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## Draining Chicago's Food Swamps: Legal Approaches

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# **DRAINING CHICAGO’S FOOD SWAMPS: LEGAL APPROACHES**

*Sofia Fernandez, MPH*

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## I. FOOD SWAMPS AS A PUBLIC HEALTH LAW ISSUE

Public health is a collective responsibility of society to improve the health and wellbeing of communities, focusing on preventing disease and promoting health as opposed to providing medical care for those already ill.<sup>1</sup> The law consists of rules issued and enforced by government entities “through which populations organize their governments, regulate social and economic interactions, and guide behavior.”<sup>2</sup> Public health law exists at the intersection of these two fields, comprising “the legal powers and duties of the state to identify, prevent, and ameliorate risks to the health of populations, as well as the study of legal structures that have a significant impact on the health of populations.”<sup>3</sup>

Public health laws can be divided into three general categories. Interventional health laws are those focused on targeting a specified public health problem, such as targeting antibiotic resistance through intellectual property laws.<sup>4</sup> Infrastructural health laws are those that determine the powers, duties, and restraints of health agencies to influence the health of the communities they serve.<sup>5</sup> Incidental public health laws are those that do not primarily focus on a health issue but have an impact on health nonetheless, such as land use laws.<sup>6</sup> Food swamps, and the food environment in general, are often a result of laws in the latter category, like zoning laws discussed later in this paper.

### A. *A Public Health Issue*

Food insecurity is a national health problem that affects millions of Americans every year, incurring substantial health care

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<sup>1</sup> SCOTT BURRIS ET AL., *THE NEW PUBLIC HEALTH LAW: A TRANSDISCIPLINARY APPROACH TO PRACTICE AND ADVOCACY*, 3-4 (2018).

<sup>2</sup> *Id.* at 12.

<sup>3</sup> Micah L. Berman, *Defining the Field of Public Health Law*, 15 DEPAUL J. HEALTH CARE L. 45, 80 (2013).

<sup>4</sup> Scott Burris, *From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective*, 159 U. PA. L. REV. 1649, 1662-63 (2011).

<sup>5</sup> *Id.* at 1663.

<sup>6</sup> *Id.*

and social costs.<sup>7</sup> In both 2020 and 2021, over ten percent of US households experienced food insecurity at some point throughout each year.<sup>8</sup> The USDA defines food insecurity as a household condition of limited or uncertain access to adequate food.<sup>9</sup> Food insecurity can include both inadequate access to any food as well as low access to quality food and a variety of food.<sup>10</sup> Food insecurity is also associated with higher prevalence of and poorer management of diet-related chronic conditions including diabetes, obesity, and hypertension.<sup>11</sup>

Food insecurity disproportionately affects minority and socioeconomically disadvantaged populations.<sup>12</sup> In 2020, the prevalence of food insecurity among Black and Hispanic households was 21.7% and 17.2%, respectively, well above the national average of 10.5%.<sup>13</sup> In 2021, among households with incomes below the federal poverty level, 32.1% experienced food insecurity.<sup>14</sup> These communities suffered greater impacts of the COVID-19 pandemic because of the link between food insecurity and chronic diseases which in turn increased the likelihood of adverse complications

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<sup>7</sup> Vivek H. Murthy, *Food Insecurity: A Public Health Issue*, 131 PUB. HEALTH REPS. 655, 655 (2016).

<sup>8</sup> *Key Statistics & Graphics*, USDA ECON. RSCH. SERV. (Sept. 7, 2022), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/key-statistics-graphics/>.

<sup>9</sup> Murthy, *supra* note 7.

<sup>10</sup> *Definitions of Food Security*, USDA ECON. RSCH. SERV. (Sept. 7, 2022), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-u-s/definitions-of-food-security/>.

<sup>11</sup> Hilary K. Seligman & Dean Schillinger, *Hunger and Socioeconomic Disparities in Chronic Disease*, 363 NEW ENG. J. MED. 6, 7 (2010).

<sup>12</sup> *Food Accessibility, Insecurity and Health Outcomes*, NAT'L INST. ON MINORITY HEALTH & HEALTH DISPARITIES, <https://www.nimhd.nih.gov/resources/understanding-health-disparities/food-accessibility-insecurity-and-health-outcomes.html> (Sept. 30, 2022).

<sup>13</sup> Off. of Disease Prevention and Health Promotion, *Food Insecurity*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <https://health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/food-insecurity#cit1> (last visited Dec. 2, 2022).

<sup>14</sup> *Food Insecurity Rates Are Highest for Single-Mother Households and Households with Incomes Below the Poverty Line*, USDA ECON. RSCH. SERV., <https://www.ers.usda.gov/data-products/chart-gallery/gallery/chart-detail/?chartId=58384> (Sept. 13, 2022).

from COVID-19.<sup>15</sup> Moreover, families experiencing food insecurity rely on school lunch programs<sup>16</sup>, which were unavailable to them during much of the pandemic.

