moreover, the intrusion has been poorly justified by City officials: prior to the adoption of the new rules, the Department already kept extensive records on carts’ owners, employees, and locations, and had been able to locate approximately 80 percent of mobile food carts.⁴

While it is the Department of Health and Mental Hygiene carrying out this new program, the data it collects is widely available to other bureaucracies, including local and federal law enforcement agencies. Broadly worded regulations hold that the Department may use and disclose data garnered from the location device when “required by law.”⁵ While the data is aggregated by location and not by name, determining worker identities’ is simple. Such a tracking system could be easily abused by law enforcement agencies such as the NYPD and ICE.

Over 500,000 undocumented New Yorkers are at constant risk of arrest by immigration enforcement.⁶ While New York City claims to be a sanctuary city, providing immigration enforcement agencies with up-to-the-minute data about New Yorkers’ whereabouts—as this new system has strong potential to do—belies that promise. The NYPD routinely shares arrest data with state agencies, which then transmit the information to the FBI and ICE.⁷ If that data is augmented by a food cart’s precise location history, it could potentially alert ICE to an individual’s home and other highly frequented locations. Disturbingly, ICE does not have to inform an individual or their attorney of what data was used to find them.⁸

Though the City asserts that it will not use GPS data as a prosecutorial tool, it has a notorious history of renegeing on its promises.⁹ The vagueness of these regulations “invite[s] discrimination

¹ See N.Y. CITY DEP’T OF PUB. HEALTH & MENTAL HYGIENE, *Notice of Public Hearing and Opportunity to Comment on Proposed Rules*, June 4, 2018, http://rules.cityofnewyork.us/sites/default/files/proposed_rules_pdf/p-dohmh_06-04-18_ch_6_mfv_grading_rules_0.pdf.

² *Id.* at 3.

³ *See id.*

⁴ *Id.* at 4.

⁵ *Id.*

⁶ See LIZ ROBBINS, “In a ‘Sanctuary City,’ Immigrants Are Still at Risk”, N.Y. TIMES, Feb. 27, 2018, <https://www.nytimes.com/2018/02/27/nyregion/sanctuary-cities-immigrants-ice.html>.

⁷ *See id.*

⁸ See FELIPE DE LA HOZ, “New York, a Sanctuary State, Provides Criminal Justice Data to ICE”, DOCUMENTED, May 8, 2019, <https://documentedny.com/2019/05/08/new-york-a-sanctuary-state-provides-criminal-justice-data-to-ice/>.

⁹ See *El-Nahal v. Yassky*, 993 F. Supp. 2d 460, 465 (2nd Cir. 2014) (finding that the Taxi and Limousine Commission betrayed its promise to avoid using GPS tracking data as a prosecutorial tool).

[and] government overreach” through access controls, hacking, internal misuse, and integration into other databases, including those operated by federal law enforcement agencies.¹⁰ Manhattan Borough President Gale Brewer, a former proponent of the use of GPS tracking technology on mobile food carts, now opposes such technology after the election of President Donald Trump, citing the increased scrutiny of individuals’ immigration status by the federal government.¹¹

The New York City Council has failed to provide persuasive arguments for such intense surveillance. Article 89 of the New York City Food Code already aggregates the name, home, and business address of food cart applicants, business partners, and all employees.¹² Further, food carts are ostensibly inspected at the same level as restaurants¹³, roughly once per year.¹⁴ Food carts almost exclusively stay in the location accessible to them by permit. Equipped with detailed contact information for every party involved with every food cart, tracking down a cart’s owner should already be relatively straightforward in the rare occasion that locating the cart becomes difficult.