While socioeconomic factors significantly influence food security, the physical environment of food insecure households plays a role as well, including “neighborhood conditions, physical access to food, and lack of transportation.”<sup>17</sup> Urban, rural, and low-income neighborhoods often have limited access to full-service grocery stores, but increased access to convenience stores offering low-quality foods at higher prices.<sup>18</sup> Residents of those neighborhoods also generally have limited transportation options, exacerbating the difficulty of accessing healthy food options.<sup>19</sup>

### 1. Food deserts

An important aspect of the food environment is availability of healthful foods. The term “food desert” was first used in the late nineties and early aughts to describe the lack of access to quality, affordable food products to support a healthy diet.<sup>20</sup> Now, the USDA defines food deserts as “low-income census tracts with a substantial number or share of residents with low levels of access to retail outlets selling healthy and affordable foods.”<sup>21</sup> Across both rural and

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<sup>15</sup> George Rice, *COVID-19 and Food Insecurity: How the COVID-19 Pandemic Has Exacerbated Food Insecurity and Will Disproportionately Affect Low Income and Minority Groups*, 21 UNIV. OF MD. L. J. OF RACE, RELIGION, GENDER, AND CLASS 160, 162 (2021).

<sup>16</sup> *Id.* at 168.

<sup>17</sup> Off. of Disease Prevention and Health Promotion, *supra* note 13.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Troy C. Blanchard & Todd L. Matthews, *Retail Concentration, Food Deserts, and Food-Disadvantaged Communities in Rural America*, in REMAKING THE NORTH AMERICAN FOOD SYSTEM: STRATEGIES FOR SUSTAINABILITY 201, 201-02 (C. Clare Hinrichs & Thomas A. Lyson eds., 2008).

<sup>21</sup> Michele Ver Ploeg et al, *Mapping Food Deserts in the United States*, AMBER WAVES (Dec. 1, 2011), <https://www.ers.usda.gov/amber-waves/2011/december/data-feature-mapping-food-deserts-in-the-us/>.

urban settings, greater concentrations of minorities than whites are affected by food deserts.<sup>22</sup>

While access to a supermarket or grocery store is associated with better eating habits and improved mental health,<sup>23</sup> populations in food deserts have a higher prevalence of diabetes, heart disease, and cancer.<sup>24</sup> One hypothesized explanation for this observation is that without access to healthy food, individuals rely on energy-dense foods that tend to cause weight gain.<sup>25</sup>

## 2. Food swamps

Considering the disparities associated with food deserts, interventions to increase access to healthful food have been attempted. Unfortunately, most attempts have not improved diet quality or obesity measures, suggesting that the effects of introducing healthier food alone may be mitigated by the persistent availability of unhealthy foods.<sup>26</sup> Access to all foods is a more important factor for obesity than access to specific relatively nutritious foods.<sup>27</sup> Accordingly, the term “food swamp” was coined to highlight the prevalence of energy-dense snack and fast foods

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<sup>22</sup> Paula Dutko et al., *Characteristics and Influential Factors of Food Deserts*, USDA ECON. RSCH, SERV. 9 (Aug. 2012), [https://www.ers.usda.gov/webdocs/publications/45014/30940\\_err140.pdf?v=5012.7](https://www.ers.usda.gov/webdocs/publications/45014/30940_err140.pdf?v=5012.7).

<sup>23</sup> U.S. DEP'T OF AG., ACCESS TO AFFORDABLE AND NUTRITIOUS FOOD: MEASURING AND UNDERSTANDING FOOD DESERTS AND THEIR CONSEQUENCES (June 2009), [https://www.ers.usda.gov/webdocs/publications/42711/12716\\_ap036\\_1\\_.pdf?v=8670.8](https://www.ers.usda.gov/webdocs/publications/42711/12716_ap036_1_.pdf?v=8670.8).

<sup>24</sup> Renee E. Walker et al., *Disparities and Access to Healthy Food in the United States: A Review of Food Desert Literature*, 16 HEALTH & PLACE 876, 878 (2010).

<sup>25</sup> U.S. DEP'T OF AG., *supra* note 23, at 55.

<sup>26</sup> Kristen Cooksey-Stowers et al., *Food Swamps Predict Obesity Rates Better Than Food Deserts in the United States*, 14(11) INT'L J. ENV'T RSCH. PUB. HEALTH 1366, 1367 (2017).

<sup>27</sup> U.S. DEP'T OF AG., *supra* note 23, at 57.

among few healthy alternatives disproportionately present in low-income areas.<sup>28</sup>

Food swamps have become a separate and stronger predictor of obesity rates than food deserts.<sup>29</sup> One study found that “greater neighborhood exposure to fast food is associated with a poorer diet and greater fast-food consumption.”<sup>30</sup> Fast-food restaurants are more prevalent in low-income areas and ethnic minority groups are more likely to live in areas with greater access to fast-food.<sup>31</sup> In Chicago, majority-Black census tracts had more diet related deaths than majority-White census tracts among tracts with a poor ratio of healthy to unhealthy food outlets.<sup>32</sup>

The conditions leading to food swamps today were catalyzed in the mid-late twentieth century as grocers followed white, affluent families to the suburbs.<sup>33</sup> As grocery chains opened bigger stores on cheap, undeveloped suburban land, the chains merged and consolidated, closing the smaller, less profitable locations in cities.<sup>34</sup> In 1992, the US Conference of Mayors described the mass closures across major cities as “supermarket redlining of urban America.”<sup>35</sup> Today, Black census tracts have the fewest supermarkets across all

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<sup>28</sup> Donald Rose et al., *Deserts in New Orleans? Illustrations of Urban Food Access and Implications for Policy*, UNIV. OF MICH. NAT’L POVERTY CTR./USDA ECON. RSCH, SERV. 15-16 (2009).

<sup>29</sup> Cooksey-Stowers et al., *supra* note 26, at 1376.

<sup>30</sup> Latetia V. Moore et al., *Fast-Food Consumption, Diet Quality, and Neighborhood Exposure to Fast Food*, 170 AM. J. EPIDEMIOLOGY 29, 34 (2009).

<sup>31</sup> S.E. Fleischhacker et al., *A Systematic Review of Fast Food Access Studies*, 12 OBESITY REVS. e460, e469.

<sup>32</sup> Gallagher Institute, *Examining the Impact of Food Deserts on Public Health in Chicago* 25 (2006) <https://www.marigallagher.com/wp-content/uploads/2020/02/ChicagoFoodDesertReport-Full-1.pdf>.

<sup>33</sup> Sarah Treuhaft & Allison Karpyn, *The Grocery Gap: Who Has Access to Healthy Food and Why It Matters*, POLICYLINK 1, 11 (2010), <https://www.policylink.org/sites/default/files/FINALGroceryGap.pdf>.

<sup>34</sup> Nathaniel Meyersohn, *How the Rise of Supermarkets Left Out Black America*, CNN BUS. (June 16, 2020, 3:15 PM), <https://www.cnn.com/2020/06/16/business/grocery-stores-access-race-inequality/index.html>.

<sup>35</sup> *Id.*

poverty levels.<sup>36</sup> Worse yet, food stores in lower-income areas and communities of color have lower stocks of healthy food and lower quality items while selling these items at higher prices.<sup>37</sup>

### B. *A Legal Issue*

Food swamps are a legal issue because they are created, in part, by laws and policies. Redlining, the discriminatory practice of denying mortgages to people of color in the early twentieth century to prevent them from purchasing homes in certain neighborhoods and thus perpetuate segregation, has been illegal for almost fifty years, but its effects are lasting.<sup>38</sup> However, supermarket redlining, the aversion of supermarket chains to open locations in inner cities or low-income areas, is not against the law and continues today.<sup>39</sup>

Moreover, food swamps can be a factor in food oppression, which stems from the structural subordination of minorities through institutionalized, food-related policies and practices.<sup>40</sup> Food oppression recognizes “the interconnected nature of race, class, and other dimensions of power and identity” to emphasize that the unconscious biases and structural forces at work which must be addressed for change to be effective.<sup>41</sup>

Primarily, zoning laws impact the food environment because they determine acceptable uses of land, thereby controlling where both healthy and unhealthy food options can be sold. Food swamps are also a legal issue because, perhaps most importantly, they can be addressed through a variety of legal avenues. Interventions aimed at improving the food environment in food swamps, and in turn health

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<sup>36</sup> Kelly M. Bower et al., *The Intersection of Neighborhood Racial Segregation, Poverty, and Urbanicity and Its Impact On Food Store Availability In The United States*, 53 PREVENTIVE MED. 33, 34 (2014).

<sup>37</sup> Treuhaft & Karpyn, *supra* note 33, at 14.

<sup>38</sup> Candace Jackson, *What is Redlining?*, NEW YORK TIMES (Aug. 17, 2021), <https://www.nytimes.com/2021/08/17/realestate/what-is-redlining.html>.

<sup>39</sup> Tonya Mukherjee, *Redlining's Legacy: Food Deserts, Insecurity, and Health*, MORNING SIGN OUT (Sept. 28, 2020), <https://sites.uci.edu/morningsignout/2020/09/28/redlinings-legacy-food-deserts-insecurity-and-health/>.