Chicago City Ordinance

New York City is only the latest jurisdiction where mandatory GPS tracking of food carts is curtailing small business owners’ right to privacy. In 2012, Chicago enacted an ordinance requiring that all food carts be equipped with a permanent GPS tracking system in order for authorities to conduct a health or administrative investigation.¹⁵ This data is then displayed on a publicly-accessible Application Programming Interface.¹⁶

This Chicago ordinance has met litigation since its inception. Food truck owners challenged that the GPS tracking requirement violated the right to be free from unreasonable search and seizure.¹⁷ The Cook County Circuit Court found that, as the city had never requested the GPS information, a search had not occurred; even if a search had occurred, it would be reasonable and not run afoul of constitutional protections.¹⁸

¹⁰ See NINA ROBERTS, *New York City Wants to Track Street Vendors With GPS Units*, DOCUMENTED, July 9, 2018, <https://documentedny.com/2018/07/09/new-york-city-wants-to-track-street-vendors-with-gps-units/>.

¹¹ *See id.*

¹² N.Y. City Food Code §89.11, <https://www1.nyc.gov/assets/doh/downloads/pdf/rii/rules-regs-mfv.pdf>.

¹³ *See Health Department Begins Issuing Letter Grades For Food Carts and Trucks*, Jan. 18, 2019,

<https://www1.nyc.gov/site/doh/about/press/pr2019/letter-grades-for-food-carts-and-trucks.page> (Health Commissioner Dr. Oxiris Barbot stating that “New Yorkers told us that they love our restaurant grading program, and it only made sense... to extend it to food carts and trucks”).

¹⁴ *See* N.Y. CITY HEALTH, *Food Service Establishments: Inspection Cycle and Letter Grading*,

<https://www1.nyc.gov/assets/doh/downloads/pdf/rii/inspection-cycle-and-letter-grading.pdf> (displaying that restaurants are inspected roughly once every 11-13 months).

¹⁵ *See* SAMANTHA BOMKAMP, *Food truck case against Chicago heads to state Supreme Court*, CHI. TRIBUNE, May 30, 2018, <https://www.chicagotribune.com/business/ct-biz-food-trucks-supreme-court-20180531-story.html>; *see also LMP Servs. v. City of Chi.*, 2017 Ill. App. LEXIS 792 at 11.

¹⁶ *See* SAMANTHA BOMKAMP, *supra* note 12.

¹⁷ *LMP Servs. v. City of Chi.*, *supra* note 12, at 1-2.

¹⁸ *Id.* at 2.

On appeal, the Appellate Court of Illinois held that, as food carts do not have a constitutionally protected right to conduct business on Chicago sidewalks, the GPS requirement is a constitutionally permissible condition precedent to the carts' conducting business in the city.¹⁹

The Illinois Supreme Court recently reaffirmed the lower court's ruling. The Court relied, in part, on the fact that some food cart owners choose to advertise their carts' locations on social media to reach the astonishing conclusion that all food cart owners' privacy interest they may have is "greatly diminished, if it exists at all."²⁰

In so holding, the Court curtails small business owners' right to privacy. This ruling allows for widespread law enforcement surveillance dragnets in a time when ICE and other agencies are drastically increasing their reach. And by permitting rewriting licensing rules at large, this decision affects almost one-fifth of the Illinois workforce, including the over one million Illinoisans who need a license to earn a living.²¹ By upholding the Chicago ordinance, the Illinois Supreme Court forces its residents to choose between the right to privacy and the need for work.

Conclusion

The New York City Department of Health and Mental Hygiene fails to articulate a constitutionally legitimate reason for its continuous food cart monitoring. A once-a-year inspection does not require around-the-clock surveillance.²² The Department can already easily locate the vast majority of food carts, and provides no evidence that finding the others would require such an onerous effort that would warrant gross Fourth Amendment violations.

¹⁹ *Id.* at 34.

²⁰ *Id.* at 20.

²¹ See NICK SIBILLA, *Illinois Supreme Court Upholds Warrantless GPS Tracking For Chicago Food Trucks*, FORBES, June 13, 2019, <https://www.forbes.com/sites/nicksibilla/2019/06/13/illinois-supreme-court-upholds-warrantless-gps-tracking-for-chicago-food-trucks/#334555ad3f98>.

²² See *Payton v. N.Y.*, 445 U.S. 573, 583(1980) (finding that "indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that motivated the framing and adoption of the Fourth Amendment).



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