<sup>40</sup> Andrea Freeman, *The Unbearable Whiteness of Milk: Food Oppression and the USDA*, 3 U.C. IRVINE L. REV. 1251, 1254 (2013).

<sup>41</sup> *Id.* at 1255.



outcomes, in food swamps can include the use of federal powers, state and local powers, and litigation.

## II. POTENTIAL POLICIES TO ADDRESS FOOD SWAMPS

Various scholars have presented different views on the potential for public health law to address health issues. Wendy Mariner, a law professor at Boston University School of Law, sorts health laws into three categories: those targeting individual conduct, those setting health and safety standards, and those creating a benefit program.<sup>42</sup> Mark Rothstein, a joint professor at the University of Louisville Schools of Medicine and Law, views public health law as government intervention “pursuant to specific legal authority, after balancing private rights and public interests, to protect the health of the public.”<sup>43</sup> Rothstein’s view limits the justifications for government action to times when a population-wide health threat exists, when the government has unique powers and expertise about an essential aspect of public health, or when more efficient and effective governmental action is needed to ensure public health.<sup>44</sup>

As previously stated, interventions aiming to improve food environments by introducing healthy food options alone have not made significant progress.<sup>45</sup> Moreover, restricting unhealthy options without increasing healthy options can increase food insecurity in affected communities, highlighting the importance of utilizing simultaneous interventions to target various aspects of the food environment.<sup>46</sup>

### A. Federal Powers

The federal government has the power to influence individual health behaviors in three ways: through taxing, spending, and the use of the Commerce Clause. The Taxing and Spending

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<sup>42</sup> Wendy K. Mariner, *Law and Public Health: Beyond Preparedness*, 38 J. OF HEALTH L. 247, 268 (2005).

<sup>43</sup> Mark A. Rothstein, *Rethinking the Meaning of Public Health*, 30 J.L. MED. & ETHICS 144, 146 (2002).

<sup>44</sup> *Id.*

<sup>45</sup> Cooksey-Stowers et al., *supra* note 26, at 1367, 1378.

<sup>46</sup> *Id.* at 1378.

Clause allows Congress to tax and spend to promote the general welfare.<sup>47</sup> The Commerce Clause allows Congress to regulate channels of interstate commerce, the persons or things in interstate commerce, and activities that have a substantial effect on interstate commerce.<sup>48</sup> Following the seminal case regarding the Affordable Care Act, there is now recent precedent to use the taxing and spending power to influence health behaviors. In *NFIB v. Sebellius*, the Supreme Court upheld the use of the taxing and spending power to mandate individuals to purchase health insurance; however, the Court held that Congress could not use the Commerce Clause to impose the mandate.<sup>49</sup>

The use of taxing and spending is especially relevant to affecting consumer purchasing behavior because the relatively low cost of most unhealthy food makes it a practical choice for those often-poorer populations affected by food swamps. When used in conjunction, taxing unhealthy foods while subsidizing healthy foods leads to the greatest behavior change.<sup>50</sup> An important consideration for taxing and spending is ensuring that policies are applied broadly as opposed to selectively to various food categories. Additionally, the taxes must be steep enough to actually discourage purchasing.<sup>51</sup>

There are pros and cons to using taxing and spending to influence consumer behaviors. One benefit is that taxing, rather than banning, preserves liberty and the notion of individual responsibility.<sup>52</sup> Another benefit is that revenues garnered from taxes on unhealthy food can be dedicated to health-promoting interventions.<sup>53</sup> Another factor to consider is that many unhealthy foods are currently subsidized by federal policies encouraging the growth of corn and soy products. Removal of those subsidies could function to raise prices of the unhealthy foods manufactured with those products, generating a similar result to taxation without having

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<sup>47</sup> U.S. CONST. art. I, § 8, cl.1.

<sup>48</sup> *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

<sup>49</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 588 (2012).

<sup>50</sup> Ashley M. Fox & Carol R. Horowitz, *Best Practices in Policy Approaches to Obesity Prevention*, 24 J. HEALTH CARE POOR & UNDERSERVED 168, 176 (2013).

<sup>51</sup> *Id.*

<sup>52</sup> Fox & Horowitz, *supra* note 50, at 184.

<sup>53</sup> *Id.* at 179.

to implement a new tax.<sup>54</sup> A drawback to taxation of unhealthy foods is that it could have a doubly negative effect on low-income populations with little to no access to healthier alternatives.<sup>55</sup>

### B. *State and Local Powers*

States and localities also have powers that can influence individual health behaviors. States have police powers that allow them to enact laws and promulgate regulations that protect, preserve, and promote safety.<sup>56</sup> States and localities may also utilize the *parens patriae* doctrine to protect the communal health and welfare in areas including sanitation, air, water, pollution, and even the marketing and distribution of harmful products.<sup>57</sup> These smaller units of government can also use taxing and spending to their advantage.

An important local power, which can incorporate *parens patriae* ideas, is zoning regulations. Given the historic protections against unseemly business that zoning has offered white, higher-income communities while simultaneously dumping that business in already-disenfranchised, lower-income communities,<sup>58</sup> it can be used to attempt to right those wrongs. Zoning can be used to promote retail outlets that sell healthy food and to restrict outlets that sell unhealthy food.

Unused properties in urban areas can be rezoned to allow for supermarkets to build, or at the very least to allow for food and produce trucks offering healthy options, like New York City's Green Carts program allocating permits to mobile food carts that sell fresh produce in neighborhoods with limited access to healthy foods.<sup>59</sup> New York also subsidizes grocery store operators and

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<sup>54</sup> *Id.* at 183.

<sup>55</sup> *Id.*

<sup>56</sup> U.S. CONST. amend. X.

<sup>57</sup> Lawrence O. Gostin & Lindsay F. Wiley, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (3d ed. 2016).

<sup>58</sup> See generally RICHARD ROTHSTEIN, THE COLOR OF LAW (2017).

<sup>59</sup> Anne Olson, *Combating Food Swamps to Improve Equity and Public Health*, GREENLAW (July 15, 2021), <https://greenlaw.blogs.pace.edu/2021/07/15/combating-food-swamps-to-improve-equity-and-public-health/>.

developers to build full-service grocery stores in low-income neighborhoods underserved by neighborhood grocery stores.<sup>60</sup> Existing stores can also be altered through zoning. An example is the code in Hartford, Connecticut requiring twenty percent of the sale space of convenience stores to be dedicated to fresh produce, whole grain products, and shelf-stable goods without unhealthy additives.<sup>61</sup>

Zoning has also effectively been used to limit the prevalence of fast-food restaurants. Many municipalities, including Detroit, Michigan, have set minimum distances between fast-food establishments and schools.<sup>62</sup> Arden Hills, Minnesota extended minimum distance restrictions to churches, public recreation areas, and residentially zoned properties as well.<sup>63</sup> The density of fast-food restaurant locations can also be capped through zoning, requiring minimum distances between fast-food outlets while maintaining space for health-promoting activities such as community gardens.<sup>64</sup> Los Angeles prohibited the opening of new fast-food establishments entirely along major commercial corridors.<sup>65</sup>

Zoning can be a powerful tool, but it has its drawbacks. For one, it can sometimes be difficult to change regulatory definitions related to mobile healthy food options like food trucks and carts. Additionally, if access to healthy options is increased without reducing access to unhealthy options, little to no change will be found in individual behavior.<sup>66</sup> However, zoning is an overall low-cost approach to altering the food environment to encourage healthier behaviors.

### C. *Litigation*

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<sup>60</sup> *Food Retail Expansion to Support Health (FRESH) Program*, NYC BUS., <https://www.nyc.gov/nycbusiness/description/food-retail-expansion-to-support-health-fresh-program> (last visited Mar. 11, 2023).

<sup>61</sup> Olson, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> LOS ANGELES, CAL., ORDINANCE NO. 180103 §§ 2-3 (2008).

<sup>66</sup> Cooksey-Stowers et al., *supra* note 26, at 1367, 1378.

Food retailers and corporations can be influenced to improve food environments through legal liability. Tort liability can be a powerful tool because “[w]ithout economic incentive, corporations are unlikely to act in the best interest of public health.”<sup>67</sup> Undoubtedly, the most prominent example of litigation used to promote public health is the mass tobacco litigation of the late twentieth century. After decades of building evidence on the harmful effects of smoking and a final “smoking gun” document leak exposing that tobacco companies knew the detriments of their products, years of litigation finally culminated in the Master Settlement Agreement. The Settlement required tobacco companies to pay compensation to states in perpetuity for the injurious effects their products had on those states’ populations.<sup>68</sup>

The lessons learned from tobacco litigation can be applied to so-called “Big Food” to hold food conglomerates responsible for “creating social ills and exposing the public to potential danger.”<sup>69</sup> This significant interference with public health can form the basis of a claim against food conglomerates for public nuisance.<sup>70</sup> With nuisance now accepted as applying to clean air and water, the doctrine could be extended to a right to a nutritious environment.<sup>71</sup>

The distinction of tobacco as a luxury compared to food as an essential can be both a benefit and a drawback to such potential litigation. On one hand, food’s essentiality could require a higher standard of corporate responsibility, but on the other hand, proving causation is even more difficult to meet for a disease as multifactored as obesity.<sup>72</sup> Big Food has already taken several pages out of Big Tobacco’s playbook, the most significant tactic being the focus on the idea of the personal responsibility of the consumer.

There are pros and cons to using litigation as a way to hold food conglomerates responsible for the unhealthy food

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<sup>67</sup> Jada J. Fehn, *The Assault on Bad Food: Tobacco-Style Litigation as an Element of the Comprehensive Scheme to Fight Obesity*, 67 FOOD & DRUG L.J. 65, 70 (2012).

<sup>68</sup> *Id.* at 73-74.

<sup>69</sup> *Id.* at 75.

<sup>70</sup> Paul A. Diller, *Combating Obesity with a Right to Nutrition*, 101 GEO. L.J. 969, 1008 (2013).

<sup>71</sup> *Id.* at 1009.

<sup>72</sup> Fehn, *supra* note 67 at 75, 78.

environments they perpetuate. A benefit is that litigation bypasses the legislature, a body influenced and motivated by many factors besides public health.<sup>73</sup> One caveat is that twenty-five state legislatures have already been lobbied to enact “cheeseburger bills” that eliminate liability for claims related to obesity.<sup>74</sup>

One downside to using litigation as an avenue for corporate responsibility is the difficulty in pinning down the causation of obesity that would be required to sustain a tort claim.<sup>75</sup> Moreover, given the nature of our judicial system, courts normally focus on negative outcomes of particular individuals, and not the population-level effects of cumulative exposures.<sup>76</sup>

### III. FOOD SWAMPS IN CHICAGO

#### A. *The Foundation of Segregation*

Historians have posited that Chicago was the national leader in segregation practices during the urban population boom of the early twentieth century.<sup>77</sup> While the Supreme Court ruled that explicit state-sponsored residential segregation was unconstitutional in 1917,<sup>78</sup> nothing prevented private actors from continuing the practice. In Chicago, after a week of riotous, racially driven mayhem, the nation’s first consolidation of the power of property owners into a political force took the form of the Chicago Real Estate Board.<sup>79</sup>

The Board created a standard racially restrictive covenant that was used to prevent non-White residents from purchasing

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<sup>73</sup> *Id.* at 71.

<sup>74</sup> Diller, *supra* note 70, at 1007.

<sup>75</sup> Fehn, *supra* note 67, at 78.

<sup>76</sup> Berman, *supra* note 3, at 78.

<sup>77</sup> Whet Moser, *Chicago Isn't Just Segregated, It Basically Invented Modern Segregation*, CHI. MAG. (Mar. 31, 2017, 11:11 AM), <https://www.chicagomag.com/city-life/March-2017/Why-Is-Chicago-So-Segregated/>.

<sup>78</sup> *See* Buchanan v. Warley, 245 U.S. 60, 81-82.

<sup>79</sup> Heather Cherone, *How Did Chicago Become So Segregated? By Inventing Modern Segregation*, WTTW News, <https://interactive.wttw.com/firsthand/segregation/how-did-chicago-become-so-segregated-by-inventing-modern-segregation> (last visited Mar. 11, 2023).

property in certain areas, first across the city and then across the country.<sup>80</sup> The Supreme Court allowed these private racist practices to continue by deciding that it did not have jurisdiction to rule on whether a group of White homeowners could legally agree to not sell their homes to Black prospective purchasers since no constitutional or statutory questions were involved.<sup>81</sup> “The Chicago Real Estate Board became the National Association of Realtors.”<sup>82</sup>

Now, the overall racial and ethnic makeup of the city’s population is evenly distributed, yet within eighteen neighborhoods, ninety percent of the population is Black.<sup>83</sup> Housing discrimination is still a problem in the city, with Black testers posing as potential renters with housing vouchers experiencing some form of discrimination sixty-three percent of the time.<sup>84</sup> Due to the lasting effects of redlining, the majority of the city’s non-White residents are highly concentrated on the South and West sides.<sup>85</sup> Perhaps the most impactful of those effects is the persistent disinvestment of businesses in those previously redlined areas, creating the building blocks of food deserts and swamps.<sup>86</sup>

### *B. Chicago’s Food Environment*

While food swamps in Chicago have not been specifically studied thus far, the prevalence of food deserts has been studied. As might be expected, there is far less access to healthy food options in

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<sup>80</sup> *Id.*

<sup>81</sup> See *Corrigan v. Buckley*, 271 U.S. 323, 331-32.

<sup>82</sup> Cherone, *supra* note 79.

<sup>83</sup> *Race and Segregation in Chicago; 'We Have Created It. We Engineered Segregation'*, CBS Chi. (Feb. 11, 2019, 8:27 AM), <https://www.cbsnews.com/chicago/news/race-segregation-chicago-neighborhoods/>.

<sup>84</sup> Jacqueline Serrato, Charmaine Runes & Pat Sier, *Mapping Chicago's Racial Segregation*, S. SIDE WKLY (Feb. 24, 2022), <https://southsideweekly.com/mapping-chicagos-racial-segregation/>.

<sup>85</sup> *Id.*

<sup>86</sup> Nausheen Husain et al., *Disinvestment in Black and Latino Chicago Neighborhoods is Rooted in Policy. Here’s How These Communities Continue to be Held Back*, CHI. TRIB. (Jul. 27, 2020, 7:55 PM), <https://www.chicagotribune.com/living/health/ct-life-inequity-data-policy-roots-chicago-20200726-r3c7qykvvbfm5bdjm4fjb6g5k4-story.html>

southern Chicago as compared to northern Chicago.<sup>87</sup> The west and south sides have significantly low and volatile food access.<sup>88</sup> The food insecurity rate for Chicago is 19.2%, but worst rates, between 35.1%-53.8% food insecure, are extremely concentrated in the South Side, among Englewood, Woodlawn, South Shore, and Chatham.<sup>89</sup> Though the number of supermarkets in Chicago has increased, the majority of new stores have opened in areas with already plentiful access to grocery stores, and those that were added in areas of high need were not enough to improve overall access across the South Side.<sup>90</sup> Just last year, Walmart abruptly closed four of its Chicago stores, three of which were in underserved communities, claiming that the locations had not been profitable for years, leaving those residents frustrated and with even less healthy food options.<sup>91</sup>

Given the prevalence of corner stores throughout the city, it would come as no surprise to find that many of the communities on the South Side are in food swamps as well as deserts.<sup>92</sup> Convenience stores are a valuable part of the food environment for many families, but there is a wide discrepancy between the availability of healthy and unhealthy purchase options.<sup>93</sup> Even when nutritional options are available, shoppers pay more for them. According to the USDA's

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<sup>87</sup> Marynia Kolak et al., *Urban Foodscape Trends: Disparities in Healthy Food Access in Chicago, 2007-2014*, 52 HEALTH & PLACE 231, 237 (2018).

<sup>88</sup> *Id.* at 235.

<sup>89</sup> Greater Chicago Food Depository, *Cook County Food Access Plan*, CHI.'S FOOD BANK 9, [https://www.chicagosfoodbank.org/wp-content/uploads/2016/10/Cook\\_County\\_Food\\_Access\\_Plan.pdf](https://www.chicagosfoodbank.org/wp-content/uploads/2016/10/Cook_County_Food_Access_Plan.pdf).

<sup>90</sup> Marynia Kolak, Daniel Block, & Myles Wolf, *Food Deserts Persist in Chicago Despite More Supermarkets*, CHI. REP. (Oct. 3, 2018), <https://www.chicagoreporter.com/food-deserts-persist-in-chicago-despite-more-supermarkets/>.

<sup>91</sup> Michelle Gallardo, Maher Kawash & Stephanie Wade, *Walmart Closes 4 Chicago Locations Permanently, Leaving Residents With Fewer Shopping Options*, ABC NEWS (Apr. 16, 2023), <https://abc7chicago.com/walmart-closed-leaving-chicago-pharmacy-closing/13136460/>.

<sup>92</sup> See Hao Huang, *A Spatial Analysis of Obesity: Interaction of Urban Food Environments and Racial Segregation in Chicago*, 98 J. URBAN HEALTH 676, 679-80 (2021) (city maps showing concentrations of various food retailers).

<sup>93</sup> Joseph R. Sharkey, Wesley R. Dean, & Courtney Nalty, *Convenience Stores and the Marketing of Foods and Beverages Through Product Assortment*, 43 AM. J. PREVENTIVE MED. S109, S113 (2012).



Economic Research Service, prices for milk, bread, and cereal were five, ten, and twenty-five percent higher, respectively, at convenience stores compared to grocery stores over ten years ago,<sup>94</sup> before large increases in inflation.

Luckily, the community comes together to address these inequities with urban agriculture. The Gary Comer Youth Center on the South Side has programs that teach youth agricultural skills, with opportunities for middle and high school students as well as college-aged young adults to learn about and participate in the food system, connecting with the land as well as the community.<sup>95</sup> The organization City Farm converts vacant land in the city to sustainable farms, educating communities about the food system and selling food back to the community.<sup>96</sup>

To bring food to the community, Urban Growers Collective operates the Fresh Moves Mobile Market, which provides an array of produce to food insecure areas. The food is sold at low cost since it is grown at local farms owned by the organization, which also provides training for aspiring BIPOC growers.<sup>97</sup> Lastly, Link Up Illinois makes these programs and other healthy, local foods more affordable by doubling the value of food assistance program funds when used at farmers markets, co-ops, mobile markets, fresh food delivery services, neighborhood corner stores, and independent grocery stores.<sup>98</sup>

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<sup>94</sup> Michele Ver Ploeg, *Access to Affordable, Nutritious Food Is Limited in "Food Deserts"*, AMBER WAVES (Mar. 1, 2010), <https://www.ers.usda.gov/amber-waves/2010/march/access-to-affordable-nutritious-food-is-limited-in-food-deserts/>.

<sup>95</sup> *Urban Agriculture*, GARY COMER YOUTH CTR., <https://www.garycomeryouthcenter.org/programs/urban-agriculture> (last visited Jan. 2, 2024).

<sup>96</sup> *City Farm*, RES. CTR., <https://theresourcecenterchicago.org/city-farm> (last visited Jan. 2, 2024).

<sup>97</sup> Sharon Hoyer, *Fresh Moves Mobile Market is a Rolling Food Oasis*, CHI. READER (Aug. 17, 2021), <https://chicagoreader.com/food-drink/fresh-moves-mobile-market-is-a-rolling-food-oasis/>.

<sup>98</sup> *Link Match*, EXPERIMENTAL STATION, [https://www.experimentalstation.org/link\\_match](https://www.experimentalstation.org/link_match) (last visited Jan. 2, 2024).

Unfortunately, as with other inequities, the COVID-19 pandemic only made disparities in food security worse.<sup>99</sup> Thankfully, local community organizations and non-profits stepped up to assist families struggling to access or afford healthy food.<sup>100</sup> Organizations across Chicago used a variety of mutual aid models to facilitate collaboration and sharing of resources to meet communities' food needs, and just three in particular distributed food to almost five thousand families in the first year of the pandemic, impacting over seventeen thousand individuals.<sup>101</sup>

#### IV. RECOMMENDATIONS

I recommend that the City of Chicago Department of Planning and Development implement policies similar to those used in Connecticut and New York. Chicago should use a convenience-store-based approach because those are the key food environments that influence healthy food availability for limited resource communities.<sup>102</sup> Given the prevalence of corner stores, an ordinance like that in Hartford should be applied to such stores requiring a minimum portion of floor space dedicated to healthy food options. The ability to apply these solutions with little to no structural change in the built environment lowers the barriers to implementation.

Additionally, like the Green Cart program in New York City, Chicago should implement an incentive for mobile sellers to bring fresh produce to areas of the city with historically low access to healthy food. This would help existing programs like the Fresh Moves Mobile Market and could help support new ones. These

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<sup>99</sup> Helena Bottemiller Evich, *Stark Racial Disparities Emerge as Families Struggle to Get Enough Food*, POLITICO (July 6, 2020), <https://www.politico.com/news/2020/07/06/racial-disparities-families-struggle-food-348810>.

<sup>100</sup> Ariel Parrella-Aureli, *The Community Groups Working to Eradicate Chicago's Food Desert Problems*, EATER (Jan. 20, 2021, 1:54 PM), <https://chicago.eater.com/2021/1/20/22231602/chicago-food-deserts-fresh-food-healthy-hood-we-go-us>.

<sup>101</sup> Saria Lofton et al., *Mutual Aid Organizations and Their Role in Reducing Food Insecurity in Chicago's Urban Communities during COVID-19*, 25 PUB. HEALTH NUTRITION 119, 120 (2021).

<sup>102</sup> Huang, *supra* note 91, at 684.

vendors can also distribute information on how to prepare and use the produce, improving two food insecurity factors with one initiative.

Chicago has already taken positive steps toward improving food security. The Chicago Food Equity Agenda was created in 2020 to advance food equity in the city. The agenda priorities include eliminating barriers to food pantry expansion, marketing and maximizing nutrition program and benefits, leveraging the city's resources to support BIPOC producers and food businesses, eliminating barriers to urban farming, and supporting BIPOC food entrepreneurs.<sup>103</sup> Utilizing the grassroots mutual aid groups that have already helped thousands of Chicagoans can ensure that the goals of the Food Equity Agenda are achieved and that the structures which make it possible are maintained.

To achieve long-term health improvements, environmental modifications alone are not enough. Zoning changes and subsidies will not impact community health if residents don't change their food-purchasing behavior.<sup>104</sup> Policies should also be put in place to educate and encourage people to eat a balanced diet regardless of the structural changes made.

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<sup>103</sup> *Chicago Food Equity Agenda* (2020), [https://www.chicago.gov/content/dam/city/sites/food-equity/pdfs/City\\_Food\\_Equity\\_Agenda.pdf](https://www.chicago.gov/content/dam/city/sites/food-equity/pdfs/City_Food_Equity_Agenda.pdf).

<sup>104</sup> Ver Ploeg, *supra* note 94.